



**Principal Maai Mahiu Girls Sec School & another v Waweru (Environment and Land Appeal E013 of 2024) [2025] KEELC 5509 (KLR) (Environment and Land) (24 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5509 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA  
ENVIRONMENT AND LAND  
ENVIRONMENT AND LAND APPEAL E013 OF 2024**

**MC OUNDO, J**

**JULY 24, 2025**

**BETWEEN**

**PRINCIPAL MAAI MAHIU GIRLS SEC SCHOOL ..... 1<sup>ST</sup> APPELLANT**

**BOM MAAI MAHIU GIRLS SEC SCHOOL ..... 2<sup>ND</sup> APPELLANT**

**AND**

**FREDRICK MUURI WAWERU ..... RESPONDENT**

*(Being an Appeal from the Judgement of the Principal Magistrate Court at Naivasha before Hon. Y.M Barasa (PM) made and delivered on 22nd August, 2024 in Naivasha MCELC 12 of 2020: Fredrick Muuri Waweru v Principal Maai Mahiu Girls Sec. School & Board of Management Maai Mahiu Girls Sec School.)*

**JUDGMENT**

1. Before me for determination on Appeal is a matter which was heard and determined by Hon. Y.M Barasa, Principal Magistrate wherein upon considering the evidence of both parties, vide his Judgment delivered on 22<sup>nd</sup> August, 2024, the learned Magistrate found in favor of the Plaintiff and issued a permanent injunction restraining the Defendants/Appellants herein from interfering in anyway with Land Parcel No. Kijabe/Kijabe Block 1/4060. The court had also awarded the Plaintiff general damages of Kshs. 500,000/= as well as the costs of the suit plus interest.
2. The Appellants, being dissatisfied with the said findings and Judgement, have now filed the present Appeal based on the following grounds in their Memorandum of Appeal:
  - i. The Honorable Magistrate erred in law and in fact in failing to appreciate the fact that the Appellants are in lawful occupation of part of Land Parcel No. Kijabe/Kijabe Block 1/3571



measuring approximately 12.5332 Ha as per the Land Survey Report, pending registration as the absolute Proprietor.

- ii. The Honorable Magistrate misdirected himself by holding that the Appellant ought to have made a report of fraud to the Director of Criminal Investigations contrary to the evidence on record.
  - iii. The Honorable Magistrate erred in law in failing to find that the alleged Land Title No. Kijabe/Kijabe Block 1/4060 was fraudulently obtained in the absence of any instrument in proof of its acquisition and failure by the Respondent to explain the alleged sub division of Land Title No. Kijabe/Kijabe Block 1/3571 whose beacons still remain intact.
  - iv. The Honorable Magistrate misdirected himself in failing to take Judicial Notice that most Public Schools in Kenya are yet to be issued with Land Title Deeds and Public Interest on Land overrides that of an individual.
  - v. The Honorable Magistrate erred in law and in fact by disregarding the Appellants' documents including the respective original land title map duly issued by the Commissioner for Lands.
  - vi. The Honorable Magistrate erred in law and fact by placing undue emphasis on the registration of the title rather than focusing on the process preceding allotment and registration.
  - vii. The Honorable Magistrate misdirected himself in failing to uphold the Supreme Court's decision that a registered Proprietor can only acquire a valid title if the original allocation was legal.
  - viii. The Honorable Magistrate failed to properly and/or at all evaluate the evidence on record cumulatively hence reaching a wrong conclusion.
  - ix. The Honorable Magistrate made a fundamental error in law by considering various extraneous issues that were not before the court.
  - x. The Honorable Magistrate erred in law and in fact by awarding general damages for trespass and destruction of trees and vegetables contrary to the evidence on record.
  - xi. The Honorable Magistrate erred in law and in fact by failing to appreciate the Appellants' written submissions on record.
3. The Appellant thus prayed for the following orders:
- i. Appeal be allowed.
  - ii. Judgement dated and delivered on 22<sup>nd</sup> August 2024 be and is hereby set aside and the decree issued pursuant thereto be set aside.
  - iii. Retrial of the main suit.
  - iv. Respondent do pay the costs of the Appeal.
  - v. Any other relief that the Honorable Court may deem fit to grant.
4. Directions were taken that the Appeal be disposed of by way of written submissions.
5. The Appellants submissions dated 9<sup>th</sup> May 2025 upon summarizing the factual background of the matter, were premised on the following issues for determination:



