County Government of Kirinyaga v Nyamu (Sued as the Legal Representative of the Estate of Nyamu Muriithi Maithi alias Nyamu Ndonga) & another (Environment and Land Appeal E038 of 2022) [2025] KEELC 913 (KLR) (27 February 2025) (Judgment)

Neutral citation: [2025] KEELC 913 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ENVIRONMENT AND LAND APPEAL E038 OF 2022

JM MUTUNGI, J

FEBRUARY 27, 2025

BETWEEN

COUNTY GOVERNMENT OF KIRINYAGA ..... APPELLANT

AND

DANIEL MUGO NYAMU (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF NYAMU MURIITHI MAITHI ALIAS NYAMU NDONGA) ..... 1ST RESPONDENT

DANIEL KARUGA NDONGA ..... 2ND RESPONDENT

(Being an appeal from the Judgement and Decree of Hon. A.K Ithuku C.M in CMCC No. 335 of 2005 at Kerugoya Law Courts delivered on 24th November 2022)

JUDGMENT

1. This Appeal is against the Judgment and Decree by Hon. A. K. Ithuku Chief Magistrate in Kerugoya CM CC No. 335 of 2005 delivered on 24th November 2022. By the Judgment the Learned Trial Magistrate held that the Respondent had proved his case and ordered for the title register of land parcel Inoi/Kerugoya/167 to be rectified by cancellation of the name of the Appellant as the registered owner.
2. The 1st Respondent who was the Plaintiff in the suit before the Lower Court vide a Plaint dated 15th September 2005, which was later amended on 12th July 2017, sought Judgment for;
    a. An order of rectification canceling the name of the Defendant from the land register of land parcel number Inoi/Kerugoya/167.
    b. Costs of the suit.
    c. Any other relief that the Honourable court may deem fit to grant.

3. The 1st Respondent's claim was that, during the land consolidation and demarcation process in 1958, Nyamu Ndonga, the 1st Respondent's deceased father, was allocated land parcel No. Inoi/ Kerugoya/167 (referred to as the "suit land") by his clan, granting him sole proprietorship of this land. The 1st Respondent stated that on or about 16th October 1971, the Appellant irregularly transferred the suit land to itself. The Appellant according to the 1st Respondent, was in an exchange arrangement to take his late father's land and as compensation give him some alternative land elsewhere but the Appellant did not fulfil their obligation.

4. The 1st Respondent particularized the irregularities by the appellant as follows:

    i. The Defendant transferred the suit land without Nyamu Ndonga's authorization, and

    ii. The Defendant did not provide Nyamu Ndonga with another parcel of land as compensation after obtaining the suit land.

5. The 1st Respondent averred that he filed Succession Cause No. 47 of 2003, where the suit land was shown as one of the assets of his deceased father and hence the Court ordered distribution amongst the beneficiaries of Nyamu Ndonga. However, the necessary forms could not be entered into the land register as the Appellant's name had been entered on the land register as the owner. The 1st Respondent contended that the Appellant's registration as the owner of the suit land before compensating the late Nyamu Ndonga was irregular and that the title should be corrected to reflect Nyamu Ndonga as the rightful owner.

6. The Appellant filed its defence on 25th October 2005, which was later amended on 11th June 2021. The Appellant denied the averments by the 1st Respondent, stating that in 1971, the defunct County Council of Kirinyaga sought to expand Kerugoya Town and began the process of acquiring parcels of land adjacent to the Town. The Appellant claimed that the 1st Respondent's father's parcel of land, known as Inoi/Kerugoya/167, was one of the properties earmarked for acquisition by the defunct County Council of Kirinyaga. The defendant asserted that the suit land was successfully acquired by the defunct Kirinyaga County Council and was duly registered by the Land Registrar in favor of the Council, following full compensation of Kshs. 1,440 to Nyamu Ndonga (deceased).

7. The Appellant contended that the amount of compensation was never challenged by the deceased, Nyamu Ndonga. The Appellant denied the allegations of irregular acquisition of the suit land and failure to compensate the deceased. The Appellant further contended that the suit was time-barred since the acquisition of the suit land occurred in 1971, while the suit to recover the land was initiated 34 years later, after the death of Nyamu Ndonga, who never raised any claims regarding the acquisition during his lifetime.

