



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Chepkoiywo (Suing as the Legal Representative of the Estate of the Late Rosemary Nyambura Gachunia - Deceased) v Karuba & 49 others (Environment & Land Case 34 of 2024) [2024] KEELC 13205 (KLR) (Environment and Land) (14 November 2024) (Judgment)

Neutral citation: [2024] KEELC 13205 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA
ENVIRONMENT AND LAND
ENVIRONMENT & LAND CASE 34 OF 2024
MC OUNDO, J
NOVEMBER 14, 2024

BETWEEN

JULIUS CHESARO CHEPKOIYWO PLAINTIFF
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE
ROSEMARY NYAMBURA GACHUNIA - DECEASED

AND

CATHERINE KARUBA 1ST DEFENDANT
GATHAMA NGANGA 2ND DEFENDANT
JOHN MWANGI MACHARIA 3RD DEFENDANT
MARY NDUTA NJOROGE 4TH DEFENDANT
JANE WANJIKU NDIRANGU 5TH DEFENDANT
DORCAS WAIRIMU MINYUE (CHAIRLADY OF MWANA MWIRERI WOMEN
GROUP 6TH DEFENDANT
MARGARET WANGARI MWANGI 7TH DEFENDANT
JOYCE WANJA KIMANI 8TH DEFENDANT
LUCY MUGURE KUNGU 9TH DEFENDANT
AGNESS WAITHIRA NGUGI 10TH DEFENDANT
NYAMBURA MAINA 11TH DEFENDANT
GLADYS WAIRIMU GACEMA 12TH DEFENDANT
ESTHER WANGARI NJUGUNA 13TH DEFENDANT



DAVID AZUNGAGE CHERE	14 TH DEFENDANT
DANSON MAINA WAMBUKU	15 TH DEFENDANT
GEORGE NJOROGE MUREU	16 TH DEFENDANT
EUNICE WAIRIMU MBERE	17 TH DEFENDANT
PETER GICHUKI KING'ORI	18 TH DEFENDANT
PETER MACHARIA MAK	19 TH DEFENDANT
JAMES WAINAINA WAIGURU	20 TH DEFENDANT
MARY NJATHI RIBA	21 ST DEFENDANT
EMMAH WANDIA	22 ND DEFENDANT
PETER MUTURI MBUGUA	23 RD DEFENDANT
JAMES NGETHA GACHANGA	24 TH DEFENDANT
LAND REGISTRAR, NAKURU	25 TH DEFENDANT
GEORGE KIHUNA NGANGA & MARY NJERI KIHUNA	26 TH DEFENDANT
MARY WARUIRU MWITHAGA	27 TH DEFENDANT
JAMES MAKIMEI WAWERU	28 TH DEFENDANT
ELIZABETH WAITHIRA KIHARA	29 TH DEFENDANT
NANCY NJOKI KIRUBI	30 TH DEFENDANT
CAROLYNE MURUGI NJOROGE	31 ST DEFENDANT
PHILIP KURIA MWANGI	32 ND DEFENDANT
JAMES KAMAU MACHARIA & PAULINE WANJIKU MWANGI	33 RD DEFENDANT
SIMON IRERE WARINGO	34 TH DEFENDANT
PETER KARIUKI KINYANJUI	35 TH DEFENDANT
JAMES WAINAINA WAIGURU	36 TH DEFENDANT
AGNES WAITHIRA NGUGI	37 TH DEFENDANT
MARGARET WANGARI MWANGI	38 TH DEFENDANT
JOHN MWANGI MACHARIA	39 TH DEFENDANT
DANSON MAINA WAMBUGU	40 TH DEFENDANT
MARY WAMUYU NJOROGE	41 ST DEFENDANT
KAMAU KINUTHIA	42 ND DEFENDANT
MARY NDUTA NJOROGE	43 RD DEFENDANT
DORCAS WAIRIMU MINYUE	44 TH DEFENDANT