- i. What category of land is Land Parcel No. Kijabe/Kijabe Block 1/3571 under Chapter 5 of *the Constitution*.
  - ii. Whether due process was followed in acquiring Land parcel No. Kijabe/Kijabe Block 1/4060 and if so, from which land Mother Title?
6. They placed reliance on the provisions of Section 2 of the Registration of Title Act to submit that the registration of the Respondent as the proprietor of the suit property was fraudulent since it was clear that the Respondent's interest did not defeat the unregistered interest of the Ministry of Education which had been created by the Ministry of Lands and Physical Planning Department. Further reliance was placed on the provisions of Section 65 and 66 of the Land Titles Act to submit that the title was a document pegged on the process and was not a standalone document.
  7. That the official search that had been produced by the Respondent raises doubts as he had no receipt and there had been no indication of who had applied for the search. That the provisions of Article 40 of *the Constitution* only protect a title that had been legally acquired. They placed reliance on the provisions of Section 80 and 26 of the *Land Registration Act* which empowers the court to cancel a title if it was irregularly obtained maintaining that the Respondent's title had been acquired illegally, unprocedurally and through a corrupt scheme there having been no documents to support its acquisition. Reliance was placed on the decision in the case of *Chemei Investments Limited v Attorney General and Others* [2018] eKLR.
  8. That once the suit property had been planned and zoned, any allocation and subsequent dealings and depositions were erroneous, irregular, illegal, unlawful and contrary to public policy and interest hence the Respondent did not deserve protection of the Court in accordance with *the Constitution*. That the court could not turn a blind eye to sanitize irregularity and fraudulently acquired properties all in the name of indefeasibility of title. They placed reliance on the provisions of Section 80 (1) of the *Land Registration Act, 2012* to submit that the court was empowered to order the rectification of the register by directing that any registration be cancelled or amended if it was satisfied that the same had been obtained, made or omitted by fraud or mistake. Their reliance was paced in the decided case of *Alberta Mae Gacci v Attorney General & 4 Others* [2006] eKLR to submit that the mere fact of holding a title did not in itself limit the power of court. That indeed, courts should not provide succor for any crook using forgery, deceit or any kind of fraud to acquire a legal and valuable title deceitfully snatched from a legally registered innocent proprietor.
  9. They hinged their reliance in the decision on the land mark case of *Dina Management Limited v County Government of Mombasa & 5 Others* [2023] eKLR to submit that a title document was not sufficient proof of ownership where the origin of the same had been challenged. That the holder of the title must go beyond the title and demonstrate that the process of acquisition from inception had been legal.
  10. That in this case, the root of the title ought to have been investigated by checking whether the land in question had been named in the Ndung'u Report, requesting for allotment letters, doing customary searches at the land office and so on. Further reliance was placed in the Court of Appeal's decision in the case of *Munyu Maina v Hiram Gitbiha Maina, Civil Appeal No. 239 of 2009*.
  11. Their contention was that there were irregularities in the process leading to the acquisition of the Respondent's title to the suit property and that the speedy registration had been shrouded in fraud. That it was impractical to register a title without a grant being issued. They placed reliance in the *Chemei Investment Limited's* case (supra) where it had been held that a speedy registration was not



a reflection of efficient delivery of public services but rather a deliberate and fast-tracking of a flawed process to facilitate the theft of public property.

12. That the Appellants' parcel of land had been donated by the Maai-Mahiu Primary School for the benefit of Maai-Mahiu Girls Secondary School. That the Appellants had been in a long and uninterrupted physical possession, occupation, use and development of the suit property, before the purported allocation and subsequent transfer and registration in the year 2020 to the Respondent. That in any case, being a public school governed by the Government of Kenya, the Commissioner of Lands had authorized the Appellants to occupy and utilize the suit property. Reliance was placed in the decided case of *Republic v Registrar of Lands in Kilifi Ex Parte Daniel Ricci*, Malindi HC JR No. 6 of 2013.
13. It was their submission that any alienation of land reserved for public purpose and issuance of a title for the same, whether under the Registration of Title Act or the Registered *Land Act* was null and void ab initio and that such a title did not exist in the first place because the land belonged to the Public and was not available for alienation. That the cancellation of such a "title" which was not a title as known in law would be an administrative exercise by the Commissioner of Lands or the Registrar of Titles to rectify the mistake or misrepresentation that had been made by the same office. They placed reliance in the decided case of *James Joram Nyaga & Another v The Hon. Attorney General & 2 Others*, Miscellaneous Civil Application No. 1732 of 2004 to submit that the suit property had been created from the land that was reserved for public purposes hence the allocation of the same to the Respondent was illegal, null and void and therefore, the said Respondent did not have a valid title in the suit property.
14. That the activities ascribed to the Respondent place public interest at risk since if he was allowed to perpetrate his activities further, public land would be grabbed to the detriment of the public good. They opined that where rights and interests of land were not definitely determined, the public interest should be paramount hence the Respondent should not be allowed to arrogate to himself authority to pronounce himself as the owner of the public school's land.
15. They explained that the Government had gazetted a multi-agency working group on school land titling comprising the National Land Commission, the Ministry of Education, Ministry of Land and Physical Planning, Shule Yangu Campaign Alliance among other partners on 1<sup>st</sup> November 2018 vide a gazette notice No. 12311 to fast-track the titling of public-school land. That it was clear that Maai-Mahiu Girls Secondary School did not have a title deed and that the portion that the Respondent was claiming had been donated by the mother Primary School thus it was a judicial notice that most public schools did not have title deeds. That whereas the Appellants had requested the court to visit the site, the Respondent had vehemently opposed the said suggestion but had the court visited the property in the company of the land surveyor, it could have made a different finding. That the Respondent's action was a deprivation of every child's right to education which was anchored in *the Constitution*, statutes and international Conventions. That a threat to acquire public school land was a threat to the right to education which must be thwarted by all means.
16. That the Respondent having failed to demonstrate how the alleged land title had been acquired, they urged the court to allow the Appeal in its entirety and by so doing, protect every child's right to education.
17. The Respondents submission in opposition of the Appeal had been on an introductory that at page 46 of their record of Appeal, the Appellants had sneaked in a green card to parcel of land known as Kijabe/ Kijabe Block 1/3571 which was not part of their documents at the trial court and which was



not produced in evidence. That indeed all the Defendants/ Appellants witnesses confirmed during cross examination that they did not have a copy of the title or the said green card.