8. Parties testified, and on 11th January 2022, the Appellant's representative Stephen Wambugu (DW1), employed as a Surveyor in the Housing and Lands Department since 2017, testified and adopted his witness statement dated 2nd September 2021. He stated that the county council acquired the suit land through compensation and was unaware of any complaints regarding the payment. He claimed the land did not appear in the Agricultural, Land and Forests Committee minutes.

9. During cross-examination, he admitted ignorance about the government's land acquisition process. He noted that while valuations are necessary, the Appellant had no records regarding the suit land's valuation or payment. He stated there was no copy of the transfer authority and was unsure if the acquisition was compulsory or voluntary but confirmed a transfer recorded on 16th October 1971. He affirmed most of the compensation was made by way of exchange with alternative land.

10. John Mugo Nyamu, the 1st Respondent, testified on 2nd July 2021. He testified that he was the Administrator of his late father's estate. He gave evidence that his father acquired their family land during the adjudication process and never sold it to the County Council of Kirinyaga. He stated his father was to be given some other land as compensation but that never happened.

11. During Cross-examination, the witness affirmed that his father temporarily allowed the Appellant to use the land while awaiting the process of compensation to be completed. He stated the Council advised patience, and they only discovered the land was registered under the Appellant's name during the succession process.

12. Daniel Kuruga Ndonga (2nd Respondent and brother of the 1st Respondent) testified that his father was to get compensation from the County Council which he never got. He stated that other people whose land was taken were compensated by being given alternative land.

13. The Learned Trial Magistrate after analyzing and evaluating the evidence concluded that the Appellant's registration as the owner of the suit land was irregular and illegal as it was not demonstrated due process was followed. The Trial Magistrate stated as follows in paragraphs 30 and 31 of his Judgment.

    30. In this case what the Defendant has is only an entry in the green card which transferred a first registration. There is no evidence at all of how the alleged sale was executed. The Defendant was by then a Local Government. It operated through minutes and resolutions. While time has lapsed there would be records showing how the transaction was conceived and executed. Nothing was brought forthwith.

    31. As it appears, registration was done in 1971 while the land was earmarked for expansion in 1973 then clearly there is irregularity. The fact that the Defendant was writing to the deceased in 1976 inviting him to discuss the issue of compensation clearly shows that there was irregularity in the way the land was transferred in 1971. The above cited case of Munyu Maina (Supra) easily and clearly covers this situation.

14. Aggrieved by the said Judgment, the Appellant herein filed the appeal vide a Memorandum of Appeal dated 20th December 2022 on the grounds that;

    1. That the Learned Magistrate erred in law and fact by failing to find that the suit before him was time-barred by dint of section 7 of the *Limitation of Actions Act*.

    2. That the Learned Magistrate erred in law and fact by failing to find that the suit before him had been instituted outside the 12 years period prescribed by section 7 of the *Limitation of Actions Act* and after the Appellant had a peaceful and uninterrupted possession and ownership of the land known as Inoi/Kerugoya/167 (herein referred to as the suit land) for 34 years.

    3. That the Learned Magistrate erred in law and fact by failing to find that time to institute the suit before him commenced running on 16th October 1971 when the suit land was transferred and registered in the Appellant's name and the 12 years' period within which the Respondents right of action accrued to recover the suit land from the Appellant lapsed sometime in 1983.

    4. That the Learned Magistrate erred in law and fact by failing to find that the provisions of section 26 of the *Limitation of Actions Act* did not apply to the circumstances of the suit before him as the suit was neither based on fraud nor on a mistake.

    5. That the Learned Magistrate erred in law and fact by failing to determine, on merits, whether the suit before him was time-barred on mere account that leave to institute the suit had already

been granted notwithstanding that the leave granted by dint of his Ruling of 17th November 2006 was on condition that the Appellant would have a chance to raise the issue as to whether the suit was time-barred at the substantive hearing of the suit.

6. That the Learned Magistrate erred in law and fact by finding that the Appellant had not challenged the leave granted to file the suit out of time notwithstanding that during the hearing of the main suit, the Appellant raised the issue as directed by his own ruling of 17th November 2006.