ESTHER WANGARI NJUGUNA	45TH DEFENDANT
MACHAEL NJOROGE MACHARIA	46TH DEFENDANT
DORCAS WAIRIMU MINYUE	47TH DEFENDANT
DAVID AZUNGANE CHORE	48TH DEFENDANT
FRANCIS NGANGA MWANGI	49TH DEFENDANT
PETER MACHARIA MARK	50TH DEFENDANT

JUDGMENT

1. Vide a Further Amended Plaintiff dated 27th November, 2023, the Plaintiff herein sought for the following orders:
 - i. An order that the registration of the 1st to 23rd Defendants as the owners of Naivasha/Mwihiringiri Block 4/209 was illegal, null and void and that the said registration be cancelled and the title be registered in the Plaintiff's name.
 - ii. That the court do make a finding that the registration of all of the following sub-divided titles was and is illegal, wrongful and was procured by fraud.
 - a. Naivasha/Mwihiringiri Block 4/6666
 - b. Naivasha/Mwihiringiri Block 4/6644
 - c. Naivasha/Mwihiringiri 4/6657
 - d. Naivasha/Mwihiringiri Block 4/6642
 - e. Naivasha/Mwihiringiri Block 4/6642(sic)
 - f. Naivasha/Mwihiringiri Block 4/6649
 - g. Naivasha/Mwihiringiri Block 4/6660 (Mirera)
 - h. Naivasha/Mwihiringiri Block 4/6050
 - i. Naivasha/Mwihiringiri Block 4/6658 (Mirera)
 - j. Naivasha/Mwihiringiri Block 4/6638
 - k. Naivasha/Mwihiringiri Block 4/6646
 - l. Naivasha/Mwihiringiri Block 4/6659
 - m. Naivasha/Mwihiringiri Block 4/6645 (Mirera)
 - n. Naivasha/Mwihiringiri Block 4/6648 (Mirera)
 - o. Naivasha/Mwihiringiri Block 4/6639 (Mirera)
 - p. Naivasha/Mwihiringiri Block 4/6649 (Mirera)
 - q. Naivasha/Mwihiringiri Block 4/6653 (Mirera)
 - r. Naivasha/Mwihiringiri Block 4/6656



- s. Naivasha/Mwichiringiri Block 4/6637
- t. Naivasha/Mwichiringiri Block 4/6654
- u. Naivasha/Mwichiringiri Block 4/6643
- v. Naivasha/Mwichiringiri Block 4/6641
- w. Naivasha/Mwichiringiri Block 4/6651
- x. Naivasha/Mwichiringiri Block 4/6652
- y. Naivasha/Mwichiringiri Block 4/6640

and that the said sub-division title deeds be cancelled and an eviction order be issued to forcefully evict all the Defendants, their agents, servants and families from each of the above title deeds and demolition of all the structures, buildings and developments erected on the Plaintiff's parcel of land known as Naivasha/Mwichiringiri Block 4/209 and vacant possession be given to the Plaintiff. The eviction be carried out by an auctioneer of the Plaintiff's choice with security being provided by the O.C.P.D Naivasha Sub-county. Costs of the eviction and demolition to be met by the Defendants.

