



Nkarichia v Magiri & 6 others (Environment & Land Case E004 of 2021) [2024] KEELC 4453 (KLR) (29 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4453 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E004 OF 2021**

CK NZILI, J

MAY 29, 2024

BETWEEN

FRANCIS KIRIMI NKARICHIA PLAINTIFF

AND

DAVID NKANATA MAGIRI 1ST DEFENDANT

M'IBIRI M'MBOGORI 2ND DEFENDANT

JUSTUS MURUGA M'IKIUGU 3RD DEFENDANT

**THE LAND REGISTRAR MERU CENTRAL DISTRICT
REGISTRY 4TH DEFENDANT**

THE CHIEF LAND REGISTRAR, NAIROBI 5TH DEFENDANT

**THE DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT OFFICER,
MERU 6TH DEFENDANT**

THE HON ATTORNEY GENERAL 7TH DEFENDANT

JUDGMENT

1. The plaintiff approached this court through a plaint dated 15.1.2021 as the lawfully and rightfully recorded owner of L.R No. Kiirua/Nkando/417 at the adjudication stage in 1970, he averred that the adjudication record eventually prepared in 1988 showed him as the sole owner and continued to live on his land until 2019, When the 1st, 2nd, and 3rd defendants allegedly trespassed on it and erected structures therein.
2. The plaintiff averred that upon visiting the offices of the 4th to 7th defendants, he discovered that this land was illegally, unprocedurally, and fraudulently acquired by the 2nd defendant on 28.1.2014, who transferred it to the 1st defendant on 16.10.2017. The plaintiff averred that whereas his name was on



- the demarcation records, the same was irregularly crossed off by pen with no objection proceedings recorded, consent, or authority from him as a matter of procedure. The plaintiff blamed the 2nd & 3rd defendants for the illegalities, irregularities, and fraud in altering the record and including his land pass over to the 2nd & 3rd defendants in the demarcation record contrary to the duplicate adjudication record obtained from the DLASO and subsequently transferred the same to the 1st defendant.
3. Additionally, the plaintiff averred that the 4th – 7th defendants fraudulently, illegally, and unprocedurally effected the transfer to and issued the 2nd defendant with a title deed by sanitizing the action of the 2nd and 3rd defendants contrary to the statutory procedure in existence and *the Constitution*. As to the title held by the 1st defendant, the plaintiff averred that it lacks the protection of the law for he failed to exercise due diligence and hence was a trespasser to the suit land.
 4. The plaintiff prayed for a declaration that invalidated the registration, transfer and issuance of title in the name of the 1st defendant, reinstatement of his name as the owner for his exact acreage, permanent injunction, and general damages. The plaint was accompanied by a list of witness statements, bundle of documents dated 15.1.2021 and paginated records dated 12.4.2021, and 21.2.2022.
 5. The 1st defendant opposed the suit by a statement of defense dated 22.4.2021. He averred that he was a lawfully registered owner of the land and has been in open occupation thereto with effect from 2016, where he has extensively made extensive developments thereon. He denied knowledge of the alleged particulars of illegalities, irregularities, and or fraud.
 6. The 1st defendant averred that he was a bonafide purchaser for value with no fraud, illegalities, or irregularities or fraud, for he exercised due diligence before he bought the land from the 2nd defendant. The 1st defendant averred that he was lawfully in occupation of the land and denied any alleged trespass or threats of eviction, which he termed unjustified. Moreso, the 1st defendant termed the plaint as disclosing no known cause of action against him except making malicious, misleading, and unsubstantiated claims against him. The 1st defendant's statement of defense was accompanied by a list of witnesses and documents dated 22.4.2021, a further list of documents dated 18.10.2021, a case summary and further statement dated 3.5.2022.
 7. The 2nd and 3rd defendants opposed the suit through the statement of defense dated 23.4.2021. It was averred that the 2nd defendant became the registered owner of the land on 28.1.2024 and obtained a title deed on 3.11.2014. they denied the alleged fraud, illegalities and or irregularities in the manner that they became the registered owner(s).
 8. Further, the 2nd and 3rd defendants averred that the 2nd defendant legally purchased the suit land from the plaintiff on a willing buyer-willing seller basis in the 1980s and followed all the procedures of acquiring ownership from the plaintiff at both the committee and adjudication stages. The 2nd and 3rd defendants averred that the 2nd defendant took open and exclusive ownership of land where he was grazing until Kentraco legally compensated him for way leaves without any objections from the plaintiff. The 2nd and 3rd defendants termed the suit as time-barred, incompetent, disclosing no cause of action, frivolous, vexatious, scandalous an abuse of the court process. Witness statements accompanied the 2nd and 3rd defendants' statement of defense and documents filed dated 8.7.2022.
 9. The 4th to 8th defendants opposed the suit by a statement of defense dated 20.4.2021, denying the alleged fraud, illegalities, and irregularities on their part or in conjunction with the 1st – 3rd defendant. The 4th – 8th defendants averred that it was within their statutory mandate to issue and effect the transfer of title documents, which they did in accordance with the statutory mandate. The 4th -8th defendants denied knowledge of any fraud, illegalities, or irregularities as alleged or at all or issuance of any notice



to that effect under the [Government Proceedings Act](#). The statement of defense was accompanied by a list of witnesses and documents dated 25th and 29.6.2021.

10. At the hearing, Francis Kirimi Nkarichia testified that the plaintiff, testified as PW 1 and adopted a witness statement dated 15.1.2021 as his evidence in chief. He told the court that he was the rightful owner of L.R No. Kiirua/Nkando/417, measuring 12.96 ha, was allocated to him in early 1970 by the then-adjudication committee headed by Nathan Mungania and Florence Mboya. PW 1 said that he sent his wife and father, who ascertained the acreage and the boundaries after he erected a hedge fence, built a temporary structure, and kept the forest, which structure was in existence until 2019.
11. PW 1 said that he would occasionally visit the land from his home at Kiirua until 2019, when he discovered that someone had encroached on the land, erected a temporary house, and gathered some building stones. After an unsuccessful inquiry from his neighbors, PW 1 said that he made a report to chief Samuel Kimonye of the Kiirua location as well as the area chief of the Kithima location. Similarly, PW 1 said that he made a police report at Kiirua police station and Meru police station. Eventually, PW 1 said that he visited the District Land Adjudication and Settlement Officer Meru Central seeking to know the progress of his title deed and was directed to the Land Registrar Meru Central, where he sought and was supplied with an official search certificate on 29.9.2020.
12. From the search certificate, PW 1 said that he established that the land was registered in the name of the 1st defendant, having been transferred to him by the 2nd defendant. PW 1 said that through his advocate, he was able to obtain documents from the Director of Land Adjudication Officer as listed in a list of documents dated 29.9.2020. The plaintiff relied on an official certificate of search as P. Exh No. (1) green card as P. Exh No. (2) registry index map as P. Exh No. (3) adjudication record serial no. 1971 as P. Exh No. (4), demarcation book as P. Exh No. (5), letters dated 13.11.2020, 24.11.2020, 24.11.2020, 14.12.2020, notice to produce and letter dated 3.3.2021 a P. Exh No's 6-11. Further, PW 1 relied on a certified copy of the Adjudication record as P. Exh No. 912), a certified copy dated 30.7.2012 and 5.11.2014 to the Chief Land Registrar as P. Exh No. 3-4.
13. In cross-examination PW 1 told the court that he acquired the land during the reign of P.C Mahiha in 1978 but has not lived on the land, which is near Maili Kumi near Isiolo Town. He said that he had leased out the land to third parties, among them one Vaite who has been grazing the land, paying him Kshs. 2000. That his land was 27 acres and not 10 ha. PW 1 told the court one of his neighbors by the name Mureithi, was the one who notified him of the invasion of the land, and he immediately made a report to Timau Police Station, who visited the land and told him it could have been illegal grazers only to later on find a temporary house erected therein in 2019.
14. PW 1 said that he did not make any formal complaint against the land adjudication officer or the land registrar over the changes to the land ownership. He said that he was not aware that the title deeds for the area were issued in 2014, nor did he file a complaint. Similarly, PW1 termed the registration of the land in favor of the 1st – 3rd defendants as fraudulent, for he never sold or transferred his land to the 2nd and 3rd defendants.
15. PW 1 told the court that the 3rd defendant was his childhood friend, whom he had given the land to use in the 1980s. He denied that there was an occupant to his land, as alleged in the photographs contained in the defendant's further list of documents. Further, PW 1 acknowledged that the ID Card number in the transfer letter belonged to him, save for the thumb print. He insisted that he never sold or transferred this land during the adjudication process, as shown in the adjudication register, leaving out the 3rd defendant as the sole owner of the land.