18. That vide an amended plaint dated 29<sup>th</sup> April 2020, the Plaintiff/Respondent who had been authorized to file suit by the co- owners of land parcel No. Kijabe/Kijabe Block 1/4060 had averred that he, his mother and siblings were the registered owners of all that land known as Kijabe/Kijabe Block 1/4060 as evidenced in their Title deed. That despite ownership, the Appellants herein had invaded the same, fenced it off wherein they had subsequently proceeded to cut down various trees on the land alleging ownership.
19. That upon being served with the Plaint, the Appellants had filed their statement of defence dated 31<sup>st</sup> July 2020 stating that the Respondent had fraudulently obtained title to the land wherein they had sought for the dismissal of the suit, an order to restrain the Respondent from interfering with their property as well as general damages and costs.
20. The matter had proceeded wherein each party had tendered their evidence and at the conclusion of the matter, the trial court entered judgment in favor of the Plaintiff/Respondent herein granting the order of permanent injunction against the Appellants as well as general damages for trespass at Ksh 500,000/= which judgment triggered the current appeal.
21. The Respondents relied on the decision in the case law of *Selle -vs - Associated Motor Boat Co.* as cited by the court in *Gichinga Kibutha -vs -Caroline Nduku* (2018) eKLR seeking that the Court analyzes and re-assess the evidence on record to reach its own conclusion on the matter.
22. The Respondents then summarized the evidence as adduced in the trial court before submitting that the whole dispute arose following the Appellants over estimation of the size of their land. That the Appellants witnesses apart from DW4 maintained that the land Kijabe/Kijabe Block 1/3571 measured 42 acres even after it had been subdivided into three parts to be occupied by the Primary School, the Boys Secondary school and the Girls Secondary School. DW4, their own surveyor confirmed that the land measured 31 acres.
23. That despite the Appellants' assertion that Kijabe/Kijabe Block 1/3571 measured 42 acres and that Kijabe/Kijabe Block 1/4060 had been fraudulently hived off from 3571 by the Plaintiff/respondents, the Appellants had confirmed that they did not have their title document or the green card to their land but had forcefully invaded into the Respondents land and occupied it laying claim to it. That Respondents together with his family members were the bonafide registered owners of Kijabe/Kijabe Block 1/4060 having acquired it through a Succession Cause from the estate of their late father who passed away in the year 2008. Reliance was placed on the provisions that Section 26 of the [Land Registration Act](#), to submit that unless demonstrated otherwise, the law was protective of a title document. Reliance was placed on the decision in *Deborah Hannah Wachegu vs Vindo Multipurpose Cooperative & Anor* (2022) eKLR.
24. That the Appellants bore the burden of proof to substantiate their allegations that the Plaintiff had obtained the title to of Kijabe/Kijabe Block 1/4060 after illegally hiving the same from of Kijabe/Kijabe Block 1/3571 and the particulars of fraud in their statement of defence as was held by the Court of Appeal in the case of *Jephther O. Opande vs Mary Atemo Gathiriga* (2017) eKLR and many other decisions, which they failed to do.
25. That no police abstract was produced by DW 2 despite the allegation that they had reported the case of fraud to the police where the matter was being considered by the authorities. That the Appellants had also failed to produce any documents from either the survey office or the Land Registry to show



the alleged hiving off of the school land but had instead resorted to relying on unknown maps in the testimony before the court. That the testimony of DW4 lacked credibility.

26. That the Appellants had relied on the Court of Appeal decision in the case of *Munyu Maina vs Hiram Gathiha Maina* [2013] eKLR to submit that the Respondent ought to have tendered evidence as to how the title was issued to him and his family. That the present case was distinguishable from the case of *Munyu Maina* (supra). That in the present case, the Appellant's did not tender any evidence before the court to support their claim to land Kijabe/Kijabe Block 1/4060 or Kijabe/Kijabe Block 1/3571 despite clearly indicating that they were seized of the title document and green card in their witness statements.
27. That the trial Magistrate had been satisfied with the contents of the proprietorship section of the title deed which showed that the Respondents were entered in the register of Kijabe/Kijabe Block 1/4060 and had been issued with a title deed on the 21<sup>st</sup> February 2020.
28. That despite the Appellant's allegations that the Respondents' title to Kijabe/Kijabe Block 1/4060 was fraudulent and that the Respondents had invaded and occupied their land, they did not file any counter claim or make any prayer to the court to either revoke the Respondents' title or issue the same in their favour and therefore their prayer to the appellate court to allow the appeal and declare that they (Respondents) do not have valid title to Kijabe/Kijabe Block 1/4060 cannot stand as they did not make any such prayer before the trial court. Reliance was placed on the decision in the case of *Beatrice Okoth vs Francis Pius Omweri & Another* [2018] eKLR to submit further that parties are bound by pleadings. They sought for a dismissal of the Appeal.

#### **Analyses of the evidence.**

29. Fredrick Muuri Waweru, (the Plaintiff/Respondent) instituted the instant suit against the Defendants/Appellants herein vide CMCELC No. 12 of 2020 wherein vide an Amended Plaintiff of 29<sup>th</sup> April 2020, he had sought for the following orders;
  - i. A permanent injunction restraining the Defendants either by themselves, their servants, employees and or agents from trespassing, encroaching, alienating, erecting structures as well as remaining on or continuing in occupation or use of the property or any part thereof of Title No. Kijabe/Kijabe Block 1/4060;
  - ii. General damages against the Defendants for trespass over the suit property and destruction of trees and vegetation;
  - iii. Costs of the suit; and
  - iv. Interest on prayer (ii) and (ii) herein above.
30. Subsequent to the filing of the suit, the Defendants/Appellants herein filed their Statement of Defence dated 31<sup>st</sup> July, 2020 denying the allegations contained in the Plaintiff's ownership of the suit property had been fraudulently obtained. They particularized fraud by the Plaintiff as forging the documents and failing to give full disclosure of material facts in respect of the said parcel of land. They thus sought for the Plaintiff's suit to be dismissed with costs and judgement be entered against him for:
  - i. An order refraining the Plaintiff from interfering with the Defendants' peaceful enjoyment of their property.
  - ii. General damages.