- iii. A declaration that the Plaintiff is the lawful and legal owner of the parcel of land known as Naivasha/Mwichiringiri Block 4/209 and an eviction order to issue against the 1st to 23rd Defendants by themselves, their agents and/or servants from L.R No. Naivasha/Mwichiringiri Block 4/209 and removal of the said Defendants, their agents and servants from the said land together with all their structures, buildings and other developments so that vacant possession can be handed over to the Plaintiff.
 - iv. Costs of the suit
2. The 1st to 23rd Defendants herein filed their Amended Statement of Defence dated 5th July, 2021 in which they denied each and every allegation contained in the Amended Plaint putting the Plaintiff to strict proof while stating that Land Parcel No. Naivasha/Mwichiringiri 4/209 (Old number) (suit land) had been purchased from the registered owner one James Ngetha Gathanga by Mwana Mwireri Women Group (the Group) to which the Defendants were members. That the said parcel of land had been bought for value and without notice of any defect in the title since they had conducted a search at the Nakuru Lands office and confirmed that the same had been registered in the name of James Ngetha Gathanga. That there had been no caution and/or any encumbrances on the same.
 3. That thereafter, the suit land had been re-surveyed and sub-divided into several smaller parcels which had been distributed among the several members of the Group who had lived there peacefully. That some of the original members of the Group had even sold their plots to third parties thus some plots had changed hands twice or more. They thus contended that they had purchased the suit land legally without any fraud and illegality.
 4. During the pendency of the suit, the 24th Defendant passed away, the suit against him abated and the claim against him was subsequently withdrawn. The 25th Defendant was amended to read "Land Registrar Naivasha"
 5. An attempt to settle the matter out of court failed wherein the same had proceeded for hearing on 6th March, 2023 with the evidence of Julius Chepkoiwo Chesaro, who testified as PW1 to the effect that Rosemary Nyambura Gachama (Deceased) was his wife and had passed away in December, 2017. He produced a Grant to her Estate as Pf exh1 and proceeded to testify that Naivasha Plot No. Block 4/209



- measuring 1.17 Hectares (suit land) had been registered to the deceased as its sole proprietor wherein she had been issued with the title to the same on 23rd December 1994. He produced the original title as Pf exh2.
6. He then proceeded to testify that he had introduced the deceased to the manager, one James Ngetha who had then assisted her in becoming a member of the company. That after they had taken up the suit land, they had fenced it and left a caretaker called Nyoro thereon. That in the year 1999 Mwana Mwireri Women Group sought from James Ngetha if they could buy the suit land wherein he had referred them to the deceased in Nyahururu where they had been misinformed that she had passed away yet she had been with him in Baringo. The group and then informed James on the alleged death of the deceased wherein he had given them the suit land. They then went and chased away the caretaker from therein.
 7. That he and the deceased had then visited the Group who had been surprised to see her alive. That they sought out Nyoro, who had informed them that he had been told that the deceased had sued James Ngetha with several offences in Criminal Case No. 691 of 2005.
 8. His testimony was that James Ngetha had cancelled the deceased's name in the company Register wherein he had appended it to plot No. 409 wherein he had then the registered the deceased's plot number 209 and subsequently sold it to Mwana Mwireri Women Group. Plot No. 409 belonged to someone else.
 9. His testimony was that the persons listed in page 34 of his bundle of documents were the people who had subdivided the deceased's land amongst themselves wherein the vendor's the agent had been named as Mr. Ngetha. That Rift Valley Supplies Ltd had also been mentioned. He confirmed that Mirera Suswa was the company that had the land.
 10. His evidence was that whereas by the year 1999 the deceased had a title deed, the same had never been cancelled or gazetted as cancelled. That further, the Mirera Suswa Company, Mr. Ngetha and Mwana Mwirera Women Group had never sued the deceased over the said title.
 11. That it had been Mwana Mwireri Women Group who had applied for the subdivision of the suit land into several plots despite the fact that he still had the original title. That the Group being the 1st to 23rd Defendants had built storeyed houses on the land as could be seen from the photographs of the developments at pages 16-17 of his bundle of documents wherein out of the 23 plots, only 4 plots had not been developed. He produced the photographs in his bundle as Pf exh3 (a-h).
 12. He testified that vide the letters at page 12 and 14 of his bundle of documents, the Land Registrar had confirmed that the deceased was the registered proprietor of the suit land which had been illegally sold by Mr. Ngetha. He marked the letters as PMFI 4 and 5 respectively. He then proceeded to testify that the Register had been taken to the Lands Office wherein the Ministry had noticed the irregularities. His opinion was that Mr. Ngetha must have colluded with the Lands officers. He clarified that at the time the Nakuru District Land Registry had been the proper registry wherein the Naivasha Land Registry had been established much later. He contended that the Defendants' titles were not valid having been issued while the deceased's title was in existence.
 13. That he had asked the 1st to 23rd Defendants' Advocate whether the said Defendants could purchase the suit land without the buildings so that he could surrender his title deed, whereas the said Advocate had promised to consult the Defendants but did not report back. That Mr. Ngetha had disappeared after the criminal case was commenced which proved that he was guilty. The Plaintiff sought for the Defendants' titles to be cancelled.