16. PW 1 said that he visited the land office more than twenty times to complain even though he did not write any complaint. He termed the entries to the adjudication record to remove and replace his names for parcel L.R No. 417 as criminal, even though he never lodged any complaint with either the police or the land office for investigations.
17. Further, PW 1 said that he even visited the anticorruption commission offices, though he had no formal complaint letters made to such offices. PW 1 told the court that in the course of his complaints, he eventually obtained an original adjudication record from the 5th & 6th defendants, which appeared canceled, produced as P. Exh No. (5).
18. Additionally, PW 1 acknowledged knowing the 1st defendant since childhood. He denied that there were several developments belonging to the 1st defendant on the suit land, save for the powerlines. PW 1 told the court that for the power lines crossing the land, he was unable to confirm who had been compensated by Kentraco for wayleaves to erect the same. He denied that the exercise to compensate for the land was a well-published event. PW 1 termed the 1st defendant as a trespasser to his land who was allegedly sold and transferred his land by the 2nd and 3rd defendants. Similarly, PW 1 admitted that he had no investigative report from the police or land fraud department over the alleged transfer and registration of his land against the defendants. Further, PW 1 admitted that he never sent a demand letter to the 2nd and 3rd defendants before suing them.
19. In cross-examination by Mr. Muthomi advocate, PW 1 told the court that the 2nd and 3rd defendant were known to him since childhood to date as the 2nd defendant was the owner of Embassy Hotel Nkubu Town.
20. PW 1 admitted that he had visited the 2nd defendant's hotel severally but denied offering to sell 25 acres of his land to him, other than him being a one-time tenant. PW 1 denied receiving Kshs.200,000/= from the 3rd defendant as consideration for the and in 1980's. PW 1 said that the 2nd defendant knew the land, for he once took him to view it but denied visiting the land adjudication offices in the company of the 2nd and 3rd defendants to transfer the same to the 3rd defendant. PW 1 insisted that his land was 12.96 ha and was under his use between 1967 /1970, when he was chased away from the land by wild animals. The rest of the time up to 2019, PW 1 said that he would occasionally pay a visit and at one time established that his temporary structure on the land had been vandalized.
21. PW 1 denied that there were ten high voltage power line poles across the suit land as indicated in the 2nd defendant's witness. PW 1 termed the alleged objection or transfer letter dated 19.9.1990 as forged, since the thumbprint appearing there was not his or witnessed by either his wife or children.
22. Regarding the allegation contained in paragraph 23 of the plaint, P W 1 told the court that he had no evidence in support of those assertions, neither had he taken the disputed documents for forensic analysis at the CID headquarters. PW 1 said that he never surrendered his known thumbprint to the police for comparison with the alleged impressions in the adjudication records. Further, PW 1 denied that he was simply changing tune after having sold and transferred his land to the 2nd & 3rd defendants for Kshs.200,000/= before the plaintiff finished testifying; the court ordered that the Deputy Registrar visit the locus in quo and file a report.
23. In further cross-examination, PW 1 denied appending his thumbprint to the adjudication record. PW 1 said that he only leased the 2nd and 3rd defendants the land in 2016. PW 1 said that if at all the 2nd and 3rd defendants were on the land, they were mere licensees and not purchasers for value. He denied that transfers for land during the adjudication process entailed parties visiting the land adjudication office and appending their signatures on the adjudication record.



24. Cross-examined by the 4th – 8th defendants, PW 1 told the court that he became the owner of the land in 1969 and utilized it for some time. Asked why, he did not visit the land department earlier, than in 2019 to collect his title deed, PW 1 was unable to give a satisfactory answer. He termed the adjudication record showing a sale and transfer in favor of the 2nd and 3rd defendants as irregular and fraudulent for the details and thumbprint indicated did not belong to him. Even though there was a court order dated directing that the disputed documents be subjected to forensic analysis, PW 1 feigned ignorance of the same and could not explain why he had taken no action to subject himself to the process.
25. In re-examination, PW 1 insisted that the suit land was his since allocation in 1969. He said that the 1st – 3rd defendants were unable to produce any sale agreement or proof that he sold, received any monies, and transferred the land to them in 1988. Moreso, PW 1 denied attending the land adjudication offices to effect any land transfer to the 2nd and 3rd defendants. PW 1 denied ever finding, knowledge, or allowing the 3rd defendant to occupy, till, or keep cattle in his land between 1969 and 2016.
26. David Nkanata Magiri, the 1st defendant, testified as DW 1 and adopted his witness statement dated 22.4.2021, 3.5.2022 and 22.4.2021 as his evidence in chief. He told the court that in 2016 met the 2nd defendant, who informed him that he had a parcel of land offering for sale measuring 10.1 ha situated in Kiirua Nkando. DW 1 said that he was accompanied to the land by his son, the 2nd defendant, and the chief Kithima Location, Mr. Misheck Maingi Muthuri.
27. Afterward, DW 1 said that he visited the land office in Meru town, searched, and obtained an official search certificate confirming that the 2nd defendant was the registered owner of the land. He said that he eventually negotiated with the owner and agreed on a consideration of Kshs.9,000,000/= . Additionally, DW 1 said that his son, the area chief Kithima location, the 2nd defendant, and a land surveyor visited the land to ascertain the land size, neighborhood, and boundaries. The 1st defendant said that he subsequently entered into a sale agreement on 26.8.2016 and paid a deposit of Kshs.1,800,000/= million, took vacant possession, applied for land control board consent, and cleared the balance.
28. DW1 told the court that the 2nd defendant transferred the land to him on 16.10.2017 and was issued with a title deed on 17.10.2017. He told the court that since 26.8.2016, he has extensively developed the by erecting a stone fence over five acres and one acre all around, sinking two dams, a borehole, a swimming pool, three septic tanks, undertaking water level surveys, prepared walkways, erected a farmhouse cleared the bushes, dug and widened the seasonal river passing through the land.
29. Additionally, DW 1 said that he had deposited building stones, sand, and ballast on the land. He also said that on 9.2.2021, he was served with a court summons by the plaintiff making wild allegations about him. In an endeavor to find out the issue, DW 1 said the 2nd defendant told him that he bought the land with the 3rd defendant from the plaintiff a while back, but the 3rd defendant relinquished all his interests over the land to him.
30. DW 1 said that he instructed his advocates on record to apply for certified copies of the adjudication records. He said that since taking vacant possession in 2016, nobody had claimed ownership of the land. DW1 also said that the 2nd defendant had disclosed and showed him all his ownership documents at the point of sale, including payments of wayleaves compensation at Kshs.318,596.91/= by Kentraco, who erected high voltage electricity metal poles on the said land. He termed himself as an innocent, bonafide purchaser or value.
31. DW1 produced a copy of an official search certificate dated 19.9.2016 copy of a title deed dated 3.11.2014 sale agreement dated 26.8.2016, an application for a land control board dated September



