



**Challo v City Chicken and Eggs Dealers Co-operative Society Limited & another
(Civil Appeal 117 of 2018) [2023] KECA 244 (KLR) (3 March 2023) (Judgment)**

Neutral citation: [2023] KECA 244 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 117 OF 2018
AK MURGOR, J MOHAMMED & HA OMONDI, JJA
MARCH 3, 2023**

BETWEEN

STEPHEN M CHALLO APPELLANT

AND

**CITY CHICKEN AND EGGS DEALERS CO-OPERATIVE SOCIETY
LIMITED 1ST RESPONDENT**

GEORGE KANYONGO GITHUKU 2ND RESPONDENT

*(Being an Appeal from the Judgment and Decree made at the Environment and Land
Court at Milimani (Kimei, J.) dated 22nd September 2017 in ELC Case No. 45 OF 2016)*

JUDGMENT

1. The appellant, Stephen M. Challos filed this suit seeking an equitable and beneficial ownership of the property comprising plot number 26 and registered as LR No. Nairobi Block /122/61 (the disputed premises) of which he claimed to be entitled to possession and occupation. In his suit, he sought the following orders;
 - a. Vacant possession.
 - b. General damages for the Tort of Trespass.
 - c. An Order directing the 1st Respondent to forthwith rectify the anomaly in their Register Book and recognize him as owner of all that property known as Plot No. 26 within Block 122/61 (nairobi).
 - d. Costs of the suit and interest.
 - e. Any other relief that the Honourable Court may deem fit to grant.



2. On its part, the 1st respondent, City Chicken and Eggs Dealers Co-operative Society Limited is a Co-operative Society registered under the [Societies Act](#). It maintained a register of members and land details of which Victoria Wanjiku Mburu, (the vendor) of the disputed premises was a member. The 2nd respondent, George Kanyongo Githuku is registered as the current owner of the disputed premises.
3. The appellant's case is that on May 20, 1995 he entered into an agreement for sale with the vendor Victoria Mburu, the absolute owner of the disputed premises. That the 1st respondent sanctioned and approved the transactions since the Sale Agreement was concluded at its offices and was witnessed by its representatives, one Mr. Kaunda.
4. The brief terms of the agreement were that, the purchase price was Kshs. 520,000 which was paid in full vide cheque No. 126993 and receipt acknowledged by the vendor; that the vendor was to surrender all the documents in relation to the disputed premises including signing all documents to effect the transfer in favour of the appellant; that thereafter, the vendor's name was to be substituted with that of the appellant in the 1st respondent's Register book.
5. The appellant claimed that he later came to learn that the 2nd respondent had illegally, fraudulently and under unclear circumstances transferred or acquired ownership of the disputed premises by having his name endorsed in the 1st respondent's Register book; that the 1st respondent had irregularly, negligently and maliciously caused the 2nd respondent to tamper with the Register book and had entered his name in it, notwithstanding that the 1st respondent knew that the appellant owned the disputed premises. He further claimed that the 2nd respondent had trespassed upon the disputed premises without his consent or authority and undertaken construction thereon which had deprived him of the use and quiet enjoyment of the disputed premises; that the trespass was continuing and that as a consequence he had suffered loss and damage.
6. In his evidence, he stated that he had not sold the disputed premises to the 2nd respondent nor had he authorized the 1st respondent to change the Register book to include the 2nd respondent's name; that upon signing of the Sale Agreement dated May 20, 1995 the vendor did not hand over any documents of title in respect of the disputed premises.
7. On cross-examination, he responded that he was not aware who in the 1st respondent's office had tampered with the Register book; that the disputed premises moved from Mr. Karanja to Victoria Mburu and then to himself, and the 2nd respondent was listed as the 6th owner in the 1st respondent's Register book; that he lodged a complaint with the 1st respondent who promised to resolve the issue but in vain; that on July 28, 1999, he also reported the matter to the CID at Kasarani and recorded a statement. But to his dismay, no action by way of investigations or arrests was taken.
8. The 1st respondent denied the claim and stated that the actions complained of were carried out in 1995, and the officials who were in the office to wit: Zakaria Marwa and Bernard Muswa were long since deceased; that the onus was on the appellant and the 2nd respondent to establish ownership of the disputed premises. The 1st respondent called one witness.
9. DW 1 Mr. Duncan Kioli Mutiso, produced the records of the 1st respondent which showed the appellant as the 5th owner of the disputed premises having acquired it from Victoria Wanjiku Mburu, who succeeded her late husband James Kabura Karanja; that the 6th transferee was the 2nd respondent. The Register book did not have records of how the transactions between the appellant, Victoria Mburu and the 2nd respondent were processed. He confirmed that the appellant's letter dated 4th August 2009 was received, but to his knowledge no investigations were carried out. He confirmed that Plot No. 26 in the 1st respondent's records was indeed LR No. Block 122/61. He stated that he did not witness