- iii. Costs of the suit.
  - iv. Interest thereof at court rates.
  - v. Any other relief that the Court deem fit to grant.
31. In response to the Defence, the Plaintiff reiterated the contents of the Plaint denying the allegations contained therein while putting the Defendants to strict proof and seeking that the Defence be dismissed with costs.
  32. The case proceeded for hearing wherein the Plaintiff while testifying as PW1 adopted his witness statement dated 29<sup>th</sup> April 2020 as his evidence in chief and produced his filed documents in evidence as follows;
    - i. Consent of the registered co-owners as Pf exh 1
    - ii. Copy of the title deed as Pf exh 2
    - iii. Photographs as Pf exh 3
    - iv. Demand Letter as pf exh 4.
  33. In cross examination, he confirmed that he was a co-owner of No. Kijabe/Kijabe Block 1/4060 measuring 5 acres alongside his mother Jane and his sister Peris in a title deed that had been issued to them on 22<sup>nd</sup> February 2020. That he had inherited the suit property when his father passed on in July 2008. That whereas he had not produced a document prior to his registration, he had produced a copy of the title.
  34. That he was not aware that the suit property was occupied by Maai Mahiu Primary School because he was in possession of land measuring 1.02 Ha. That Maai Mahiu Girls Secondary School was his neighbor as the school was adjacent to his land. That he did not know when the school was built but he wanted the Defendants evicted from the suit land since they had cut down his fence and trees. That whereas they had served the Defendants with an order to eviction, he did not report to the police. He confirmed that there was a fence erected on the suit property which fence the Defendants had started constructing in the year 2020. That whereas he was not a professional photographer, the photographs that he had taken and produced had shown that the Defendants had invaded his land.
  35. That the court could tell that he was the one who had taken the photographs as the same were still in his phone. That the said photographs had shown that his tress were being cut down. That whereas he had not produced the beacon certificate, he had produced the photographs in court to show that there had been encroachment on the suit property.
  36. That his land was No. Kijabe/Kijabe Block 1/4060 and he had no claim over land No. Kijabe/Kijabe Block 1/3571. He confirmed that he was neighboring Maai Mahiu Primary and Secondary Schools. He admitted that he had not produced any survey report to show the encroachment. That whereas he did not have any issue with the documents filed by the Defendants, he urged the court to rely on the title deed that he had produced.
  37. In re-examination, he confirmed that he had acquired the title document after the succession of his late father and that there had been a title document in relation to his late father which original title he had surrendered in order for him to be issued with a new one. That during the intervening period there had been succession proceedings which were lengthy. That the Defendants did not invade the suit property during the succession. That since the title deed was what gave a person the right of claim, they were the owners of land parcel No. Kijabe/Kijabe Block 1/4060. He confirmed that the illegal structures



had not been taken down and that there had been no documents by the Defendants showing that they owned the suit property.

The Plaintiff had thus closed his case

38. Grace Wanjiko Waituku, the principal Maai Mahiu Girls Secondary School, adopted her witness statement as her evidence in chief and proceeded to testify as DW1 to the effect that she had joined the school in July 2018 as the principal and that there had been no land dispute at the time. That the suit land herein which had been donated by the Maai Mahiu Primary School was owned by Maai Mahiu High School.
39. That Maai Mahiu Girls Secondary School occupies 12 acres and that the whole building (sic) had an estimate of 42 acres from the maps which had no amendments. That they had never been served with any demand letter alleging trespass. That they had reported the matter to the land registry and to the police for the protection of the school. That whereas the Plaintiff had produced a title deed for Kijabe/ Kijabe Block 1/4060, there had been no supplementary document to show how the said title had been obtained or that the suit property had been obtained by the Plaintiff by way of succession.
40. That further, there had been no green card produced in evidence and it was not possible to know from where the trees in the photographs had come from. That in any case, the said photographs had neither shown the school buildings nor when the same had been taken and that it was not possible to tell if the trees had been cut.
41. That there had not been a report to the police for material damage. That the Surveyor's Report had indicated that Maai Mahiu Secondary School which was a public school had been on the land since the year 1991 but it had a new number. That they had not sold the land and that the number resulting from the evidence that had been given were not part of the school land. That the beacons were intact.
42. She sought to produce the filed documents in the Defendants' list and supplementary list of documents in evidence. However, upon the objection by the counsel for the Plaintiff, the court had directed that she produces the said documents save for document No. 4 (the RIM for Kijabi /Kijabe Block 1/3571) and the Land Surveyors report dated 17<sup>th</sup> September 2021 (in their supplementary list of documents) since she was not the author. Subsequently, she had produced the following documents as Defence Exhibits 1 to 7 respectively;
  - i. Defendants' Identification Cards.
  - ii. Complaint letter to the Lands registry.
  - iii. Letter of inquiry to the land registry.
  - iv. Ministry and physical planning request form on the status of the school title deed (Naivasha clinic).
  - v. Demand Letter from the firm of M/s Wairagu & Wairagu Advocates.
  - vi. Demand Letter dated 11<sup>th</sup> March 2020.
  - vii. Defendants' Letter dated 11<sup>th</sup> March 2020 addressed to the cabinet secretary -interior ministry.
43. In cross-examination, she confirmed that she was the Principal of Maai Mahiu High School although she had not produced any identification to that effect. That Maai Mahiu Primary School was the registered owner of the land and that she had not produced any document to show that the land had been transferred by the Primary School to their school. She confirmed that she had worked at the school from the year 2018 and that they did not have a title deed and that she did not know when the school