14. On cross-examination, the Plaintiff confirmed that he did not know where the deceased had obtained the original title from although it could have been the Nakuru Land office. That he did not come with the green card for the said title since he had not gone to the Lands office. That whereas Nyoro's name had featured to the effect that he had lived on the suit land, he was not in court since he had been sick. His testimony was that Nyoro had informed them about the women group in the year 2002 which was the year that they had discovered the subdivision.
15. When he was referred to page 8 of his statement, he admitted that he had not stated that the Mwana Mwireri Group had been told that the deceased had died and was adamant that he had not lied. The whereas the suit land had previously been a government land, he did not know when Mirera Suswa Co. Ltd had purchased the same but only knew that it had owned the land. That whereas he knew that the said company had many members, he did not know the process of becoming its member as they had just gone and asked that the deceased be included so that she could ballot. That he was neither aware that there was to be paid a membership fee nor that every member had a certificate. That further, he neither knew how much the membership fee was nor the cost of a share in the company. He however confirmed that Mr. Ngetha had been a manager in the company and that he had known him as one of the officials of the company. That they had sued him because he had sold the suit land. He was in agreement that a receipt had been a must for anyone who had paid for land.
16. That whereas he neither had the Deceased's membership fee receipt nor Certificate, the deceased's name had been in the company's Register. That the land had been subdivided and issued amongst the members. That whilst he was aware that there had been balloting, he did not have the ballot paper since he did not know where the deceased had kept it. That further, whereas he was aware that some of the resultant portions had been sold to third parties whom he did not know, he had not sued them since it was for the Government to do so.
17. When he was referred to PMFI 5, he confirmed that there had been no reason for cancellation of title in the said letter dated 26th September, 2003 and that they never spoke with the Land Registrar. That he was not aware that Mirera Company had been bungled. That since there had been a register in the District Officer's office, he did not know of any loss of receipts or unused receipts.
18. When he was referred to Gazette Notice No. 4144 of 31st December, 1982, he contended that the same had been a fraudulent document since he had been in the service and that investigations could be carried out on the same, however, when the said Gazette notice was read to him by the Court Assistant, he testified that he was neither aware that the thieves had tried to insert themselves into the company register nor that there had been an attempt to include the deceased's name. That he was not aware that the company register had later been cleaned up and neither did he have evidence that the deceased had taken her documents to the company for verification.
19. That whereas he and the deceased had gone to the Chief's office, he was not aware that Ngetha had been summoned on 16th August, 2003 or that he had been acquitted. His evidence was that it had been the company that used to process the titles hence he did not know about the Land Control Board. He confirmed that the deceased was his wife and that she had bought the suit land. That whereas he neither knew the amount paid nor had evidence of payment of stamp duty, he was adamant that the deceased had paid for the suit land.
20. Upon being referred to page 36 of his bundle, he confirmed that the same was a Sale Agreement for plot No. 209 at a consideration of Kshs.400,000/=. When he was referred to page 37 of the same bundle, he confirmed that the same was a mutation form that had been stamped by the District Surveyor wherein upon being referred to the Green Card at page 13 of his bundle, he confirmed that the deceased's name did not appear.