7. That the Learned Magistrate erred in law and fact by disregarding his own findings made in the ruling of 17th November 2006 that had allowed the Appellant herein to challenge and canvass the issue as to whether the suit was time-barred at the hearing of the main suit and thereby failed to determine, on merits, whether the suit before him was time-barred in violation of the Appellant's right to a fair hearing guaranteed by Article 50 of *the Constitution*.

8. That the Learned Magistrate erred in law and fact by failing to dismiss the suit even after appreciating that the time had lapsed instead condemned the Appellant for not producing documents to defend the suit and thereby denying the Appellant their valuable right to access of justice and fair hearing in violation of Article 50 of *the Constitution*.

9. That the Learned Magistrate erred in law and fact by failing to find that the Respondents had not proved to the requisite threshold that there were irregularities in the transfer of the suit land to the Appellant.

10. That the Learned Magistrate erred in law and fact by failing to find that the Appellant paid a monetary consideration to the deceased in exchange of the suit land.

15. The Appellant sought the following orders from this court;

a. The appeal be allowed.

b. The Judgment of the Chief Magistrate's Court in Civil Case No. 335 of 2005 between John Mugo Nyamu v County Government of Kirinyaga & Another be set aside and substituted with an order dismissing the suit against the Appellant.

c. Costs of the appeal be granted to the Appellant.

16. The Appeal was canvassed by way of written submissions. The Appellant filed its written submissions on 9th November 2023, and interalia argued that the trial court did not appropriately address the issue of whether the suit was time-barred. The Appellant contended that the 1st Respondent's suit was time barred and ought not to have been entertained by the Court. The Appellant noted that in addressing the issue of time limitation, the Trial Court relied on a Ruling delivered on 17th November 2006, which granted an extension of time. However, the Appellant pointed out that the Ruling did not provide reasons for allowing the extension.

17. The Appellant argued that the Learned Magistrate only granted the extension on the basis that it would have the opportunity to address the issue of limitation during the main suit hearing, implying that the extension was conditional. The Appellant submitted that it did not appeal this ruling because it was granted the chance to deal with the limitation issue during the hearing.

18. The Appellant asserted that the 1st Respondent's case was not based on fraud, which at any rate would have been required to be specifically pleaded but was based on alleged irregularities. The Appellant stressed that even if the Court found elements of fraud, the 1st Respondent would have been required to substantiate his claim by demonstrating, through evidence, that they could not have discovered

the fraud despite exercising reasonable diligence. The Appellant pointed out that the 2nd Respondent himself testified in the Trial Court that he became aware of a problem with the suit land back in 1980 when he sought a loan using the land's title. Additionally, the Appellant stated the 1st Respondent produced a letter dated 28th May 1976, which purportedly invited the deceased to discuss an alleged land exchange at the Kirinyaga County Council offices.

19. The Appellant highlighted that it had owned and possessed the suit land for 34 years before the suit was filed and had made developments on the property. These developments should have raised suspicions for the deceased and the Respondents if the occupation had been fraudulent.

20. Regarding the transfer of the suit land, the Appellant contended that there was no exchange of the land for another and that the suit land was acquired by the Appellant upon payment to the deceased of the agreed consideration. The Appellant contended that as per the green card the land was transferred for a consideration of Kshs. 1,440/-, an amount that was never contested by the deceased.

21. The 1st Respondent filed his written submissions on 5th May 2024, and inter alia he asserted that the Respondent's claim was not time-barred. He argued that the Appellant irregularly and fraudulently transferred the suit land to itself, a fact that they discovered when they were processing succession in respect of his late father's estate in 2002.

22. The 1st Respondent submitted that the fraud and irregularity were discovered on 5th December 2002, marking the start of the limitation period, which expired on 5th December 2005. He emphasized that the suit was filed on 16th September 2005 and contended that there was no way the deceased and the beneficiaries could have known about the fraudulent and illegal transfer of the suit land to the Appellant.

23. The 1st Respondent further highlighted that the agreement/arrangement between the deceased and the Appellant involved an exchange of the suit land for land parcel number Mwerua/Gitaka/388 in compensation. He argued that without this exchange being completed, the Respondents and the deceased would not have discovered the fraud perpetrated by the Appellant.