- had become the owner of the suit property. She confirmed that the Plaintiff's title was No. Kijabe/Kijabe Block 1/4060 which was different from Kijabe/Kijabe Block 1/3771.
44. She admitted that although they only had a green card she had not produced the same in evidence or a copy of the search.
  45. That their letters to the land commission offices to account for the land had received no responses and the police had not initiated any criminal proceedings against the Plaintiff. That she was not served with any court order or letter and had no knowledge as to whether the primary school had received any order. She acknowledged that the land had been fenced, had there were beacons as per the surveyor's report.
  46. In re-examination, she confirmed that they did not have anything to show that the school had encroached onto anyone's land. That the beacons for plot Number Kijabe/Kijabe Block 1/4060 had not been produced and that the primary school was not a party to the suit herein. That the Plaintiff had not exhibited either the search or the green card and one could not acquire a title without following due process.
  47. DW2 one David Gitonga Muragu, the head teacher of Maai Mahiu Primary School confirmed that he had been the head teacher of the school for 11 years. He adopted his witness statement dated 31<sup>st</sup> July 2020 as his evidence in chief and proceeded to testify that Maai Mahiu Girls Secondary School stood on their land parcel No. Kijabe/Kijabe Block 1/3571 which measured approximately 42 acres. That the said land had been sub divided into 3 portions wherein one portion remained with Maai Mahiu Primary school, approximately 12 acres was donated to Maai Mahiu Girls Secondary School and the third portion went to Maai Mahiu Boys Secondary School.
  48. That it was not true that the Plaintiff was the owner of the land because he had all the documents to prove ownership, being the green card, map and an extract that had been done by the parents of the school. That the original map had not been amended and Plot No. Kijabe/Kijabe Block 1/4060 was not indicated on the same.
  49. That whereas the Plaintiff had indicated that his title had been issued on 21<sup>st</sup> February 2020, the land had been allocated to the school in the year 1975. That the requests to register and part 2 of the title had indicated that the land had been subdivided. That however, the Plaintiff's title had not indicated that the sub division had been done. That he could not identify any trees on the photographs since there had been no trees on the land and neither could he tell when the photographs had been taken.
  50. That he had written a letter on 15<sup>th</sup> November 2018 to inform the land registrar that there were people who were claiming ownership of the land and were seen on the land putting beacons. That the land belonged to the school for which they had been utilizing it long before it was acquired.
  51. In cross-examination, he confirmed that he had joined Maai Mahiu Primary School as head teacher in the year 1975 when it was established although he did not have any documents to prove the same. He confirmed that the land measured 42 acres and that the documents that they had produced should be green card and not title deed.
  52. He admitted that he had signed his witness statement. That although in his letter he had indicated the area of the land as 6.07 Ha, the same was not equivalent to 42 acres. He also admitted to not having availed the green card to the court but was adamant that the land had been issued to the school in the year 1975.
  53. That the Ministry of Education never used to push school to get titles. He confirmed that he did not have any document showing that the land had been donated to the High school neither did he have a mutation form. That he did not know how the 12 acres had been hived. That whereas paragraph 7 of



- the witness statement had said that the primary school was the custodian of the title, the same should read green card. That he did not have a letter of allotment. That whereas the people from the land offices who had visited the land had signed the visitors' book, he had not produced the same in court.
54. That the area that had featured in the photographs produced by the Plaintiff were not in the school hence he had no claim for the same. He confirmed that the land was cultivated and fenced but there were no acacia trees on it but on land parcel No. Kijabe/Kijabe Block 1/3571.
  55. That land parcel No. Kijabe/Kijabe Block 1/4060 was a forgery for which they had made a report to the police although he did not have the OB in court. That he had written to the Cabinet Secretary for appropriate action since Maai Mahiu Secondary school claimed part of the suit property.
  56. In re-examination, he stated that he could avail the OB. He reconfirmed that the school occupied land measuring 42 acres. That the 6 acres were only for the Girls High School. That it was not necessary for the allotment letter to be issued. That the people had visited the school and promised to give a report. He confirmed that acacia trees were not in their school. That he had attempted to ensure that the school had a title. He confirmed that they had reported to the police with regard to land number Kijabe/Kijabe Block 1/4060 OB number 31/13/2/2022 and that the said OB number had been referred to in their letter that had been addressed to the Cabinet Secretary and others. He confirmed that their land was cultivated and that it had no shrubs.
  57. Titus Muigai Mbugua, a business man in Maai Mahiu testified as DW3 to the effect that he knew both Maai Mahiu Primary and Secondary Schools since they were not far from his home. He adopted his witness statement as his evidence in chief before proceeding to state that the land in dispute had been given to the schools and did not belong to the Plaintiff.
  58. In cross-examination, he confirmed that he lived on his parcel of land near the school and that his children attended Maai Mahiu primary school. That he had heard the elders say that the land had been grabbed. That he did not know when the land had been given to the secondary school neither did he know when the school got its title since he had not seen title documents. That the land was approximately 42 acres and that the same had been surveyed. That he could not tell when the Plaintiff's title had been forged because whereas the school land was No. Kijabe/Kijabe Block 1/3571, he was not aware of the land parcel No. Kijabe/Kijabe Block 1/4060. He confirmed that the school was still operational.
  59. In re-examination, he confirmed that he lived about 1 kilometer from the school. That he had not seen any documents that had been used to acquire the land.
  60. DW4, one Max Njuguna, a District Surveyor, Naivasha testified that after he had visited Maai Mahiu Girls Secondary School, he had made a report dated 17<sup>th</sup> September 2021. That the property had been pointed out to him by the Board members wherein he confirmed that there had been there had been encroachment of the school by an area of approximately 12.5332 Ha.
  61. He confirmed that the school perimeter was intact and that there were no physical boundaries between 4060 and 4061. That he stood by his report. That in the old map, the land measured 12.5 Ha. That whereas he did not see any beacons, the original beacons were still intact. He further stated that the school had been the first to occupy the ground. He confirmed that he had signed the report at page two and produced the maps and the report as Df exh 4 and 9.
  62. In cross-examination, he confirmed that whereas he had an appointment letter, he did not have anything to show that he was the District Surveyor. Further, that whilst he had gone on the ground on the invitation of the school board, he had neither charged fee nor had he been paid to attend court to testify.