21. In re-examination, and upon being referred to paragraph 8 in pages 8 to 9 of his statement at page 36 of his bundle, he confirmed that the agreement was dated 9th August, 1999. When he was referred to page 37 of his bundle, he confirmed that the date was 6th August 1999 and that the Mutation had been prepared 3 days before the sale agreement. That Mirera Suswa Co. Ltd did not sue the deceased neither had they been joined in the present case because Mr. Ngetha had been the one guilty of the irregularities and not the company. That subsequently, the instant case had not been against Mirera Company as its documents had been clean.
22. When he was referred to the Kenya Gazette of the year 1982, he confirmed that the deceased's name had been entered in the company's register in the year 1994 wherein she had obtained a title and that she had taken her documents for verification. That Mirera Suswa Co. Ltd had never sued her over the said title.
23. When he was referred to the sale agreement at page 36 of his bundle, he testified that the Land Control Board Consent had not been one of the conditions of the sale since the transfer of the suit land to the deceased never needed the Land Control Board Consent after balloting. On being referred to page 13 of his bundle (a Green Card to Land parcel No. Naivasha/Mwichiringiri Block 4/6638) he confirmed that Peter Muturi Mbugua was a Defendant and that those who had been sued as well as those who had sold the land to third parties had no clean title. That in any case, some of the sale transactions had been made during the pendency of the present case.
The Plaintiff thus closed its case.
24. The matter had thus proceeded for Defence hearing on 9th July 2024 wherein Dorcas Wairimu Mburu, the 6th Defendant herein and a resident of Mirera within Naivasha testified as DW1 to the effect that on 20th May, 2024, she had recorded a statement that was rectifying her earlier statement, on 29th July, 2019, she had filed a list of documents and further that on 17th February, 2020, she had added a supplementary list of documents. That she would place reliance on the above documents.
25. Her evidence was that she knew a group known as Mwana Mwireri women group which group used to look for land so that its members could develop the same and live therein. That the said group was started in the year 1998 wherein it had been registered and had obtained a certificate dated 4th November, 2020 herein produced as Df exh1 and then explained that at the time of the Group's formation, there had been 24 members. That she had a register to show the people who had bought LR No. Naivasha Mwichiringiri Block 2/209 as well as the pictures of the members which register and pictures which she produced as Df exh2 (a) and (b) respectively.
26. That the suit land had belonged to James Ngetha Gachanga before they bought as per a title herein produced as Df exh3. That in the year 1998 whilst they were in Naivasha Town, they heard a certain John (Deceased) say that James Ngetha Gachanga was selling his parcel of land. That thereafter, they had looked for the said James who agreed to sell it to them and showed them the suit land, which had been bear with only bushes and no trees.
27. That they had negotiated the purchase price at Ksh. 400,000/= wherein they had asked for a photocopy of the title deed with which they had gone to Nakuru Lands Registry and conducted a search which showed that the land belonged to James Gachanga. That subsequently, in the year 1999, they had bought the suit land measuring 3 acres (Approximately 1.174 hectares) and paid him Ksh. 400,000/= in cash on 9th August, 1999 vide an Agreement dated 9th August 1999 herein produced as Df exh4.
28. That later on the group decided to sub-divide the land amongst themselves wherein they had called a surveyor who sub-divided it into 24 plots running from Nos. 6637 to 6660 a per the mutation form



dated 6th August, 1999 herein produced as Df exh5. That they had then been issued with their respective titles the copies herein produced as Df exh 6 (a-x)