24. Regarding the issue of leave granted for filing the suit out of time, the 1st Respondent argued that the Trial Court did not err in its conclusion that the Appellant did not contest that leave. The 1st Respondent pointed out that the Appellant never challenged the leave granted to the 1st Respondent in its Amended Defence or address the limitation issue specifically.

25. The 1st Respondent further submitted that the deceased was unaware of the transfer of the suit land to the Appellant at the time of his death and he had no reason to get alarmed that his property was in any danger. He had only given the Appellant possession of the land, and in 1976, a letter was sent to the deceased inviting him to a meeting to discuss compensation after the transfer had occurred in 1971, which was done without their knowledge.

26. The 1st Respondent submitted that the deceased did not sign any transfer forms or grant authority for the transfer of the suit land to the Appellant; such transfer would only have been executed upon compensation. He added that his deceased father swore an affidavit on 26th June 1989, indicating that the land was registered in his name and had not been transferred to any third party.

27. The 2nd Respondent submitted his written submissions on 14th February 2024, stating that the issue of the limitation of actions was addressed during the preliminary stage. He noted that the Appellant did not appeal this matter despite having ample time to do so.

28. The 1st Respondent further submitted that the Appellant's position throughout the proceedings was that an entry in the green card served as proof of a transaction. The 1st Respondent submitted the Appellant's witness failed to provide any documents or evidence to support the process by which the entry was registered. The root of the title now registered in the Appellant's name was not established and it was not shown how the Appellant got to be registered.

29. I have reviewed the record of appeal, the evidence presented at the trial court, and the parties' submissions. The issues that stand out for determination are as follows:

    i. Whether the suit before the Lower Court was statute barred under the provisions of the *Limitation of Actions Act*, Cap 22 Laws of Kenya?

    ii. Whether the provisions of Section 26 of the *Limitation of Actions Act* were applicable in the circumstances of this case?

    iii. Whether the transfer of the suit land to the Appellant was legally and regularly effected?.

30. In a first appeal like this one, the Court is called upon to subject the whole of the evidence to fresh scrutiny and to make its own conclusions on the facts, bearing in mind that it did not have the benefit of hearing the witnesses firsthand and observing their demeanor.

31. This duty was well articulated in the Case of Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123 where the Court stated as follows:

> " This Court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)."

32. The Appellant in its Memorandum of Appeal and the submissions has highlighted and argued that the suit before the Lower Court was statute barred by virtue of the provisions of Section 7 of the *Limitation of Actions Act* which provides as follows:-

> " An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person".

33. The Appellant contends that the Trial Court did not address the issue of whether the suit was time-barred. Instead, the court relied on the ruling issued on 17th November 2006, which had granted the 1st Respondent leave to file the suit out of time.

34. According to the Appellant, this order had been made with the understanding that the Appellant would have the opportunity to raise the argument regarding the suit's timeliness during the substantive hearing. As such, the Appellant was of the view that the ruling dated 17th November 2006 was a conditional one and that the reason it did not appeal the decision was that it was to be given an opportunity to challenge the suit's timeliness in the hearing.

35. Both the 1st and 2nd Respondents argued that the Trial Court had addressed and determined whether the suit was barred by the statute of limitations at the preliminary stage. The Appellant did not challenge the Ruling of the Learned Trial Magistrate granting extension of time and hence the Respondents argued the Ruling was final.

36. Though no Appeal was made against the Ruling of the Learned Resident Magistrate, rendered on 17th November 2006 effectively allowing the 1st Respondent's application dated 12th June, 2006 where he sought extension of time to bring an action out of time, that application was made under the provisions of Section 27 of *Limitation of Actions Act*, Cap 22 Laws of Kenya. Section on 27, of the *Limitation of Actions Act* refers to tortious acts such as negligence and in my view would be inapplicable to claims for recovery of land. In the instant case the claim was one for the recovery of land and it behoved the Court to determine whether the action was commenced within the Limitation period prescribed under Section 7 of the *Limitation of Actions Act*.