the signing of the Sale Agreement between the appellant and Victoria Mburu nor between Victoria Wanjiku Mburu and the 2nd respondent. The witness further confirmed that the 1st respondent sent letters dated 1st November 1995 and March 27, 1997 to the Commissioner of Lands stating that the disputed premises belonged to the appellant and the 2nd respondent. In answer to a question whether Mr. Kaunda is known to him as an official of the 1st respondent, the witness replied that he did not know Mr. Kaunda nor who in the 1st respondent's office witnessed the agreement between the appellant and Victoria Mburu.

10. He further stated that it was the policy of the 1st respondent not to concern itself with what members did with their parcels, once the plots were allocated to them; that sale transactions were constantly ongoing between members and third parties, and the resultant purchaser may proceed to register the land in their name without the knowledge of the 1st respondent.
11. In denying the claim, the 2nd respondent stated that he is the registered owner of the disputed premises having been registered as such on October 19, 1999. He denied having acquired the disputed premises illegally or fraudulently as alleged by the appellant; that on acquisition, he took possession of the disputed premises and developed it. He denied trespassing on land he owned.
12. He testified through one witness, Joseph Ngethe, DW 2 who had a power of attorney dated December 23, 2014 to testify on his behalf. At the trial, the 2nd respondent's witness produced various documentary evidence in support of his ownership of the disputed premises, and further informed the court that he is the 2nd respondent's cousin and was authorised to live there by the 2nd respondent who resides in the USA; that he is the caretaker of the property which has several single rooms for rental from which he collects rent. He stated that he was not present when the 2nd respondent acquired the land; that he bought the property from one Victoria Wanjiku Mburu for the sum of Kshs. 530,000 on September 9, 1994; that a down payment of Kshs 200,000 was made, as evidenced by a receipt dated September 9, 1994 (Ref 1847). A 2nd payment was made on November 17, 1994 in the sum of Kshs. 75,000, and pursuant to a demand by the law firm of Mutua Mboya & Nzissi Advocates, he paid the last payment of Kshs. 255,000 to the said vendor's Advocates.
13. Finally, the 2nd respondent further contended that the appellant's claim was time barred by dint of the provisions of the *Limitation of Actions Act* Cap 22.
14. Upon considering the matter, the trial court dismissed the suit for the reason that it was statute barred and for want of proof that the 2nd respondent had fraudulently acquired the disputed premises. The appellant was aggrieved by the trial court's decision and brought this appeal on grounds that the trial judge misdirected herself in disregarding the appellant's case notwithstanding that the court had found that the 1st respondent's Register book showed the entry of appellant as having been registered before the 2nd respondent, and then failing to find that there was malice in the manner of registration of the 2nd respondent as titleholder; in considering extraneous matters that were not material to the suit when she found that the appellant failed to challenge the change of user sought by the 2nd respondent as this was not a matter that had a bearing on ownership; in faulting the appellant for failing to call the vendor of the disputed premises, and disregarding his testimony that she had vanished without a trace, and no reasonable efforts would bring her to court; in upholding the 2nd respondent's agreement with her; in finding that there was no nexus in the transfer of the disputed premises by the appellant to the 2nd respondent, and in failing to find that there was collusion between the respondents in the transfer of the disputed premises to the 2nd respondent; in finding that the 1st respondent's Register book was of little probative value; that the learned judge had no basis in law to disregard it, no matter how badly it was maintained; in finding that the suit was time barred by a wrongful interpretation of section 7