- 2016, a land control board consent dated 27.9.2016, a transfer form dated 15.9.2016, copy of the records opened on 28.1.2004 in the name of the 2nd defendant, title deed dated 17.10.2017, an adjudication record certified on 4.3.2021, a letter dated 26.2.2021 requesting for the adjudication records, receipt dated 1.3.2021 and a copy of map registry sheet No. 37 as D. Exh No. 1-11 respectively.
32. Further, DW 1 said that he managed to obtain documents from the land adjudication and settlement offices showing that the suit land lawfully passed from the plaintiff to the 2nd & 3rd defendants and from the 3rd defendant to the 2nd defendant. Additionally, DW 1 produced a copy of the original adjudication record number A 107917, a duplicate copy of an objection proceedings no. 502 dated 19.9.1990, a copy of the register showing the outcome of objection No. 502 in respect of land parcel No. 417 and photographs showing his developments on the suit land as D. Exh No's 12, 13, 14, 15, 16 (a – k) respectively.
33. DW1 said that the plaintiff or his agents never stopped his developments on the land; otherwise, none of the neighbors or the area chief told him about the claim by the plaintiff. He said the land was bare and full of natural vegetation when he acquired it, with no developments thereon. Regarding the alleged invasion, DW 1 said none was proved by way of O.B. reports. He said D. Exh No. 14 had all the details of the plaintiff, who, despite a court order issued for fingerprint verification, no forensic report was produced to support the plaintiff's allegations against the defendants. He denied being a trespasser to the land. Again, DW 1 said there was adequate due diligence before purchasing the land in not only obtaining an official search certificate, verifying the boundaries and the size through a land surveyor, but also involving the neighbors and the area chief.
34. Similarly, DW 1 said that D. Exh 13, 14 & 15 were clear that the plaintiff had willingly and lawfully sold the land to the 2nd & 3rd defendants, as per the transfer effected on 5.11.1991. He said that the land size appearing in his title deed was similar to the one contained in D. Exh No. (12), which had been countersigned to replace the plaintiff's name with those of the 2nd and 3rd respondent.
35. DW 1 said that after Objection No. 502 was lodged, and the outcome was implemented as per D. Exh No. (13). Therefore, DW 1 said the four exhibits were straightforward and that the 2nd and 3rd defendants commented no fraud or irregularity. He termed the black book produced by the plaintiff as P. Exh No. (5) as incomplete, unlike D. Exh No. (15).
36. Meshack Maingi and Michael Muthiora testified as DW 2 and 3, as a Senior Chief of Kithima Location D.W. 1 told the court that he came to know the 2nd and 3rd defendants when Kentraco was erecting power lines along Isiolo road in 2014 and all property owners affected by the way leave were summoned for a meeting for purposes of compensation. DW 2 said that it was the 2nd defendant who was identified as the owner of the and not the plaintiff. Further, DW 1 said he came to know the 1st defendant after he visited his offices in the company of the 2nd defendant, and he accompanied them to view the land. Further, he said that after buying the land, the 1st defendant visited his office together with a land surveyor and accompanied them to the land to place the beacons. DW 2 denied that the was involved in the land adjudication process or during the transfer of the land to the 2nd & 3rd defendants by the plaintiff as per D. Exh No. 13,14 & 15. That notwithstanding, DW 2 confirmed that it was the 2nd defendant who was compensated by Kentraco and not the plaintiff for the way leaves.
37. D.W. 3, on his part, told the court that he started living in the Kiirua Nkando area in 1970 as a neighbor to L.R No. 417. He told the court that initially, the land belonged to the plaintiff, who left the land in 1971 and never came back. DW 3 said that the 2nd defendant had been occupying the land after they visited the land with the plaintiff, and the latter told him that he had sold the land and, therefore, requested him as a neighbor to take care of it on his behalf.



38. DW 3 said that the plaintiff only returned the land recently to asset ownership, but unfortunately, during the scene visit, he could not even remember its boundaries or pinpoint any of his developments on the land. DW 3 said that during the land acquisition process in 1970, parties would ballot for the land, and the adjudication committee would determine any complaints thereof. Similarly, DW 3 said that any land sale transaction would require the two parties to visit the land adjudication office and sign entries on the black register by way of objection proceedings.
39. DW 3 confirmed that he was about 77 years old and that the late father was allocated land parcel No. 418 next to the plaintiff's land parcel L.R No. 417. He insisted that the 2nd and 3rd defendants were not on the list of the original allottees and only came much later to inform him that they had bought parcel L.R No. 417 from the plaintiff. Similarly, he said that the plaintiff also confirmed the sale of his land to him and his late father. Even though he did not witness any sale agreement or money being paid to the plaintiff, DW3 clarified that he was left to take care of the land on behalf of the 2nd and 3rd defendants by virtue of buying the land. Further, DW 3 said that after surrendering the land, PW 1 demolished his temporary structures and vacated the land, after which the 2nd & 3rd defendants erected a cattle shed and a homestead.
40. DW 3 said he took the word of the plaintiff, the 2nd and 3rd defendant, as the truth in line with Ameru culture of believing elder's words; hence, he became a caretaker for them for over 30 years. He said that after all those years, the plaintiff only resurfaced after the 1st defendant had long bought, occupied, and developed the land.
41. Joseph Levu, on behalf of the 4th – 8th defendants testified as DW 4. He adopted his witness statement dated 29.6.2021 as his evidence in chief. He produced the documents in the list dated 25.6.2021 namely the duplicate adjudication records, the original adjudication record, objection proceedings No. 502 as 2DD Exh. No. (17), (18), and (19). He said that the variance between the original and duplicate adjudication record have a difference as regards acreage.
42. Further, he said that the owner in the final original adjudication record indicated the 2nd defendant, while the duplicate showed the plaintiff as the owner. Even though the name of the plaintiff was in the original adjudication register. D.W. 4s said that the parcel number was effected by objection No. 502, as per 2DD Exh No. (19), that was heard, and the parcel name was replaced with the 2nd and 3rd defendants as joint owners as captured in part vi of the A/R.
43. DW 4 said that the adjudication register was closed and inspected in 1988, the register was published, and the section was registered in 2012. Between 1988 and 2012, DW 4 said that any person selling his land had to have the changes captured or implemented on part 14 or part vi of the adjudication register as a decision after hearing the objections.
44. DW 4 said that a final title to land must agree with the original adjudication register. He said the two adjudication registers have the same serial number. He said that the certificate of finality for the section was issued on 5.4.1990. D. Exh 4 said that an adjudication register has only one duplicate and that whatever was in the original must tally with the contents of the duplicate. DW 4 said that after an adjudication register is prepared following the completion of the hearing of the objections, the same is sent to the titling center for registration through the Director of Lands Adjudication for verification and subsequently sent to the Chief Land Registrar.
45. DW 4 said that it is the Director of the Land Adjudication who verifies the original against the duplicate since there would be some changes to the original. He said that the original remains at the local level while the duplicate goes to Nairobi and that record book information is transferred to the adjudication register.



46. In this case, DW 4 said that the duplicate bore the plaintiff's name, but after the objection was heard in September 1990, the decision was implemented immediately, and an entry was made on 5.11.1991. He said the receipt number for the objection must appear on the objection register.
47. DW 4 said the plaintiff filed an objection since an officer could not apply on his behalf as per 2DD Exh no. (3). He also said that under the [Land Adjudication Act](#) and the [Land Consolidation Act](#) Cap 284 and 283, there are no transfer forms and that ordinarily, statements are taken from the parties as well as sale agreement as supporting documents.
48. In this case, DW 4 said that part 14 of the adjudication register shows that the plaintiff's objection was heard and implemented after he relinquished his interest in the land to the 2nd and 3rd defendants. DW 4 said that all that was done was procedural, including the removal of the name of the 3rd defendant as a co-owner through a mutual agreement. Again, DW 4 said that a demarcation map is typically prepared by survey assistants and published once it is final and forwarded to the titling center in Nairobi after all the parcels have been plotted on it.
49. Regarding the discrepancies in acreage, DW 4 said it appeared that the information on the duplicate was not updated with the information in the original out of perhaps an oversight on parcel L.R No. 417. He said the verification at the Director's office involves reconciling the objection register with the adjudication register. To this end, he said there was reconciliation but the information on the original was not transferred to the duplicate since amendments were done on the original after the objective decision was implemented. He said that due process was followed in the hearing and the implementation of the A/R Objection. He said that the plaintiff participated in the A/R objection since his particulars and fingerprints were taken in the proceedings. He also said that there has been no complaint from the 3rd defendant, whose name was dropped from the record. He said that there were no detectable illegalities or irregularities in the adjudication record since the paper trail was lawfully done and documents forwarded to the titling center through the Director, who eventually sent back the original adjudication register for the opening of the green cards by the land registrar.
50. Moreso, DW 4 also said that the most critical document for the opening of the green card is the original adjudication register which any anomalies in the duplicate cannot invalidate. He said that all the changes that were effected on parts 6 and 4 of the duplicate were duly countersigned. DW 4 said that his office has never received any complaint from the plaintiff over any alleged fraud regarding parcel L.R No. 417 directly or through any investigative agencies with the mandate to investigate and detect crime.
51. M'Ibiri M'Mbogori, the 2nd defendant, testified as DW 5 and adopted his witness statement dated 8.7.2022 as his evidence in chief and produced the adjudication record as D. Exh No. (20), green card as D. Exh No. (21), letter dated 12.5.2014 from Kentraco as D. Exh No. (22), a letter dated 1.8.2014 from the DLASO as D. Exh No. (23) and a grant of easement to Kentraco as D. Exh No. (24). He denied any alleged fraud, illegality, and or irregularity in how he acquired the land from the plaintiff and later transferred it to the 1st defendant.
52. DW 5 said that he paid the plaintiff Kshs.200,000/= after viewing the land in the company of the 3rd defendant and the plaintiff and upon confirming ownership at the land adjudication committee offices situated at Maili Nane Kwa Mungania where the register was checked and confirmed as belonging to the plaintiff. DW 5 said that they paid the plaintiff the sum in two equal installments, after which they again visited the land committee offices, and the transfer was effected by the plaintiff affixing his thumbprint on the adjudication forms in the presence of the area chief the land adjudication officer