37. Section 26 of the *Limitation of Actions Act* however provides automatic extension of Limitation period in case of fraud or mistake such that the period of Limitation starts running from when the fraud or mistake is discovered. Section 26 of the *Limitation of Actions Act* in the relevant part provides:-

> 26. Where, in the case of an action for which a period of limitation is prescribed, either—
>
> (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
>
> (b) the right of action is concealed by the fraud of any such person as aforesaid; or
>
> (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:

38. The Appellant's Counsel has submitted that Section 26 of the *Limitation of Actions Act* would only have been applicable in the case of the 1st Respondent if he had pleaded fraud and provided the particulars of fraud in his pleadings which he had not done. The Appellant in support of his submissions relied on the Case of Vijay Morjaria –vs- Nansingh Madhusingh Darbar & Another (2000) eKLR where Tunoi (JA) as he then was stated:-

> " 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 pleadings. The acts as 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 how that fraudulently conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts."

39. The Appellant submitted that under Order 2 Rule 4 of the Civil Procedure Rules provides that fraud must be specifically pleaded and particularized and reiterated that parties are bound by their pleadings and cited the case of IEBC & Another –vs- Stephen Mutinda Mule & 3 Others (2014) eKLR in support of this submission. The Appellant argued the 1st Respondent based his case on alleged irregularities and not fraud and submitted the 1st Respondent ought not to be allowed to present a different case from the one he pleaded. In support of this limb of the submissions the Appellant relied on the Case of David Sironga Ole Tukai –vs- Francis Arap Muge & 2 Others (2014) eKLR and Daniel Otieno

Migore –vs- South Nyanza Sugar Co. Ltd (2018) eKLR. In the Ole Tukai Case (supra) the Court of Appeal stated thus:-

> " In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainity and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the others case is as pleaded. The purpose of the rules of pleadings is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite litigation through diminution of delay and expense."

40. The 1st Respondent in response to the Appellant's submission that the 1st Respondent had not pleaded fraud affirmed that the 1st Respondent in his Plaint had challenged the process of transfer of the suit land to the Appellant which he pleaded was irregular and gave particulars of the irregularity. The 1st Respondent referred to the definition of "fraud" and "irregular" in the Black's Law Dictionary thus:-

> " Fraud – A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his detriment".
>
> "Irregular – The want of adherence to some prescribed rule or mode of proceedings; consisting either in omitting to do something that is necessary for the due and orderly conducting of a suit, or doing it in unreasonable or improper manner."

41. To contextualise the pleading by the 1st Respondent paragraphs 4, 5, 6 and 7 of the Amended Plaint are set out hereunder:-

4) On or about 16th day of October 1971, the Defendant irregularly transferred land parcel No. Inoi/Kerugoya/167 to itself and purported to exchange the said land with the land which it intended to give Nyamu Ndonga as compensation but which it did not comply.

   Particulars of Irregularities

   a. The Defendant transferring land parcel MNO Inoi/Kerugoya/167 without authority of Nyamu Ndonga.

   b. The Defendant failing to compensate Nyamu Ndonga with another land upon obtaining land parcel No. Inoi/Kerugoya/167.

5) The Plaintiff filed succession cause No. 47 of 2003 and in which cause law parcel No. Inoi/Kerugoya/167 was distributed to the beneficiaries but the relevant forms could not be entered on the land register as currently the land is held by the Defendant.

6) That the Defendant having caused itself to be registered as owners of land Parcel No. Inoi/Kerugoya/167 before compensating Nyamu Ndonga was irregular and the said title should be rectified to read Nyamu Ndonga.

7) The Plaintiff's claim against the Defendant is for the rectification register by cancelling the name of the Defendant from register of land parcel No. Inoi/Kerugoya/167 plus mesn profits for loss of user.

42. Without any doubt the 1st Respondent was challenging the manner through which the Appellant got itself registered as the owner of the suit property. The 1st Respondent contended the Appellant was

registered as owner irregularly without following due process. The 1st Respondent pleaded what he considered were the particulars of the irregularities. In essence the 1st Respondent was challenging the title registered in the Appellant's name for having been acquired illegally and/or unprocedurally.