29. That subsequently, a suit had been filed against them and James Gachanga, the 24th Defendant herein now deceased. That prior, the said James had been charged in Criminal Case No. 691/2005 in Nakuru wherein she had been summoned by the CID as a witness. That James won the case as per the charge sheet and the Proceedings herein produced as Df exh7 (a) and (b) respectively. She explained that prior to the registration of James as a proprietor of the suit land, the same had been registered to Mirera Suswa Farmers Company Ltd.
30. That when James had been summoned to court, she had inquired from him what the problem had been wherein he informed her that at one time the office of Mirera Suswa had been broken into wherein documents had been stolen and an announcement/Notice was issued to every member of Suswa Company to produce their documents. That she came to know the Plaintiff in the year 2003 who had visited her at her house and informed her that she was on her land. That she had informed her that the suit land had been sold to her by James.
31. Her evidence was that she had subsequently reported the matter to the chief wherein James had been summoned to the chief's office on the 16th August, 2003 wherein the Plaintiff failed to turn up and the meeting had not been held. That further, when Suswa Company made the announcement/Notice, the deceased did not turn up. She produced the Gazette Notice No. 4144/24/12/82 as Df exh9 and then explained that she had been chair lady for the group and that whereas there had been 24 members, one member had bought two plots. That other than them, other members of the group had sold their plots to third parties.
32. She insisted that they had taken possession of the suit land legally as the owner of the said land one James had a title deed. That they had lived on the suit land for 4 ½ years and developed it according to one's financial ability, as depicted by the pictures produced by the Plaintiff and therefore the court should allow them to continue living on the land.
33. In cross-examination, she confirmed that they had purchased land parcel No. Naivasha/Mwichiringiri Block 2/209 as per the agreement herein produced. as Df exh4. She reiterated that when they went to the suit land with James, the same had no fence and nobody was in occupation although there might have been neighbors around from whom she did not enquire who owned the suit land.
34. That they had conducted a search at Nakuru Lands Registry but the original papers had been taken by the CID and therefore she did not have the search certificate. That James had informed them that he had bought the suit land from Mirera Suswa Company.
35. On being referred to Df exh 9, she confirmed that Mirera Company had been broken into and documents stolen. That whereas James had showed her the papers as prove that he had bought the suit land from Mirera Suswa Company, she did not follow up because she had seen the title.
36. When she was referred to the Plaintiff's title deed Pf exh2, she denied having seen it and that she was seeing it for the first time. She however confirmed that the same was dated 23rd December, 1994 whereas their title was dated 1999.
37. In re-examination, she was referred to Df exh3 wherein she confirmed that the suit land had been Naivasha/Mwichiringiri Block 4/209 as indicated in the Sale Agreement. That indeed, both the agreement and the title to James were in reference of the same parcel of land. She maintained that they had conducted a search which had shown that the suit land belonged to James. That the transfer which



had been done in Nakuru had been from James to the group. She maintained that the Plaintiff's title was fake.

38. When she was examined by the court, she confirmed that they had lived on the suit land from the year 1999 to date.

The Defence thus closed their case.

39. Parties filed their respective submissions wherein after the Plaintiff had summarized the factual background of the matter as well the evidence adduced in court, proceeded to submit that the Defendants had not produced a transfer document, application to the Land Control Board or a search to justify the transfer of the suit land to them. That further, the said Defendants had not produced any document showing how the title to the suit land had been transferred from the deceased who had been registered as its owner in the year 1995, to James Ngetha Gathanga who had acquired title in the year 1999. That whereas the Defendants had in their evidence insinuated that the deceased had falsely obtained her title after Mirera Suswa Group had been vandalized and the title to the suit land stolen in the process, James Ngetha Gathanga who had sold the suit land to the deceased was the same person who had sold the same to the 1st to 23rd Defendants.
40. He placed reliance on the provisions of Section 26 of the *Land Registration Act*, 2012 and the decided case in Embakasi Properties Limited & another v Commissioner of Lands & another [2019] eKLR to submit that whereas a certificate of title was held as a conclusive evidence of proprietorship, a title of an innocent person was impeachable so long as the same had not been obtained illegally, un-procedurally or through corrupt scheme and that the title holder need not to have contributed to the vitiating factors. His submission was that the evidence adduced by the 1st to 23rd Defendants had proved that James Ngetha Gathanga had no capacity to transfer the suit land. Further reliance was placed on a combination of decisions in the case of Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others [2016] eKLR, among others.
41. He thus submitted that Article 40 (3) of *the Constitution* guaranteed the Plaintiff the right to own property thus the Defendants' illegal actions had contravened the said article for the Plaintiff was entitled to the prayers sought in his amended Plaint dated 7th January 2019 or which Plaintiff be deemed as the absolute registered proprietor of all that land known as Naivasha/Mwichiringiri Block 4/209.
42. The 1st to 23rd Defendants via their submissions dated also summarized the factual background of the matter wherein they framed their issues for determination as follows; -
- i. Whether the registration culminating in title being registered in favour of the 24th Defendant relating to the suit property was procured fraudulently.
 - ii. Whether the 24th Defendant passed a good title to the 1st to 23rd Defendants
 - iii. Whether the Plaintiff is entitled to the reliefs pleaded.
 - iv. Who bears the costs of the suit?
43. On the first issue for determination, they submitted that it was trite that the standard of proof where fraud was an alleged in civil matters had been held to be higher than the ordinary standard of balance of probabilities. That the Plaintiff's evidence and the documents herein produced, he had alleged that the deceased, the 24th Defendant herein had altered the company membership register by removing the deceased's name and replacing it with his own so as to acquire the suit land.
44. That it was therefore upon him to prove that the said action by the 24th Defendant had been fraudulent. That it was not enough to simply infer fraud from the facts, but to show the existence of those facts by