- of the *Limitation of Actions Act*, particularly since a claim for adverse possession was not specifically pleaded; in concluding that the appellant's case was fatal by failing to include the Registrar of Lands.
15. Both the appellant and the respondents filed written submissions. At the hearing of the appeal, learned counsel for the appellant Mr. Gachie Mwanza relied on their written submissions in their entirety while learned counsel for the 2nd respondent, Mr. Gakii Kalaimi highlighted their written submissions. There was no appearance for the 1st respondent though they had been served.
 16. In his written submissions, the appellant stated that the learned judge did not evaluate the evidence that was before the trial court, which failure had rendered a wrong result; that the learned judge had failed to consider that the appellant was the lawful owner of the disputed premises as his name was entered on the 1st respondent's Register book before the 2nd respondent's name; that one Victoria Mburu was not registered in the Register book when the 2nd respondent claimed to have purchased the property in 1994; that the learned judge did not appreciate that the appellant did not transfer the disputed premises to the 2nd respondent, and which transfer was effected through connivance with the 1st respondent officials; that the learned judge instead focused on the inadequacy of the 1st respondent's Register book without appreciating its authentic value in supporting the appellant's ownership of the disputed premises.
 17. The appellant also submitted that, the learned judge wrongly faulted the appellant for failing to secure the appearance of the vendor who was a crucial witness, yet went ahead to uphold the 2nd respondent's agreement with her.
 18. On the issue of whether the failure to join the Land Registrar as a party was fatal, it was argued that this was not a proper case to include the Land Registrar since nothing demonstrated that the office was at fault, and hence there was no reason for joinder of that office.
 19. Turning to the issue of whether the suit was time barred, the appellant submitted that the learned judge misdirected herself in basing her determination on adverse possession while the claim advanced was on the tort of trespass of land, and whether the 2nd respondent lawfully entered upon the disputed premises; that the claim was not time barred because the 2nd respondent did not enjoy uninterrupted occupation of the disputed premises having lodged complaints with the 1st respondent and the police, and in filing the suit in 2011 which was not 12 years after registration of the title. In support of the proposition that time was interrupted, the appellant cited the cases of *Mate Gitabi vs Jane Kabubu Muga alias Jane Kabubu Muga & 3 others* [2017] eKLR.
 20. On its part, the 1st respondent submitted that the learned judge rightly dismissed the appellant's suit for the reason that there was no evidence supportive of the allegations that the 1st respondent colluded with the 2nd respondent to fraudulently alter the records in his favor; that the learned judge took into account the entries in the 1st respondent's Register book having appreciated that the disputed premises moved from James Mburu Karanja to Victoria Wanjiku Mburu to Stephen M. Challos and finally to George Kanyongo Karanja Githuku.
 21. It was further submitted that the judge rightly found that the suit was time barred, since the 2nd respondent had been in occupation of the disputed premises since 1995, and that prior to filing the suit, the appellant worked as a civil servant in Geneva. It was submitted that by virtue of section 26 of the *Land Registration Act*, the 1st respondent had a duty to recognise the 2nd respondent as the owner of the disputed premises unless the appellant provided tangible evidence to rebut the 2nd respondent's evidence; that no evidence was provided by the appellant to warrant the changing of the records therefore, the 1st respondent's failure to do so could not be termed as collusion.