- and the chairman of the land committee who signed the form. Eventually, DW 5 said the name of the plaintiff was struck off and the names of the buyers inserted.
53. D.W. 5 said the balance of Kshs.100,000 was paid immediately after the plaintiff surrendered his interests in the land after signing the transfer adjudication form. Further, D.W. 5 said that in 1991, the 3rd defendant surrendered his rights to the land, and he was left as the sole owner of the land. D.W. 5 said that he was paid wayleave compensation by Kentraco in 2014 and eventually sold and transferred the land to the 1st defendant in 2017 after having owned and occupied the land for 36 years. He wondered why the plaintiff shied away from subjecting his documents to forensic audit, yet he was alleging the paper trail on the acquisition by the 1st – 3rd defendants as forged or fraudulent.
54. Additionally, DW 5 said no one had objected to his occupation through a complaint for 26 years an objection or by way of caution against his title until he sold and transferred the land to the 1st defendant. Even though he had no sale agreement with the plaintiff, DW 5 said that he took vacant possession of the land after the plaintiff willingly sold and transferred it to him and the 3rd defendant in 1991. He said the land transfer and payment of the balance took place and was witnessed at the land adjudication offices Maili Nane Isiolo.
55. DW 5 said that between 1984 to 2016, the plaintiff never came back, ejected him, or gave him the notice to vacate the land where he was keeping livestock. Answering questions posed by the court, DW 5 said that he was not aware of any police complaint lodged by the plaintiff against him over the land. Similarly, he said that there was no summons issued to him by the area chief Kithima, the Land Adjudication Officer, or the land registrar regarding any complaint made against him by the plaintiff over the land with the close of the defendant testifying, parties were directed to file written submissions by 3.3.2024.
56. The plaintiff relied on written submissions dated 12.3.2024 and isolated five issues for the court determination, namely:
- i. Whether the plaintiff was the rightful legal owner of the suit land.
 - ii. Whether the plaintiff sold the land to the 2nd and 3rd defendants.
 - iii. Whether the plaintiff transferred the land to the 2nd and 3rd defendants during the adjudication period.
 - iv. Whether the 2nd and 3rd defendants acquired the land unprocedurally, fraudulently or through a corrupt scheme.
 - v. Whether the 1st defendant was a bona fide purchaser for value.
57. Submitting on the 1st issue, the plaintiff took the view that the Land Adjudication Act 1968 had elaborate steps for the ascertainment of interest and rights in land declared to be under adjudication. The plaintiff submitted that upon the recording officer investigating, considering all claims under Section 19 of the Act, the recording officer prepares a duplicate under Section 23 of thereof in respect of every parcel shown in the demarcation map. The forms prepared by the recording officer comprise the adjudication record which forms shall be signed and can only be altered under Section 27(1) or 29(3) of the Act. The demarcation map and the adjudication record in what is collectively known as the adjudication register.
58. In this case, the plaintiff discharged the burden of proof under Section 107 (1) of the Evidence Act. He submitted that the produced P. Exh No. (3) the duplicate adjudication record, the registry index map, a demarcation book, letter dated 14.12.2022 as P. Exh No. 1 (3), (4), (5) and (8), all showing that



- the was the rightful legal owner of P.N Kiirua/Nkando/417 during the adjudication record. Reliance was placed on Gatirau Peter Munya vs Dickson Mwenda Kithinji and others (2014) eKLR on the proposition that a person who makes an allegation must lead evidence to prove the fact or to the existence or non-existence of a fact in issue.
59. On the sale of the suit land to the 2nd and 3rd defendants, the plaintiff submitted that DW 5 was unable to produce any sale agreements and acknowledge receipts of monies paid to the plaintiff. Further, the plaintiff submitted that despite a notice to produce the documents dated 2.6.2021, the 2nd defendant failed to produce such exhibits to justify his claim of purchase of the suit land from the plaintiff, contrary to Section 107 – 109 of the Evidence Act. Reliance was placed on Jeniffer Nyambura Kamau vs Humphrey Mbaka Nandi (2013) eKLR.
 60. Relying on Sections 3 (3) and (7) of the Law of Contract Act, the plaintiff submitted that in the absence of a sale agreement or proof of payment, the court should hold that there was no sale of land had, therefore, the purported sale and transfer in the absence of a form to that effect signed at the land adjudication office and also a witness to the sale. The plaintiff submitted that under Section 3 (7) of the Law of Contract, exemption is granted to oral agreements done before 2003. However, in this case, the 2nd and 3rd defendants cannot benefit from the exception since the parties did not anticipate an oral contract or none has been pleaded. Since the 2nd and 3rd defendants insisted that there was a contract allegedly written by an unknown committee member, it is apparent that in the absence of proof by way of a copy, no sale agreements, whether written or oral, entered into by the three parties or envisaged to create a legal relationship to that effect. Reliance was placed on Garvey vs Richards (2011) JMCA 16.
 61. The plaintiff submitted that the 2nd defendant's claim of possession of the suit land before 2014, when he acquired the title, and the nature of his occupation of the was false, unsubstantiated, and uncorroborated by any of his witnesses.
 62. On the transfer of the suit land between the 2nd and 3rd defendants, the plaintiff submitted D. Exh No. 2DD (3) dated 19.9.1990, purportedly signed by the plaintiff through impressing on it a left-hand thumb print, was vehemently disputed by PW 1 as different from what was contained in his I.D. card. Relying on Section 70 of the Evidence Act, the plaintiff submitted that there was a need to prove that the thumbprint belonged to the plaintiff. Further, it was submitted a transfer as defined under the Black Laws Dictionary 11th Edition and Registered Land Act (Cap 300) repealed means to convey or remove pass or hand over change over the ownership or control of sell or give passing of land and the instrument by which the passing is effected.
 63. The plaintiff submitted that the purported documents of transfer should be both a transfer and an instrument at the same time. To this end, the parties should have either thumbprinted or signed the same to effect changes intended if it was a genuine document. In the absence of the signatures or thumb prints of the three parties, no title could pass to the 2nd and 3rd defendants to relinquish the plaintiff's rights to the suit land regardless of whether objection No. 502 contains the three names of the parties.
 64. The plaintiff submitted that it was curious why the other parties did not sign the documents and or a land adjudication officer called to shed light on what transpired on the material day and clarify whether the 2nd and 3rd defendants were indeed present in their offices. Additionally, the plaintiff submitted that there was no evidence that the plaintiff paid for the objection.
 65. The plaintiff submitted that the legal burden was upon the 2nd defendant to prove that the thumbprint appended to the transfer belonged to him. In the absence of the authentication of the document by an expert to verify it through the CID office report as was ordered by the court, the 2nd and 3rd defendants could not claim with authority that the plaintiff executed the document during the adjudication stage



in their favor. Reliance was placed on *Mutonyi vs Republic* (1982) KLR 203 and Section 48 of the [Evidence Act](#).