Under Section 26(1)(b) of the *Land Registration Act*, 2012 the title of a registered proprietor can be challenged on account of having been illegally and/or unprocedurally acquired Section 26(1) of the *Land Registration Act*, 2012 provides as follows:-

26

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts 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 that 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; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

43. In my view irregularities depending in the context in which they are committed would be a kin to and/or synonymous with fraud. Thus Section 26 of the *Limitation of Actions Act* would be applicable in the context of when an irregularity leading to unprocedural transfer of land is discovered.

44. In the present case therefore the issue is whether the 1st Respondent discovered the irregularity in 2002 when he claims he did and/or whether he could have discovered the irregularity much earlier through exercise of reasonable diligence.

45. The Appellant without prejudice to its submissions that the 1st Respondent having not pleaded fraud, Section 26 of the *Limitation of Actions Act* would have no application has further submitted that the 1st Respondent would have discovered the alleged irregularities/fraud much earlier. The Appellant argued the contention by the 1st Respondent that he discovered the fraud when he obtained a green card in 2005 was unrealistic because a green card is a public document which he could have accessed anytime. The Appellant also pointed to a letter dated 28th May, 1976 "PEX 4" which purportedly invited the deceased father of the 1st Respondent to discuss the issue of the alleged exchange of land and argued the deceased knew his land had an issue and should by exercise of reasonable diligence have discovered the Appellant had been registered as owner of the suit land. The Appellant relied interalia on the following authorities Chris Nyakundi –vs- Mimosa Plantations Ltd & 4 Others (2015) eKLR, Margaret Magugu –vs- Karura Investment Ltd & 4 Others (2019) eKLR to support this submission.

46. For their part the Respondents countered that their father died without knowing his land had been illegally and irregularly transferred to the Appellant. The Respondents contended that they only became aware of the irregular transfer after they carried out succession proceedings in respect of their father's estate and were at the stage of distributing the suit land when on acquiring the green card they noticed the illegal entry of the Appellant's name.

47. The Court takes notice that people do not routinely carry out searches at the Lands Office to ascertain the status of their parcels of land and that was particularly the case before the onset of the 21st Century as before then there was no rampant fraud and land grabbing that characterized the 1990s and the initial decade of the 21st Century (2000 to 2010). People only visited the Lands Office when they were

carrying out a land transaction like a sale or subdivision or when they were undertaking a succession process. In the premises I do not consider there was in particular anything that could have led the deceased to check on the status of his land at the Lands Office. Indeed when the 1st Respondent and his siblings desired to do succession following their father's death is when they visited the Lands Office only to discover the suit land had been registered in the Appellant's name.

48. In the circumstances and having regard to my foregoing evaluation and analysis it is my determination that the suit before the Lower Court was not statute barred. The provisions of Section 26 of the *Limitation of Actions Act* came to the 1st Respondent's aid as he learnt of the Appellant's registration as owner of the land when they applied for succession in 2003. Consequently the period of Limitation started to run from that time.

Validity of the transfer to the Appellant.

49. It was never in dispute that the suit property was first registered in the name of the 1st Respondent's father (Nyamu Ngonga) in 1958 following land Adjudication. In the early 1970's (1971-1973) it is evident the Kirinyaga County Council required land for expansion of Kerugoya Town and it identified several parcels of land which apparently included that of the 1st Respondent's deceased father land parcel Inoi/Kerugoya/167. The County Council of Kirinyaga was to compensate the identified land owners with other land. The Respondents contended that their father as compensation was to exchange his land with land parcel Mwerua/Gitaku/388 but that never happened. Instead the Respondents stated the Appellant irregularly caused the transfer of the deceased land to its name.

50. On the basis of the pleadings it was clear that the 1st Respondent was challenging the process through which the Appellant got to be registered as the owner of the suit land when no compensation was paid to their father. Once the transfer/title was under challenge the burden shifted to the Appellant to prove that the title was transferred to them legally. In the instant case, the Appellant was obligated to prove that the land was procedurally transferred to them either by way of sale and/or exchange. The witness called to testify on behalf of the Appellant adduced no documents either by way of sale agreement, consents, minutes or instrument of transfer to support the entry recording the Appellant as owner of the suit property. How then was the transfer effected? The witness of the Appellant affirmed the owners whose land was required for the expansion of Kerugoya Township were compensated by way of exchange with other parcels of land. He produced a schedule of the land owners whose lands were taken showing the parcels of land they were given in exchange. The 1st Respondents father's was not included in the schedule. The witness indicated the Green Card (abstract of title) for land parcel Inoi/Kerugoya/167 (PEX1) showed that the same was registered in the Appellant's name on 16th October 1971 for a consideration of Kshs 1,440/-. He however had no evidence of payment or receipt of the money and neither did he have any document evidencing any sale.