63. He confirmed that the report had indicated Maai Mahiu Girls Secondary School. That it had been the chair of the board who had authorized him to visit the ground. That he not been shown either the title of the land or the green card. That the land measures approximately 12.53 Ha, that is, about 31 acres. That the owners of the other parcels of land were not present during the exercise. That whereas he was aware that he was supposed to be impartial in his work, he had visited the land to do a ground report at the request of the institution.
64. He confirmed that whereas he had prepared his report after visiting the land, he did not say that the land belonged to Maai Mahiu Girls Secondary School. That the visit was to confirm their boundaries as per their 2 maps. He confirmed that the land was approximately 31 acres and that he was not paid any facilitation charge and that he had been driven to the ground by the chairman of the school.
65. He contended that he was neutral in the instant matter and that the Registrar was to confirm where the boundaries lay according to the 2 maps. That since there was a part of the land that had been hived off, hence it was fair to hear both parties but he had not heard the other party whose land had been hived off because that was not his duty as a surveyor.
66. He confirmed that he got the maps at the regional survey office in Nakuru where the records for movement of the files had been kept. That it was not required of him to produce the entry. He also confirmed that he did not have the maps from the records office and neither had he attached the same in the report. He confirmed that he had seen beacons in place although he did not take the photographs for which some were missing. That the beacons were marked using angle iron.
67. He explained that where there was subdivision of land the original parcel number would change. That since the school had indicated that they were the owner of land parcel No. Kijabe/Kijabe Block 1/3571, the said number should have changed. He maintained that the property had been pointed out by members of the school committee.
68. That he did not engage the local community members to point out the boundary and that he had drawn the map on a later date. That the records that he had were based on co-ordinates which he did not have in court.
69. In re-examination, he reiterated that his investigation had been in respect of ascertaining boundaries in view of the 2 conflicting maps. That land No. Kijabe/Kijabe Block 1/3571 was fenced and had a learning institution therein. That he had picked the boundary since it was using GPS. That he was not invited to solve land dispute thus it was not necessary to call any other party. He confirmed that whereas the report had maps, they were not the ones found at the provincial office. That it was not necessary for the maps to be endorsed since some of the beacons were visible on the ground. That it was also not necessary to invite the chief.
70. Ayubu Mugo Njoroge adopted his witness statement as his evidence in chief and was cross-examined as DW5 wherein he confirmed that he lived in Maai Mahiu town and owned land neighboring the school. That he was a parent and had been a member of the management committee of the Maai Mahiu Primary School since the year 1992 although he did not have any document to prove the same.
71. That the land was approximately 42 acres according to the documents that the teacher had shown them, being the map and the title deed. That whereas he had written his statement in the year 2020, the Head teacher Mr. Mbugua had shown them the said documents in the year 1992, in a committee meeting although he could not recall the date and the month and did not have the minutes of the said meeting.



72. That whereas the land documents were normally kept in school, he never heard that the title deed had been stolen. He confirmed that he left the committee in the year 1997.
73. That the primary school and the secondary school were separated in the year 2011 and that the land had been sub-divided although he did not have the mutation. That whereas Maai Mahiu Girls Secondary School had been given the land belonging to Maai Mahiu Primary School, he did not know the land parcel number for the primary school. That there were people who had forged title deed but he did not know them since he had heard that the school land had been grabbed and the school children had demonstrated. That the school was supposed to investigate the issue and report to the police which it had and investigations carried out.
74. That there was a surveyor report that had been done when the case was in court. He confirmed that whereas the entire parcel of land belonged to the primary school, the same had been subdivided into three different parcels with different numbers. That nonetheless, he did not have the land parcel number for the secondary school and neither did he know if the school had the same.
75. That as a committee, they had proposed that the primary school donates the land to the secondary school. That he was not aware of the land parcel No. Kijabe/Kijabe Block 1/4060. That the Plaintiff had wanted to grab the school's parcel of land for which he had seen the title deed No. Kijabe/Kijabe Block 1/4060.
76. In re-examination, he confirmed that in the year 2011, he was not a committee member of the school. That he did not have the minutes since he was not the custodian of the school documents. He confirmed that the school's parcel of land measured 42 acres and that the committee had requested the primary school to donate land to both Maai Mahiu Girls Secondary School and Maai Mahiu Boys Secondary School.
77. That the Respondent's title had been issued in the year 2020 and the instance case was also filed in the year 2020. That the school children knew their rights hence they had the right to demonstrate. That it was not their duty to follow up if the school had been issued with the title. That there were boundaries demarcating the school land which boundaries were still intact.