2. On the issue of whether the appellant's failure to include the Land Registrar was fatal to the claim, the 1st respondent submitted that the appellant's oral application in court to amend prayer C of the plaint so as to replace the 1st respondent with the Land Registrar was fatal as the Land Registrar was not a party to the suit; that as a consequence the court could not make orders against a party who was not afforded a right to be heard; that the appellant had the opportunity to join the Land Registrar, but had failed to do so, as a consequence of which the trial judge could not be faulted for declining to grant the orders sought against the Land Registrar.
22. On his part the 2nd respondent submitted that the appellant had failed to prove his case on a balance of probabilities; that the 2nd respondent purchased the disputed premises in 1994 while the appellant purchased it in 1995, a period of eight months after the 2nd respondent had purchased it from the same vendor; that the vendor was not responsible for conferring the title on the parties as alleged by the appellant. That furthermore, the 2nd respondent was issued with a title on 29th October 1999, which the appellant had never challenged. It was argued that the appellant had filed his suit in 2011 and the 2nd respondent had allegedly purchased and occupied the property in 1995; that having moved to court 16 years after the 2nd respondent took possession, the suit was statute barred under section 7 of the *Limitation of Actions Act*, and as such, the learned judge rightfully dismissed the appellant's suit.
23. In reply, Mr Mwanza submitted that the appellant's registration in the 1st respondent's register book superseded any subsequent registration. The register in respect of the disputed premises was in the 1st respondent's custody and the sale to the appellant's ought to have been registered by the Lands Registrar; that the 2nd respondent's title ought to have been impeached on account of fraud, which is the basis of the appellant's case against the respondents.
24. On the cause of action having been time barred, counsel submitted that the suit was not in respect of the enforcement of the sale contract, but against trespass on the disputed premises by the 2nd respondent; that owing to his continued occupation, the suit was not time barred.
25. This is a first appeal, and the duty of this Court is well settled. The Court is required to re-evaluate, reassess and reanalyse the evidence and reach its own independent conclusion. An appellate Court will nevertheless not ordinarily interfere with the findings of fact by the trial court unless such finding was based on no evidence at all, or on a misapprehension of the facts or if the Court has shown demonstrably to have acted on wrong principles in reaching its findings. See *Selle vs Associated Motor Boat Co Ltd* [1968] EA 123.
26. In view of this guidance, we consider that the issues for consideration are;
 1. Whether the suit was time barred;
 2. Whether the tort of trespass was proved by the fraudulent registration of the 2nd respondent in the 1st respondent's Register book;
 3. Whether the appellant was entitled to be registered as titleholder of the disputed premises;
 4. Whether the learned judge properly evaluated the evidence; and
 5. Whether the failure to include the Land Registrar as a party to the suit was fatal.
27. We begin with whether the trial court was right in holding that the cause of action, was time barred as a challenge based on limitation pertains to a court's jurisdiction to hear and determine the suit.



28. In determining the issue, the learned judge concluded that by virtue of the 2nd respondent having been in possession, acquired title and developed the land and was enjoying quiet and peaceful and uninterrupted occupation of the disputed premises for over 12 years meant that his occupation was adverse to the appellant's ownership, and as a result, the suit was time barred.
29. In his plaint, the appellant claimed that the 2nd respondent had trespassed and undertaken development upon the disputed premises without his, (the appellant's) consent or authority, since his name was registered in the 1st respondent's Register book before the 2nd respondent's; that the 2nd respondent had deprived him of the use and quiet enjoyment of the disputed premises, and as a consequence he had suffered loss and damage. He prayed for orders of "General damages for the Tort of Trespass".
30. On his part, the 2nd respondent claimed to have acquired the disputed premises in 1994, whereupon he proceeded to take up occupation and develop it. Despite noticing the alleged trespass, the appellant stayed away from disputed premises until 2011 when he filed a suit. It is therefore not in dispute that by the time the suit was filed, the 2nd respondent was in occupation. He had developed the disputed premises and was enjoying quiet, peaceful and uninterrupted possession of the disputed premises.
31. The appellant's suit is clear that it was concerned with the tort of trespass by the 2nd respondent from 1995 or thereabouts until 2011 when the suit was filed, and was therefore not a claim for adverse possession. As such, what the trial court was required to determine was whether the appellant's claim of trespass was time barred and if not, whether the 2nd respondent had illegally and fraudulently transferred and occupied the disputed premises. It therefore falls upon us to determine this issue.
32. Trespass is defined under the *Trespass Act*, Cap 294 as being where "any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof"
33. The text book *Clerk & Lindsel on Torts*, 16th Edition, at paragraph 23 - 01, states that;
- Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues".
34. *Salmond on Torts*, 15th ed., at p. 791, provides an enumeration of a continuing tort thus;
- When the act of the defendant is a continuing injury, its continuance after the date of the first action is a new cause of action for which a second action can be brought, and so from time to time until the injury is discontinued. An injury is said to be a continuing one so long as it is still in the course of being committed and is not wholly past. Thus the wrong of false imprisonment continues so long as the plaintiff is kept in confinement; a nuisance continues so long as the state of things causing the nuisance is suffered by the defendant to remain upon his land; and a trespass continues so long as the defendant remains present upon the plaintiff's land. In the case of such continuing injury an action may be brought during its continuance, but damages are recoverable only down to the time of their assessment in the action."
35. In construing the definition of a continuing trust in the case of *Muthiora vs Marion Muthama Kiara (Suing on behalf of the Estate of Erastus Muthamia Kiara - Deceased)* (Civil Appeal 43 of 2017) [2022] KECA 28 this Court had this to say;
- From the above definitions of the term "trespass" by the eminent learned authors, it is clear that any unauthorized entry whether present or continuous is trespass. In this case, it is indeed common ground that the appellant entered into and has remained in occupation