53. The Learned Trial Magistrate in his Judgment considered in considerable detail the validity of the registration in favour of the Appellant under paragraphs 28, 29, 30 and 31 of the Judgment and came to the conclusion that the Appellant had not established that it acquired the suit land from the deceased validly. In reaching the decision that he did, the Learned Trial Magistrate relied on the Court of Appeal decision in the Case of Munyu Maina –vs- Hiram Gathiha Maina (2013) eKLR where the Court stated:-

> " We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of the title as proof of ownership. It is the instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and

free from any encumbrances including any and all interests which need not be noted on the register, it is our considered view that the Respondent did not go this extra mile that it required of him and no evidence was led to rebut the Appellant's testimony."

54. The Appellant in my view was vide the Plaint put on Notice that its registration as owner of the suit land was under challenge and as in the Munyu Maina Case (supra) they needed to go beyond the registration and show how they got to be registered. There was no explanation from their end how they got registered in 1971 yet the process of acquisition of the land parcels for expansion appears to have been carried out in 1973. The witness of the Appellant affirmed in his evidence and witness statement that the process of acquisition was mooted in 1973 and that the 1st Respondent's father's land was one of those identified for acquisition. While all the other land owners were compensated by way of exchange with other land, no viable or credible explanation was given how come the Respondent's father was not compensated through exchange with other land. If there was a sale as claimed by the Appellant there was no evidence adduced in support. There was specifically no sale agreement and/or Council Resolution approving the purchase of the suit land exhibited by the Appellant.

55. The Appellant contented itself by pointing to the registration entered in the title register in its favour. That precisely was the registration that was in contestation and the Appellant needed to demonstrate it was regularly made. In the Supreme Court of Kenya case of Dinah Management Ltd – vs- County Government of Mombasa & 5 Others (2023) KESC 30 KLR considering the application of indefeasibility of title doctrine the Supreme Court observed as follows:-

> " 108 ---- Further, we cannot, on the basis of indefeasibility of title, sanction irregularities and illegalities in the allocation of public land. It is not enough for a party to state they have a lease or title to the property. In the Case of Funzi Development Ltd & Others –vs- County Council of Kwale, Mombasa Civil Appeal No. 252 of 2005 (2014) eKLR the Court of Appeal which decision this Court affirmed stated that:-
>
> > "—a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A Court of Law cannot on the basis of indefeasiblity of title sanction illegality or give, its seal of approval to an illegal or irregular obtained title."

56. Upon a careful evaluation of the Record of Appeal and the evidence, I am satisfied that the Learned Trial Magistrate correctly held that the transfer and registration of the Appellant as owner of the suit property was irregular and illegal as it was not demonstrated due process was adhered to. The Learned Trial Magistrate went ahead and ordered rectification of the title register by cancelling the Appellant's name from the register. Considering that the Appellant was in possession and had developed some public infrastructure on the suit land which would be difficult to relocate, I consider that it would be in the interest of Justice to vary the relief granted to one requiring the Appellant to compensate the Respondents for the land at todays market value.

57. I accordingly dismiss the Appellant's Appeal and uphold the Judgment of the Learned Trial Magistrate delivered on 24th November 2022 but vary the relief granted for rectification of the Land Register by cancelling the name of the Appellant from land parcel No. Inoi/Kerugoya/167 and substitute the same with an order that:-

> The Appellant pays to the Respondents compensation for land parcel Inoi/Kerugoya/167 at the current market value within the next six (6) months from the date of this Judgment.

58. The Respondents are awarded the costs of the Appeal.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 27TH DAY OF FEBRUARY 2025

J. M. MUTUNGI

ELC- JUDGE