66. The plaintiff submitted that evidence by DW 5 that they executed a sale agreement before a recording officer in 1988 was not backed by any letter by the plaintiff to the land adjudication officer confirming that he had sold his land, not the 2nd & 3rd defendants and was therefore authorizing his name to be deleted and replaced with those of the new owners. In the absence of such a procedure, the plaintiff submitted that the procedure used to file an Objection No. 502 was fraudulent, irregular, one-sided, and unprocedural.
67. On whether the 2nd and 3rd defendants acquired the land illegally, unprocedurally, fraudulent, or through a corrupt scheme, the plaintiff submitted that fraud must be strictly pleaded and proved. To this end paragraphs 21 to 34 of the plaintiff had particularized the elements of fraud in line with Order 2 Rule 4 of the Civil Procedure Rules. Reliance was placed on *Virjay Morjaria vs Nansigh Madhusingh Darbar & another* (2000) eKLR and *Kinyanjui Kamau vs George Kamau* (2015) eKLR.
68. It was submitted that the plaintiff's evidence was consistent and unshaken as to the elements of fraud and in his unchallenged manner of the acquisition of his land by the 1st – 3rd defendants. Reliance was placed on *Munyu Maina vs. Hiram Gathiha Maina* (2013) eKLR and *Daudi Kiptugen vs Commissioner of Lands & another* (2015) eKLR.
69. The plaintiff submitted that the objection proceeding allegedly undertaken should only have been done within 60 days after the publication of the notice of completion of the adjudication register under Section 261 Cap 284 and considered upon consultation and inquiries. In the absence of evidence of any inquiries or consultations, the plaintiff submitted that the land adjudication officer was complicit in the whole issue of the sale and transfer so as to deprive the plaintiff of his land and which was contrary to the law.
70. Additionally, the plaintiff submitted that the implementation of the objection proceedings on 5.11.1991 by altering the original adjudication record and inserting the 2nd and 3rd defendants without doing so in duplicate at the headquarters to effect the changes was contrary to Section 27 of Cap 284. As to the title held initially by the 2nd defendant and presently the 1st defendant, the plaintiff submitted it was tainted with irregularity and unprocedurally, which the 1st and 2nd defendants were unable to show a clear path or root of its legality, formality, and procedurally as held in *Hubert L. Martin & others vs. Margaret J Kamar & others* (2016) eKLR, *Munyu Miana & 2 others vs Hiram Gathiha Miana* (supra), *Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & others* (2013) eKLR, *Alice Chemutai Too vs Nickson Kipkurui Korir 1 & others* (2015) eKLR, *Fahiya & 2 others vs Omar & 4 others* (2001) 2 KLR 224, *Milan Kumar Shah & others vs City Council of Nairobi & another Nairobi HCC no. 1024 of 2005*, *Champaklal Ramji Shah & others vs A.G. & another HCC No. 145 of 1997*.
71. On whether the 1st defendant was a bonafide purchaser for value. Relying on *Black Laws Dictionary* 9th Edition, *Katende vs Harindar & Co. Ltd* (2008), 2 E. A 173, *Samuel Kamere vs Land Registrar Kajiado* (2015) eKLR and *Munyu Maina vs Hiram Gathiha Miana* (supra), the plaintiff submitted that given the root of the title right from the 2nd and 3rd defendants to the 1st defendant was unprocedurally, illegal, irregular and unlawful. Therefore, had the 1st defendant conducted due diligence when purchasing the suit property before he bought it, he would have discovered the same; otherwise, he was not keen on doing so until he wrote the letter dated 26.5.2021 when it was too late. Reliance was placed on *Dima Management Ltd vs. the County Government of Mombasa & others* Petition no. (8) (E010) of 2021 (eKLR).



72. The 1st defendant relied on written submissions dated 27.3.2024 and identified six issues for the court's determination. On whether the plaintiff has proved irregularities, illegality, and fraud against the 2nd & 3rd defendants relying on Black's Law Dictionary 7th Edition definition of irregularity and illegality against the 4th -7th defendant submitted the contents of paragraphs 23 and 29 of the plaint were not proved through evidence to the required standard. Reliance was placed on D.T Moi vs. Mwangi Stephen Murithi & another (2014) eKLR, Vijay Morjaria vs Darbar & another (supra) and Mutsonga vs Nyati (1984) KLR 425.
73. The 1st defendant submitted that fraud could not be imputed on their part, and the adopted by the plaintiff as his evidence in chief did not raise any allegations of that nature, did not name the alleged fraudsters, and no O.B. reports were produced to show that complaint had been made to any investigative authorities to prove the alleged criminal acts. The 1st defendant submitted that despite a court order to provide a specimen thumbprint made on 12.7.2022, the plaintiff reneged and also appeared untruthful to the extent of denying obvious facts on who was in occupation of the suit property and the power lines erected therein in 2014 as contains in the scene visit report by the deputy registrar.
74. The 1st defendant submitted that looking at the evidence tendered by the plaintiff, he was unable to support his pleadings in paragraphs 20-29 of the plaint. Reliance was placed on Stephen Ndolo Wambua vs Beatrice Mbula Mutilu and others (2019) eKLR.
75. Regarding the consent to transfer the land as pleaded in paragraph 28 of the plaint, the 1st & 2nd defendants submitted that there was no requirement under Cap 284 for a land adjudication committee to give consent to transfer land falling under an adjudication section.
76. The 1st defendant submitted that under Sections 27(1) & 29 (3) of Cap 284, an adjudication record could be altered from time to time to conform to any determination of objections under Section 26 of the Act. Therefore, for an adjudication officer to do so, he could not be said to be acting irregularly, illegally, and or fraudulently so long as any alteration are countersigned.
77. In this case, the 1st defendant submitted that the original adjudication record produced by the 2nd, 4th and 7th defendants clearly showed that the name was altered and countersigned by the land adjudication officer on 5.11.1991 after the plaintiff sold and transferred his land to the 2nd and 3rd defendants after Objection No. 502 was allowed.
78. The 1st defendant submitted that D. Exh No. (13) dated 19.9.1990, while the original adjudication record shows it was altered on 5.11.1991 following submissions of Objections No. 502. Further, it was submitted that D. Exh No. 14 indicates the objection was allowed after the transfer was signed by the plaintiff on 19.9.1990, containing his I.D. card No.
79. The 1st defendant submitted that the plaintiff failed to tender any evidence to prove that the transfer letter, his thumbprint, and his I.D. card number were all forgeries. Further, the plaintiff also failed to prove that D. Exh No. 14 and the entries therein were not genuine.
80. Regarding whether the plaintiff proved trespass, unprocedural, and irregular actions against the 1st defendant, it was submitted that the contents of paragraphs 32-34 of the plaint were not substantiated to the required standard, more so given the scene visit report and evidence of due diligence undertaken by the 1st defendant before he bought the suit land, payment of considerations and extensive developments on the land.
81. On the law applicable in 1988 when the 2nd and 3rd defendants acquired the land from the plaintiff, it was submitted that the sale of the land took place in 1988 when the plaintiff was paid Kshs.200,000/



- = and made the transfer of the land and the 2nd and 3rd defendants took vacant possession. The 2nd and 3rd defendants submitted that the sale was in line with the law of the contract act at the time since they took vacant possession and assumed ownership by way of registration at offices followed by the transfer letter dated 19.9.1990 and subsequently resulted in the alteration of the adjudication record on 5.11.1991 pursuant to the transfer from.
82. The 1st defendant submitted that the 2nd & 3rd defendants took possession of the land with effect from 1988 to 2016 coupled with the Ketraco documents, which was a clear proof of ownership following the oral agreement. Reliance was placed on *Margaret Karema vs James Muthuri M'Mungania Meru HCCC No. 45 of 2003*. On whether the defendant had a reasonable defense to the plaintiff's claim, the 1st defendant submitted that the evidence of the 1st defendant, taken together with that of Justus Levu and the exhibits that he produced, displaced and countered the allegations and the evidence tendered by the plaintiff, that there was any irregularity, illegality, unprocedurally, fraud and corrupt scheme in the manner the suit land came to the names of the 2nd and 3rd defendants and altered to the 1st defendant.
83. The court has carefully gone through the pleadings, evidence tendered by the parties, written submissions, the authorities cited and the law. The issues calling for the court's determination are:
- i. If the plaintiff's claim is time-barred.
 - ii. If the plaintiff pleaded and proved ownership of L.R No. Kiirua/Nkando/417.
 - iii. If the plaintiff sold and transferred his interests and rights in the suit land to the 2nd and 3rd defendants.
 - iv. If the process of transfer of the plaintiff's interest and rights to the 2nd and 3rd defendants complied with the law.
 - v. If the 2nd and 3rd defendants took possession of the suit land between 1988 and 2016 to the exclusion of the plaintiff.
 - vi. If the transfer of the land from the joint names of the 2nd and 3rd defendants to the 2nd defendant was lawful.
 - vii. If there was any irregularity, illegality, and fraud undertaken by the 4th – 5th defendants in collusion with the 1st – 3rd defendants in effecting any changes to title to the suit land.
 - viii. If the 1st defendant was an innocent purchaser for value without notice.
 - ix. If the 1st defendant was a trespasser into the suitland.
 - x. If the plaintiff was justified in reclaiming the land from the 1st defendant.
84. The plaintiff's complaint against the defendants was the manner, process, and procedure used in effecting changes to the official land records by removing his name in 1990 and replacing it with those of the 2nd and 3rd defendants, later to the 2nd defendant who obtained a title deed in 2014, and the subsequent transfer of the land to the 1st defendant in 2017. The plaintiff termed the entire process as an irregular, fraudulent, illegal, unprocedural and corrupt scheme.
85. The plaintiff averred that the scheme orchestrated by the defendants interfered with the adjudication records as they were reflecting his name as the recorded owner in 1988 and he was the one living peacefully on the land without interference by anybody until 2019 when he learned of some people