The Defendants had thus closed their case.

### **Determination.**

78. I have considered the record of Appeal, the holding by the trial Magistrate, the written submissions by learned Counsel. The authorities cited and the applicable law. Conscious of my duty as the first Appellate Court in this matter, I have to reconsider the decision Appealed against, assess it and make my own conclusions as was stated by the Court of Appeal in *Paramount Bank Limited vs. First National Bank Limited & 2 Others* (Civil Appeal 468 of 2018) [2023] KECA 1424 (KLR) where the court held as follows;

“A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. A first Appellate Court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. While considering the scope of section 78 of the *Civil Procedure Act*, a first Appellate Court can appreciate the entire evidence and come to a different conclusion.”



79. The summary of the Plaintiff's/Respondent's case in the trial court both in evidence and vide his adopted statement was that he together with four others were the registered owners of all that piece of land holding the Title Number Kijabe/Kijabe Block 1/4060 (suit property) situated in Nakuru County for which he had obtained the consent of the registered co-owners to institute the suit herein on their behalf.
80. That when he visited the suit property, he was surprised to find out that part of his land had been fenced off, some of the trees had been cut down and there were people clearing the land. That upon inquiry, he had been told that the Defendants/Appellants were responsible for the said activities. He had produced in evidence, Consent of the registered co-owners as Pf exh 1, a Copy of the title deed as Pf exh 2, Photographs as Pf exh 3 and a Demand Letter as Pf exh 4.
81. His case was that parcel No. Kijabe/Kijabe Block 1/4060 measuring 5 acres was co-owned with his mother Jane and his sister Peris in a title deed that had been issued to them on 22<sup>nd</sup> February 2020. That he had inherited the suit property upon the passing away of his father in July 2008.
82. That Maai Mahiu Girls Secondary School (the Appellant) was his neighbor as the school was adjacent to his land and had encroached on his land in the year 2020 and erected a fence after cutting down his trees and fence. That he wanted the school evicted from his land.
83. The Defendant's/Appellants case on the other hand, through its witness' adopted statements and oral evidence had been that the land in which it stood was initially owned by Maai Mahiu Primary School, established in the year 1975, wherein the title deed to parcel No. Kijabe/Kijabe Block 1/3571 measuring approximately 42 acres had been issued in the year 1985.
84. That subsequently upon donation, the land had been sub-divided into three portions in the year 2011, one for Maai Mahiu Primary School, another for Maai Mahiu Girls Secondary School and lastly for Maai Mahiu Boys Secondary School upon the establishment of the secondary schools. That the title deed and the original land map was in the custody of the Head Teacher, Maai Mahiu Primary School. That Land parcel No. Kijabe/Kijabe Block 1/3571 belonged to three (3) public institutions and was public land.
85. That some people had invaded the Appellant compound alleging ownership of part of its land where a complaint had been lodged with the land registrar which had received no response. That the school had never sold part of its land, hence the Plaintiff's title was obtained fraudulently for which he wanted to grab public land.
86. The evidence by DW4 a land surveyor who had visited the suit land on 17<sup>th</sup> September 2021 was to the effect that he gone to establish a boundary dispute at the invitation of the Board members. That he had made a report and produced the same together with a map as Df exh 4 and 9. He had confirmed that land measured approximately 12.53 Ha, which was approximately 31 acres. That the owners of the other parcels of land were not present during the exercise and further that whereas he did not see any beacons, the original beacons were still intact.
87. I have looked at the Report herein produced in evidence which stated as follows:
- “1. Property Kijabe /Kijabe BLK 1/ 3571 was pointed out by members of school's committee. The property's boundaries were marked with old angle iron in concrete reinforcement, which were stable and intact. The property is currently developed with a School on active mode.
  2. The ground area of property Kijabe/ Kijabe BLK 1/ 3571 is approximately 12.5332 Ha.



3. The property position on ground tallies with that on the older Registry Index Map — Kijabe / Kijabe BLK 1 (Maai Mahiu) Sheet 2, as defined by coordinates as shown-on the map attached. Newer RIMS dating from 11<sup>th</sup> August 1991 has shown amendments that resulted into new numbers 4059- 4063, with the institution resulting into an acreage of 8.8546 Ha. as shown with dotted lines on the map attached.
4. By the time of the visit no physical boundaries of the resultant amendments i.e parcels 4059-4063, were evident.

Kindly receive this information for your consideration. Attached please find maps of the area.”

88. Having summarized what transpired during the hearing at the trial Court, as herein above, and having looked at the recorded statements herein which were adopted as the evidence in chief, I find the issue arising herein for determination as follows: -

- i. Whether the trial learned trial Magistrate erred in his findings.