of the suit property. The appellant's continued occupation of the said property from the 1st date of entry in so far as it is unauthorized by the respondent amounts to trespass and remains as such to date. The respondent's claim for trespass being a continued tort is, therefore, not time barred. We find no fault with that finding by the trial court".

36. The above cited authorities bring into focus the aspect of a continuing trespass, which can be held to arise from an unauthorized entry and occupation of property without authority or consent, and which occupation continues unabated.
37. In the instant case, it is not disputed that the appellant purchased the disputed premises sometime in 1995, and had his name entered in the 1st respondent's Register book. The 2nd appellant who had also purchased the disputed premises from the vendor also had his name entered in the 1st respondent's Register book. He thereafter took up occupation and development of the property, which occupation continued upto the filing of the suit. So that, in so far as the appellant's claim against the 2nd respondent's occupation was concerned, his continued occupation of the disputed premises remained a continuing trespass, that was not time barred.
38. Clearly, the learned judge overlooked this salient feature of the appellant's claim, and instead relied on, section 7 of the *Limitation of Actions Act*, to reach a finding that the suit was time barred and the appellant had been dispossessed of the disputed premises. Hence, the cause of action being based on the tort of trespass, we find that the trial judge misdirected herself in concluding that the suit was time barred.
39. Having so found, it becomes incumbent upon us to determine whether the tort of trespass on the disputed premises by the 2nd respondent was established on a preponderance of the evidence.
40. In determining this issue sections 107 and 108 of the *Evidence Act*, are explicit. They stipulate;
- 107.
- (1) 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 those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."
41. The provisions of the law are buttressed in the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] eKL R, where Tunoi, JA. (as he then was) observed;
- 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."
42. As regards the standard of proof, this Court in the case of *Kinyanjui Kamau vs George Kamau* [2015] eKLR expressed thus;
- ...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs Ndolo* (2008) 1 KLR (G & F) 742 wherein the Court stated that: "...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to



prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."