- were effecting developments thereon. He made reports to various government agencies and eventually conducted inquiries and official search only to establish that changes had occurred to the registration of his title without his knowledge consent approval and or notification.
86. The 2nd and 3rd defendants have, in paragraph 22 of their statement of defense dated 23.4.2021, pleaded that the plaintiff's suit offends the Limitation of Actions Act is incompetent, discloses no causes of action is scandalous, frivolous, vexatious, and an abuse of the court process.
 87. The 4th – 5th defendants deny having been issued with any notice to sue in accordance with the Government Proceedings Act. Further, the 2nd and 3rd defendants averred in paragraph 6 of their defense that the 2nd defendant became the registered owner of the land on 28.1.2014 and obtained a title deed on 3.11.2014, which was regular and legal.
 88. In paragraph 20 of their defense, the 2nd and 3rd defendants pleaded that the plaintiff's claim was an afterthought as the 2nd defendant legally purchased the suit land from the plaintiff on a willing buyer willing seller basis in the 1980s for value and that the process to acquire ownership for the plaintiff was strictly adhered to at the committee and the adjudication stages.
 89. In paragraph 21 thereof, the 2nd and 3rd defendants averred that during the 2nd defendant's occupation of the suit land, he was openly and exclusively grazing his cattle thereon and was legally paid wayleaves compensation by Ketraco in a widely publicized exercise without any objection from the plaintiff.
 90. In reply to the statement of defense dated 21.2.2022, the plaintiff denied the alleged sale and transfer to the 2nd and 3rd defendants. He termed their acquisition of his land as fraudulent, a corrupt scheme, and the title as a nullity since no objection proceedings were sanctioned and or transfer or documentation available to support it.
 91. The plaintiff averred that despite notice to sue the 1st defendant, had neglected to vacate his land illegally acquired from the 2nd and 3rd defendants. He denied the alleged occupation of his land and purported payment of wayleave compensation to the 2nd defendant. The plaintiff denied that this suit was time-barred. Regarding the statement of defense by the 4th – 5th defendants, the plaintiff averred that he visited the land registry offices and was not assisted at all. He averred that the 4th – 5th defendants committed the illegalities and abused their offices by effecting the transfers in an unprocedural, illegal, mean and contrary to their mandate, the law and regulations established therein. The plaintiff insisted that notice was sent to the 4th – 5th defendants as per paragraph 38 of the plaint.
 92. Going by the notice listed as item no. 10 of the plaintiff's list of documents accompanying the plaint dated 10.12.2021, the plaintiffs stated that the alleged fraud illegalities and irregularities against the 4th – 5th defendants occurred between 28.1.2014 and 17.10.2017. He indicated that he had lodged a complaint with the Meru police station as O.B. no. 36/26/10/2020, and no action had been taken.
 93. Regarding the 1st defendant, the plaintiff relied on a letter dated 10.12.2020 where he stated that he had, through an official search dated 20.9.2020, found out that the 1st defendant was the registered owner of the suit land as well as the occupant with some developments there in who despite several warning had refused to vacate the land and or denied him possession of it. The plaintiff further relied on letters dated 24.11.2020 and 14.12.2020 in which he was supplied with both the demarcation record from the Meru DLASO office and the headquarters Nairobi.
 94. In the witness statement dated 15.1.2021, the plaintiff stated that he was in occupation of his land from 1988 to 2019 when his temporary structure fell and he discovered in late 2019 that someone had encroached on his land. The plaintiff's claim as framed is for recovery of land allegedly fraudulently



- and irregularly transferred from his name and registered by the 4th and 5th defendants in favor of the 2nd – 3rd defendants, then presently to the 1st defendant.
95. The law of limitations of action is intended to protect defendants against unreasonable delay in bringing a suit against them. The intended plaintiff is expected to exercise reasonable diligence and to take reasonable steps in his interest. See *Gathoni vs KCC Ltd* (1982) KLR 104. In *Iga vs Makerere University* (1972) E.A the court held that a limitation of time does not extinguish a claim but operates to bar the claim or the remedy sought, and when it is statute-barred, a court cannot grant the remedy sought.
 96. Section 7 of cap 22 provides that a suit for recovery of land after the end of twelve years on which a right of action accrued may not be brought. Section 9(1) thereof provides that where the person bringing an action to recover land or some person through whom he claims has been in possession of the land and has while entitled to the and been disposed or discontinued his possession, the right of action accrues on the date of the dispossession or discontinuance. Section 26 thereof states that where a period of limitation is prescribed regarding fraud, the limitations period does to begin to run until the plaintiff has discovered the fraud or mistake or could, with reasonable diligence, have discovered it.
 97. A cause of action is an act on the part of the defendant that gives rise to the plaintiff a cause of complaint. See *D.T Dobie & Co. Ltd vs Joseph Mbaria Muchina & another* Civil Appeal No. 37 of 1978. The changes to the adjudication records occurred in 1990/1991. The suit land became registered land in the name of the 2nd defendant in 2014, going by the copy of the record relied on by the 2nd and 3rd defendants. The plaintiff pleaded that he had been on the land throughout till 2019 when the encroachment occurred and went to the land adjudication office as well as the land office in 2020 to establish the whereabouts of his title deed only to discover the fraud, irregularities, and illegalities over his title.
 98. The plaintiff did not plead that he was unavailable, suffering from any disability, and or was denied information on the status of the land registration in the section, so much so that he was unable, through reasonable diligence, to discover the fraud, illegality and or corrupt scheme in either 1990, 2014 or 2016. Even after the 2nd & 3rd defendants pleaded that the change to the land title or adjudication register was within the knowledge, consent, and approval of the plaintiff, he did not plead as to the date when he discovered not only the entries in the register issuance of the title deed but also adverse developments on his land. The 2nd defendant produced exhibits to show occupation of the land at least by 2014. W here he allowed the Kenya Electricity Transmission Company. Ltd high voltage transmission poles to be erected on the suit land and was duly compensated for it.
 99. All these are obvious facts that the plaintiff could not deny at all in his version of events as per his pleadings letters written in 2020, and evidence is to be believed as likely to have been the case. See *Elijah Nyangwara vs Stephen Mungai Njuguna* (supra).
 100. It is the plaintiff who wants the court to believe that he was on the land throughout the period between 1988 to 2019. Therefore, any occurrence both on the land and the question of the locals being aware that the land had become titled was capable of coming to the attention of the plaintiff with the exercise of reasonable diligence. The plaintiff testified that the suit land was hardly eight kilometers away from his homestead.
 101. The plaintiff, using reasonable diligence, would have noticed adverse developments on his land. High-voltage power lines and several poles were erected on the land as early as 2014. Title deeds were issued in 2014 or thereabouts. Issuance of title deeds is preceded by announcements through the available information in local channels by area local administration and their personnel.