89. I note that these properties were initially registered under the repealed Registered Land Act which is now governed by The Land Act, 2012 and The Land Registration Act, 2012. Indeed, the law is very clear on the position of a holder of a title deed in respect of land. Section 26(1) of the Land Registration Act provides as follows:

“The Certificate of Title issued by the Registrar upon registration, to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all counts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of the proprietor shall not be subject to challenge, except –

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party
- b. Where the Certificate of Title has been acquired illegally un-procedurally or through a corrupt scheme’

90. As may be observed, the law is extremely protective of title and provides only two instances for the challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.

91. The import of Section 26 (1)(b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, un-procedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1)(b) is to protect the real title holders from being deprived of their titles by subsequent transactions.

92. In the case before the court, the Respondent’s evidence had been that he, his mother Jane and his sister Peris were co-owners of No. Kijabe/Kijabe Block 1/4060 measuring 5 acres having been issued title produced herein as Pf exh 1 on 22<sup>nd</sup> February 2020 which showed the registered proprietors as Frederick Muuri Waweru, Jane Mary Muuri, Michael Muuri Waweru and Peris Wambui Muuri, which land they had inherited from their father who had passed away in July 2008.



93. It was held in *Republic vs Senior Registrar of Titles Ex-parte Brookside Court Limited* (2012) eKLR, that the statutorily, the sanctity of title to land is assured and protected under Sections 24, 25 and 26 of the *Land Registration Act*. From the above provisions of the law, and the fact that the Respondent holds a title to land parcel No. Kijabe/Kijabe Block 1/4060, I find prima facie that he had disclosed a legal interest capable of protection under the law.
94. The Appellants have however challenged the said title stating that it was fraudulently obtained and that the said parcel of land had been hived from and or formed part of land parcel No. Kijabe/Kijabe Block 1/3571 and that the Plaintiff was out to grab the Appellant's land.
95. The Court of Appeal in the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR, held as follows:
- “It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”
96. The Appellants having stated that land parcel No. Kijabe/Kijabe Block 1/4060 was obtained through fraud and that they were the proprietors of land parcel No. Kijabe/Kijabe Block 1/3571 which encompassed the said title, it behooved them under Section 107 of the *Evidence Act* which provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist and Section 109 of the same act stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, to support their claim with evidence.
97. To me this evidence was not established and I say so on the basis of the evidence herein adduced by the Appellant which was insufficient to support their claim. Firstly, it is not in contention that No. Kijabe/Kijabe Block 1/3571 measuring 42 acres was registered to Maai Mahiu Primary School in 1985.
98. That subsequently upon donation, the land had been sub-divided into three portions in the year 2011, one for Maai Mahiu Primary School, another for Maai Mahiu Girls Secondary School and lastly for Maai Mahiu Boys Secondary School upon the establishment of the secondary schools.
99. It is trite and indeed through the evidence of the surveyor that once land has been sub divided, the mother title is closed and subsequent title deeds of the sub divisions are issued. In his report of 17<sup>th</sup> September 2012, Df exh 9, the same had indicated as follows;
- “Newer RIMS dating from 11<sup>th</sup> August 1991 has shown amendments that resulted into new numbers 4059- 4063.”,
100. Parcel No. Kijabe/Kijabe Block 1/3571 ceased to exist in 1991. There was no documentary evidence in the form of a title produced by the Appellant herein as proof of ownership of any interest in any land, let alone Kijabe/Kijabe Block 1/4060. Indeed, no expert witness was called by the Appellant and the evidential burden of proof had been shifted to it to call the expert witness to prove the fraud. The surveyors' report had been that;
- ‘The property's boundaries were marked with old angle iron in concrete reinforcement, which were stable and intact.’
101. It is trite law that fraud, being a quasi-criminal accusation, must be specifically pleaded and proved.



102. The Court of Appeal in *C O Okere v Esther Nduta Kiiyukia & 2 others* [2019] eKLR, had observed as follows:

“We have scrutinized the amended Plaint. There are no particulars of fraud pleaded in the Plaint...To succeed, the appellant needed not only to plead and particularize fraud, but also a basis by way of evidence, upon which a trial court would make a finding. In the instant appeal, failure by the appellant to plead fraud and to give particulars thereof is fatal to submissions founded on fraud. The trial court had no pleading and particulars to consider and determine any allegations on fraud... Failure by the appellant to plead and particularize fraud lead us to find that this ground of appeal has no merit...”

103. I find that mere allegations of fraud without substantiation remained just that, mere allegations, and did not assist the Appellant. General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice.

104. Indeed, it had also been incumbent upon the Appellant to call an officer from the lands office to avail the parcel file for the suit land, to establish their claim which they failed to do.

105. In *Fanikiwa Limited & 3 others v Sirikwa Squatters Group & 17 others* (Petition 32 (E036), 35 (E038) & 36 (E039) of 2022 (Consolidated)) [2023] KESC 105 (KLR) (15 December 2023) (Judgment), the Supreme Court had at paragraphs *para\_ 80 80*, *para\_ 82 82* and *para\_ 83 83* observed as follows:

“.....it is trite law that fraud which, depending on the circumstances is recognized as a criminal offence, must be pleaded and strictly proved. In addition, although the standard of proof of fraud in civil matters is not proof beyond reasonable doubt, it is higher than proof on a balance of probabilities as required in other civil claims.”

106. Accordingly, upon careful consideration of the record, the documents, the submissions and the authorities cited, I find that the Plaintiff’s title to land parcel No. Kijabe/Kijabe Block 1/4060 remained unchallenged, I find no fault in the holding by the trial learned Principal Magistrate. The Appeal herein thus lacks merit and the same is dismissed with costs.

**DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 24<sup>TH</sup> DAY OF JULY 2025.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**