43. The appellant's case was that he signed a sale agreement with the vendor, Victoria Mburu. Thereafter, his name was entered in the 1st respondent's Register book. He claimed that on account of fraud, and connivance between the 1st and 2nd respondents, the 2nd respondent was registered in the Register book which led to his occupation and trespass on the disputed premises. At this juncture, the question that arises is whether the appellant proved that the respondents fraudulently connived to deprive him of the disputed premises.
44. A review of the plaint reveals that, even though the appellant alleged that the respondents acted fraudulently, fraud was not specifically particularised. But, on the allegations of collusion, the appellant particularised this as being that; a) the 1st respondent being custodians of the Register book, causing it to be altered without the appellant's consent; b) the 2nd respondent asserted ownership of the disputed premises while knowing that no transfer was effected to him and with no consideration; c) by collusion to unlawfully deprive the appellant his lawfully acquired premises.
45. But, our reanalysis of the allegations leads us to conclude that the appellant did not demonstrate that fraudulent dealings or collusion was established between the respondents. This is because, no evidence of fraud or collusion was presented to support the allegations. In particular, when asked under cross examination, whether he knew who was responsible for including the 2nd respondent's name in the Register book, the appellant's response was that he was not aware of who in the 1st respondent's office had tampered with the book. As such the allegations of fraud and collusion remained unfounded.
46. Needless to say, what the record discloses is the existence of two competing interests between the appellant and the 2nd respondent over the disputed premises, both of which were recorded in the 1st respondent's Register book. Both the appellant and the 2nd respondent purchased the disputed premises from one Victoria Wanjiku Mburu, and both proceeded to have their names entered in the 1st respondent's Register book. The appellant's agreement was entered on May 20, 1995 after he paid a purchase price of Kshs 520,000 for the disputed premises, while the 2nd respondent's evidence was that he bought the disputed premises on 9th September 1994 for Kshs. 530,000; a down payment of Kshs. 200,000 was made as evidenced by a receipt (Ref 1847). The 2nd payment of Kshs. 75,000 was made on 17th November 1994, and the last payment made was Kshs. 255,000. The appellant's sale agreement was entered into after the 2nd respondent's agreement. It is of pertinence that the appellant went on to further disclose that the vendor did not give him any documents of ownership of the disputed premises, as agreed. It seems they were handed over to the 2nd respondent who subsequently proceeded to extract the title of the disputed premises in his name.
47. With neither fraud nor collusion having been disclosed on either of the respondents' part, it can only be surmised that registration of both parties in the 1st respondent's Register book was pursuant to the existence of valid sale documentation pertaining to the disputed premises that created two competing interests. With such registration, we find the 2nd respondent's occupation to have been inconsistent with the tort of trespass. In other words, having also outrightly purchased the disputed premises from the vendor, and notwithstanding the appellant's interest, the 2nd respondent whose name also appeared in the Register book was as much entitled to occupation of the premises as the appellant, and therefore the question of trespass could not be said to have arisen.



48. The next issue for determination was whether the appellant was entitled to be registered as the titleholder of the disputed premises. The appellant's case is that since his name was registered on the 1st respondent's Register book before the 2nd respondent, and since he did not at any time transfer the disputed premises to the 2nd respondent, he remained the rightful owner and was entitled to have the title registered in his name. Under prayer C of the plaint, he sought "An Order directing the 1st Respondent to forthwith rectify the anomaly in their Register Book and recognize him as owner of all that property known as Plot No. 26 within Block 122/61 (Nairobi).
49. On the other hand, the 2nd respondent who had also signed a sale agreement with Victoria Mburu, and obtained the relevant documentation that pertained to the disputed premises, proceeded to have them registered in his name on 29th October 1999.
50. At the conclusion of the hearing in the trial court, the appellant sought for and had the 1st respondent's name replaced with the Land Registrar, thereby amending prayer C to read, "... An Order directing the Land Registrar to forthwith rectify the anomaly in their Register Book and recognize him as owner of all that property known as Plot No. 26 within Block 122/61 (Nairobi)." We will address the implication of the amendment of the pleading more substantially below.
51. A reading of the initial prayer C makes it clear that though the appellant was seeking to be recognised as the owner of the disputed premises in the 1st respondent's Register book, it cannot be gainsaid that the 1st respondent did not have the authority to have him registered as the titleholder. This being the situation, the appellant amended the prayer to replace the 1st respondent with the Land Registrar, so as to secure his registration as the titleholder of the disputed premises in the Lands registry, in the place of the 2nd respondent who was already registered as titleholder.
52. So was the appellant entitled to be registered as the titleholder? Pursuant to the 2nd respondent's registration as titleholder, section 26 (1) of the [Land Registration Act](#) is specific. It provides;
53. 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, restriction 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."