102. In *Ogenga* (suing as the legal representative of the estate of Turufena Kemunto Ogaga (deceased) vs Ogaga & others (Civil Appeal 45 of 2018 (2022) KECA 1422 9KLR) (16th December 2022 (Judgment)) was a plaint dated 14.4.2016 against parcels of land allegedly fraudulently transferred to the names of the 1st – 3rd respondents in the land adjudication record and subsequent a title deed issued to them. A preliminary objection had been raised by the defendants, which the trial court upheld. On appeal at issue was whether the suit was statute-barred, given it was a claim for the recovery of land after 12 years. The appellant had alleged that time ought to have run from the date he had discovered the fraud pursuant to a letter to the land registrar dated 2.2.2016. The adjudication and titling had taken place in 1986. Discovery of the entries occurred 11 years after the registration of the land. Some parties had also filed notices of admission of the claim. The appellant and the 1st and 2nd respondents were siblings. The 1st and 2nd respondents were the children of the deceased, while the 3rd respondent was a buyer. His objections had been lodged and determined by the land adjudication officer in accordance with Section 26 of Cap 284, which, if one was aggrieved, should have appealed to the Minister.
103. The Court of Appeal looked at the adjudication record and noted that the buyer had filed an objection that was allowed, and the new owners entered into the records. The court held that it was disingenuous of the appellant to lodge a claim 30 years later alleging fraud on the part of her siblings and the buyer. The court termed it as deceitful and mischievous to bring such a suit. As to the second limb of jurisdiction given, if one is aggrieved by a decision by a land adjudication officer under Section 26 Cap 284, he has to file a minister's appeal; the court said that in the absence of compliance with the internal dispute mechanism under Cap 284, the appellant could not file a suit thirty years later, seeking to reverse the decision of the adjudication officer made with respect to an objection properly lodged and determined during the lifetime of the deceased.
104. On fraud, the court said since the claim was that the respondents' names were fraudulently inserted in the adjudication record in 2005 and the record showed the same had been made in 12.11.1986 time for limitation with respect to fraud does not begin to run until the plaintiff discovers the fraud as held in *Kenya Ports Authority vs Timberland (K) Ltd* (2017) eKLR. The court emphasized that the appellant ought to have exhausted the parameters of Section 29 of Cap 284, and in the absence of any explanation for not filing the suit and or for a delay of 30 years after the entry in the adjudication records, the trial court was correct in upholding the preliminary objection.
105. In *Eri Ltd vs Equatorial Commercial Bank* (formerly Southern Credit Bank Corp Ltd & another Civil Appeal 122 of 2017 (2023) KECA 730 (KLR) (9th June 2023) (judgment), at issue was whether the suit for recovery of land was time-barred under Sections 4 & 7 of Cap 22, among other things on account of fraud. On appeal, one of the issues was whether the suit was purely on recovery of land or based on a contract. The court held that the trial court was correct to find the suit as filed outside Section 4 of Cap 22 since it was based on a breach of a contract whose limitation period is six years and, therefore, was calling an alleged fraudulent disposal of charged properties in furtherance of a contract.
106. In this suit, one of the issues framed by the parties for determination is whether there was a sale and transfer between the plaintiff and the 2nd and 3rd defendants and, if not, whether there was fraud in the insertion of the names of the 2nd and 3rd defendants in the adjudication records by the 4th & 5th defendants in place of the plaintiff. The cause of action, in this case, arose on 29.9.1988, based on the adjudication records produced by the plaintiff and the defendants.
107. The second limb of the claim is whether there was fraud in the transfer of the land between the 2nd and 3rd defendants to the 2nd defendant and, whether the 2nd defendant was fraudulently registered and issued with a title deed. The third issue is whether or not there was a sale and transfer of the land between the 2nd defendant and the 1st defendant. The plaintiff attacks all three instances alluded



to above on account of fraud, illegality, unprocedural, and a corrupt scheme to defraud him of his ownership rights.

108. The critical question is whether the plaintiff exercised reasonable diligence to detect and discover the fraud between 1988 and 2020. Put another way, is the year 2020 the earliest the plaintiff could have established the alleged fraud, illegality, corrupt scheme, and or irregularities over the register and title to his land?
109. In *Margaret Wairimu Magugu vs Karura Investment Ltd & others* (2019) eKLR, the trial court had struck out the suit on account of the limitation of time as per Section 7 of Cap 22 for a claim brought to impeach registration made in October 1993 and challenged after 24 years. The court, regarding Section 26 of Cap 22 exception, held that it was inconceivable that for 19 years in the case of the deceased and 24 years in the case of the appellant, they would have failed to discover with the exercise of due diligence the alleged fraud and to act if indeed the acquisition of the property by the 1st respondent was fraudulent. The court observed that due diligence entails the exercise of care required from a given person in a given situation and that it entails proactivity and absence of carelessness. The court cited *Paragon Finance vs DB Thakerar & Co.* (1999) 1 ALL ER 400, where the Supreme Court of England said:
- “The question is not whether the plaintiffs should have discovered the fraud sooner but whether they could, with reasonable diligence, have done so. The burden of proof is on them. They must establish that they could not have discovered the fraud without exceptional measures that they could not reasonably have been expected to take”.
110. In this suit, the plaintiff pleaded that he had been in occupation of his land from 1988 to 2019 to the exclusion of any of the defendants. He has said that his temporary structures were on the land until 2019. That narrative was indicated in his witness statement, demand letters and paragraphs 10 - 14, & 16 of an affidavit sworn on 15.1.2021. It is inconceivable that the plaintiff would have been on the land between 1988 and 2014 and not be aware that title deeds for the adjudication area were being issued to the land owners. Further, it would be unbelievable that the high voltage electricity power lines and at least five poles would be erected on the plaintiff's land and fail to come to his attention that his land was being encroached on and compensation being paid for without his notice or knowledge.
111. The key events are what happened to the suit land in 1990/1991, 2014, and 2016, when the 1st defendant got into the land. Had the plaintiff been on the land as pleaded and testified, he would have raised an alarm, suspicions and concerns and reacted immediately. It would not have taken a neighbor to notify the plaintiff of such adverse developments on his land. Between 1988 and the filing of the suit in 2021, the plaintiff has failed to explain the apparent unreasonable and inordinate delay in filing the suit or taking any remedial actions under Cap 284.
112. My finding is that the suit filed by the plaintiff for the recovery of the suit land against the 2nd and 3rd defendants for a cause of action arising from an alleged forged sale agreement, fraudulent transfer, and registration in 1991 became time-barred in 1994 on account of fraud, and in 1996 for recovery of land. The claim as regards fraud against the 1st -5th defendants based on fraud became stale in 2001 upon publication of adjudication records. As concerns the registration of the parcel and the issuance of a title deed in the name of the 2nd defendant the claim against the 4th, 5th, and 8th defendants on account of fraud became stale in 2017.
113. Concerning the 1st defendant, the plaintiff averred that he established the trespass in 2020 and embarked on acquiring documentation from the 4th and 5th defendants. My finding is that the suit was not time-barred, for it was filed within three years of discovering the alleged fraud.



114. The next issue is ownership of the suit land. The plaintiff pleaded that he became the recorded sole owner of the suit land in 1988 after which an adjudication record was prepared to that effect. He relied on P. Exh No. (4) dated 29.9.1988, P. Exh No. (4), P. Exh No. (6), (7), (8), P. Exh No. (9), (11), (12), (13), (14), (18). The 2nd and 3rd defendants, on the other hand, pleaded that the plaintiff filed Objection No. 502 over Parcel No. 417 on 19.9.1990, seeking to transfer the suit parcel to them, which objection was allowed and a transfer effected in a regular, procedural, and lawful manner.
115. In support of their defense, the 4th – 5th defendants produced a duplicate Adjudication Record No. A10917, an original Adjudication Record No. 1107917, and the adjudication record objections proceedings as D. Exh No. 2DD "2" & 2DD "3". The 1st defendant similarly produced the three documents as D. Exh No's. (12), (13) and (14) respectively. Through an application dated 4.10.2021, the plaintiff sought an order that the thumbprints be taken at Meru Police Station DCIO offices for purposes of comparison matching and confirmation as to whether he signed the transfer documents dated 19.9.1990 supplied as evidence by the DLASO one Justus Levu.
116. Further, the plaintiff sought for the original objection No. 502 and the proceedings be supplied to Meru police station DCIO offices immediately forwarding to DCIO forensic examination department Nairobi for purposes of matching comparison and confirmation as to whether they were signed by him using the alleged left-hand thumbprint imposed on the said documents. The third prayer was for the DLASO Meru Central to avail the said original Objection No. 502 and proceedings at the police station for purposes of the forensic examination and lastly for a forensic examination report to be filed as opinion evidence to assist the court in unraveling the matter. In a ruling dated 2.2.2022, the court dismissed the application.
117. After complying with the pre-trial questionnaires, the court, by an order dated 12.7.2022, ordered for the documents filed by the 4th – 5th defendants to be subjected to a forensic examination and for the plaintiff and the 2nd defendant to provide a specimen thumbprint within 14 days at the DCI offices Meru and a report be filed once ready. Come 24.10.2022, the parties, mainly the plaintiff, had not complied with the said orders. Even though the record indicates that the plaintiff was initially the recorded owner, he transferred and relinquished his rights on 19.9.1990. Going by the doctrine of regularity, there is a rebuttable presumption that official duties have been properly discharged and all procedures duly followed until the challenger presents clear evidence to the contrary. In *Chief Land Registrar and 4 others vs Nathan Tirop Koech & 4 others* (2018) eKLR, the court observed that all acts done by public officials are presumed legally undertaken unless there is rebuttal evidence to the contrary. In *Teresia Kamene Kingoo vs. Harun Edward Mwangi* (2019) eKLR, the court captured the doctrine that all things are presumed to have been done rightly "omin pre-essumuntur tie esse act."
118. The exhibits produced by the defendants are all public documents. The 4th – 5th defendants confirmed that the ownership of the suit land changed from the plaintiff to the 2nd and 3rd defendants and was later transferred to the 2nd defendant, currently registered in the 1st defendant's name, with the plaintiff's knowledge, consent, and or approval, regularly and procedurally.
119. The burden to rebut the presumption of legality, regularity, procedurally and lawfulness was upon the plaintiff with cogent, clear and uncontroverted evidence. The plaintiff had alleged that the D. Exh No's 12, 13 & 14 were fake, forged, fraudulent, and illegal. Expressly, the plaintiff had denied signing the transfer dated 19.9.1990.
120. Fraud must be pleaded and strictly proved to the required standards on a balance higher than ordinary burden since it borders on criminality. See *Vijay Morjaria vs. Darbar* (supra) *Arithi Developers Authority vs West End Butchery Ltd* (2015) eKLR.



121. Any party aggrieved by an objection under Section 26 of Cap 284 has to file a Minister's appeal, after which he may challenge the outcome, if aggrieved through judicial review. It is trite law that once an adjudication section is declared complete, the register is published, and parties are invited to lodge any objection. There is no dispute, as testified by the 4th – 5th defendants that parties were invited to view the register and ascertain their parcel sizes, status, and names.
122. If the plaintiff was in occupation of his land and diligent he definitely would have realized the change of status to his land before the records were sent to the Chief Land Registrar for titling, through the Director of Land Adjudication. The plaintiff was not vigilant at all. He failed to exhaust the available internal dispute mechanism under Cap 284.
123. Fraud cannot be inferred from the facts, but must be proved with tangible evidence after it has been specifically pleaded. The plaintiff has not specified the date, time, nature, persons, and manner of participation of the defendants, individually, severally and jointly, in the alleged fraud, illegalities, and irregularities.
124. Even though the plaintiff alleged that he made a report to the police, no copy or copies of O.B. reports were availed. Similarly, even after a court order was made, the plaintiff did not subject the documents he seeks to impeach for fraud, illegality, and irregularity to any expert or forensic investigation to rule out the thumbprint impression appearing in the documents as his.
125. The burden of proof lies on who is likely to lose if specific facts are not proven on their existence. It is the plaintiff who would lose if there is no definite report to challenge the official and public documents held by the 4th – 5th defendants, regarding his role in relinquishing his rights or interest to the land. The submission that the burden of proof was on the defendants to prove regularity and legality was unconvincing and based in law. The defendants disclosed all the paper trail and the root cause of the title deed as held in *Dr. Ngok vs Moijo Ole Keiwua* (supra) and *Harbet L. Martin* (supra).
126. The evidence availed by the defendants to show a presumption of legality and regularity in the objection proceedings and the subsequent actions leading to the issuance of a title deed to the 2nd defendant in 2014 were clear and uncontroverted by the plaintiff.
127. The plaintiff has submitted that the 2nd and 3rd defendants were unable to prove that he sold and transferred land to them in 1988. The applicable legal regime in 1988 – 1990 on land contracts was proof of possession, an acknowledgment note and part performance. In *Peter Mbiri Michuki vs Samuel Mugo Michuki* (2014), eKLR the Court of Appeal affirmed the position that Section 3 (7) of the [*Law of Contract Act*](#) excludes contracts made before 1.6.2003 to be in writing.
128. There is evidence of constructive possession of the land by the 2nd defendant up to 2014, when he was found on the land and obtained compensation for the way leaves. The plaintiff was nowhere on the land up to 2019; otherwise, he would have objected to the compensation being paid to the 2nd defendant at the time or even soon thereafter. If it came to his knowledge at all, one would have expected that the plaintiff would have lodged a criminal complaint for fraud, impersonation, and unjust enrichment against the 2nd defendant. Possession of land can be actual, physical, or constructive. The plaintiff admitted that the 2nd defendant at one stage was his licensee to the land. Unfortunately, he did not plead under what terms, for what duration, and whether he terminated the license and ordered the 2nd defendant or the 3rd defendant to vacate his land. Evidence of the lease or tenancy was not availed.
129. In *Kinyanjui Kamau vs. George Kamau Njoroge* (2015) eKLR, the court cited *Ndolo vs Ndolo* (2008) 1 KLR that in a charge of forgery or fraud, the burden of proof is higher than in an ordinary proof. The plaintiff tried to pour cold water on the discrepancies in the transfer form and stated that it was irregular



- and or unprocedural since the three parties did not sign the transfer forms. The 4th – 5th defendants testified that it was regular and lawful to transfer land during an adjudication process.
130. In *Solomon Meme Muthama vs Ntaari Kabutura & another* (2001) eKLR, the court observed that once a change occurs, the land adjudication officer is under a duty to forward the new names to the Director of the Land Adjudication and eventually to the Chief Land Registrar for the registration of the suit property under the new names and that the transfer process takes the form of objection proceedings and endorsement of its reverse side.
 131. The plaintiff is the one who filed the objection proceedings and asked the 4th – 5th defendants to effect the changes. The changes were done in the presence of the land adjudication officer and the 2nd and 3rd defendants. In my view, what the law envisages as consultation and inquiries is whether the party's transacting are in agreement. Rules of natural justice were observed for the plaintiff to append his signature. He has explained the reasons for the objection, and the decision was made which he did not challenge before the minister in a court by way of judicial review within 60 days or six months after it was made.
 132. The burden of proof was on the plaintiff to vitiate the process through tangible evidence that it was facilitated through fraud and that the 4th – 8th defendants acted contrary to public duties. In *Juneja & another vs Meja & another* (Civil Appeal 35 of (2018) (2023) KECA 1241 (KLR) (6th October 2023) (Judgment), the court cited *Purple Rose Trading Co. Ltd vs Bhano Shashikant Jai* that once an issue of illegality is raised a court must investigate the issue raised whether pleaded or not. The court further held that where one buys interest in an adjudicated parcel of land, the claim has to be recorded with the recording demarcation officer and that the evidence of adjudication and demarcation map would be necessary to determine who had been adjudged the original owner during the adjudication process.
 133. The last issue is whether the 1st defendant was an innocent purchaser for value. There is evidence that the 2nd defendant became the registered owner in 2014 and had been in the occupation since 1990 after he and the 3rd defendant became recorded as the new owner after the transfer made in 1988/1990 by the plaintiff.
 134. The 1st defendant testified that he undertook due diligence by visiting the land, confirming from the area chief and a neighbor of its status, visiting and conducting an official search returning to the land with a land surveyor to ascertain and verify acreage, locality, and the beacons. Further, the 1st defendant said that he entered into a binding sale agreement, attended the land control board meeting for transfer, and eventually executed the transfer form which he lodged to the land registry and eventually obtained a title deed.
 135. In *Gichinga Kibutha vs Caroline Nduku* (2018) eKLR, the court held fraud includes the suggestion as a fact of that which is not confirmed by one who does not believe it to be accurate, the active concealment of a fact by one having knowledge or belief of the fact of a promise without an intention of performing it. Due diligence is expected of any party wishing to purchase a property. See *Mohamed Shabana Butt & another vs KRA & others* (2020) eKLR, *Ngere Tea Factory Co. Ltd vs Alice Wambui Nzomo* (2018) eKLR. In *Samuel Kamere vs Land Registrar Kajiado* (supra), the court cited *Munyu Maina vs Hiram Gathiha Maina* (supra), that a registered owner must go beyond the instructions and prove the legality and how the process of acquisition was legal, formal, and free of any encumbrances.
 136. In my considered view, the 1st defendant did all that was required of a prudent potential buyer. There were no existing red flags or cautions that the 2nd defendant's title was fraudulently or illegally obtained or registered. There was no evidence tendered that the 1st defendant was a party to any fraud, illegality, or corrupt scheme. There were no specific criminal complaints lodged against the 1st



defendant individually and jointly with the 2nd -5th defendants. Adverse records or reports pointing to the intention to circumvent the law, and the procedure of land acquisition and registration were not availed against the 1st defendant. There is also evidence of payment of consideration to acquire the title.

137. By the time the 1st defendant took vacant possession and embarked on developing the suit property and when the plaintiff lodged the complaint, over three years had elapsed after the issuance of a title deed. The title to the land was protected under Article 40 of *the Constitution* as read together with Sections 24, 25, 26 & 27 of the *Land Registration Act*.
138. The 1st defendant, therefore, does not fit the description of a trespasser to private land under Section 3 (3) of the *Trespass Act*. The upshot is that the plaintiff's suit has not been proven to the required standards. It is hereby dismissed with costs to the defendants.

Orders accordingly.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON
THIS 29TH DAY OF MAY, 2024**

In presence of

C.A Kananu

Plaintiff

1st defendant

Obwande for the plaintiff

Muhtomi for the 2nd & 3rd defendants

Nyamu Nyaga for the 1st defendant

HON. C K NZILI

JUDGE