54. In the case of [Caroget Investment Limited vs Aster Holdings Limited & 4 others](#) [2019] eKLR Where two parties assert competing proprietary interest over one parcel of land, each must produce evidence in support of his claim. This Court (Platt, Apaloo & Masime, JJA) recognized this in James Henry Mundiar t/a Kabarak Development Services V. Tradewheel Kenya Ltd (1987) eKLR, and said;

"But the plaintiff cannot attack the relative weakness of the Defendant's title by pleading just tertii, namely that the Council owns the land. The Plaintiff can only attack the position of the Defendant, on the strength of some title of its own. (See The Law of Real Property by Meggery and Wade, 4th Ed pp 1005 to 1009.)"



55. This dictum was applied in *Samuel Otieno Otieno v Municipal Council of Malindi & another* [2015] eKLR.

Put differently, a claimant will succeed on the strength of his own case and not on the weakness of the opponent's case, save to add that the standard of proof in a case for declaration of title is on a preponderance of evidence."

56. In other words, section 26 and the excerpt above are plain that it was incumbent upon the appellant to demonstrate that the 2nd respondent was improperly registered as titleholder. But having re-evaluated the evidence, we once again find that nothing discloses that the 2nd respondent fraudulently, illegally or unprocedurally registered the disputed premises in his name. The 1st respondent stated that it forwarded the 2nd respondent's name to the Land Registrar, and together with the sale agreement with Victoria Mburu, evidence of payment of the full purchase price, and other documents pertaining to the disputed premises the 2nd respondent was able to obtain the certificate of title for the disputed premises in his name. The title was produced as evidence. In effect, we can find nothing that was improper or unprocedural with the process of registration of the 2nd respondent as the absolute and indefeasible owner of the disputed premises.
57. In contrast, besides production of the sale agreement and payment of the purchase price, in the face of the 2nd respondent's registered title, the appellant advanced little or no other proof of ownership of the disputed premises. As such, as was the trial judge, we too are satisfied that having failed to demonstrate that the disputed premises was improperly registered in the 2nd respondent's name, it followed that it was no longer available to be registered in the appellant's name.
58. On the complaint that the learned judge failed to properly evaluate the evidence, and as a result wrongly concluded that there was no nexus between the transfer of the disputed premises from the appellant to the 2nd respondent; that the respondents had not colluded in the transferring the disputed premises and that the 1st respondent's Register book was of little or no probative value, we are satisfied that this does not hold any sway.
59. In evaluating the evidence, the learned judge considered all the evidence, the prevalent circumstances of the case, and also took into account that the vendor, Victoria Mburu created competing interests over the disputed premises by selling it twice over to the appellant and the 2nd respondent that resulted in the entry of the two different sale agreements in the 1st respondent's Register book. Notwithstanding that the vendor did not testify, as she could not be traced, the trial court was categorical that she remained the one individual who ought to have explained how she came to enter into two sale agreements with both the appellant and the 2nd respondent. And without such explanation, the entries in the Register book were unassailable.
60. Regarding the Register book, the court observed that the 2nd respondent's registration did not arise from the fraudulent transfer of the disputed premises to the 2nd respondent or from collusion of the 1st respondent's officials, but the court found fault with the improperly maintained records and the poorly run cooperative for the double entry of the appellant and the 2nd respondent in the Register book. As a consequence, we find and hold that the trial judge undertook a proper evaluation of the evidence, and rightly dismissed the appellant's case.
61. The final issue was whether the learned judge misdirected herself in finding that the failure to include the Land Registrar's name as a party to the suit was fatal.



- 62. By seeking to amend the prayers in the plaint to include the Land Registrar, who had not been included as a party to the suit, the appellant was in effect attempting to have the Land Registrar condemned unheard which would have amounted to a breach of Articles 25 and 50 of the Constitution and the rules of natural justice. As did the learned judge we find that the amendment was fatally defective, and the learned judge was right in declining to grant the orders sought against the Land Registrar.
- 63. In sum, we have found that on a preponderance of the evidence, that the appellant failed to prove on a balance of probabilities the tort of trespass or that he was entitled to be registered as the proprietor of the disputed premises.
- 64. Accordingly, the appeal lacks merit and is accordingly dismissed with costs to the respondents.
It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF MARCH, 2023.

A. K. MURGOR

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

H.A. OMONDI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