- evidence. That whereas the Plaintiff had marked the letters from the Ministry of Lands as PMF14 to support the allegation on fraud, the same could not be relied upon as proof because the lands office did not have powers to interfere with the operations and membership of a Company and the same letters had not pointed out that there had been fraudulent land transaction by the change of membership from the deceased's name to the 24th Defendant's name which had then necessitated a change in land ownership.
45. That indeed the 24th Defendant had subsequently been charged for Fraud and Forgery in Nakuru Chief Magistrates Court Criminal Case No. 691 of 2005 wherein vide a ruling dated 12th February, 2010, he had been acquitted of all the charges there having been no evidence linking him to the said charges. That decision has never been set aside on appeal.
 46. That it had been the breaking into Mirera Suswa Company Limited on 31st December, 1981 wherein crucial documents including the members register had been stolen that there had been infiltration by non-members which had prompted the company to audit its members and deregister the non-members including the deceased.
 47. That in any case, the Plaintiff had failed to produce any evidence to prove that the deceased had indeed been a member of Mirera Suswa Farmers Company. The decision to alter the membership register had been done by the company and not by the 24th Defendant as an individual. It was their submission that on this point, the Plaintiff had failed to provide and/or prove fraud. That his case was based on mere allegations and suspicion without any concrete evidence.
 48. On the second issue for determination as to whether the 24th Defendant had passed a good title to the 1st to 23rd Defendants, their submission was in the affirmative. That the Plaintiff had failed to prove the allegations of fraud against the 24th Defendant hence he could not be heard to claim that good title had not been passed to the 1st to 23rd Defendants. Reliance was placed on the provisions of Section 26 of the [Land Registration Act](#) to submit that 1st to 23rd Defendants had produced a copy of title to the suit land which had been issued to the 24th Defendant on 25th May 1999.
 49. Reliance was placed on the decisions in the case of *Dina Management Limited v County Government of Mombasa & 5 Others* [2023] eKLR and *Herbert L. Martin & 2 Others v Margaret J. Kamar & 5 Others* [2016] eKLR to submit that the Plaintiff herein had just claimed that the deceased, who was his wife, had been a member of the company wherein she had been allocated the suit land and issued with a title. The Plaintiff had however failed to produce any green card indicating that the deceased had at one point been issued with a title document which had then been transferred to the 24th Defendant. That without such evidence, the presumption must be that the title held by the Plaintiff had no record at the lands office and was thus null and void.
 50. That on the other hand, the 6th Defendant on behalf of Mwana Mwireri Women Self-Help Group, through both oral and documentary evidence had explained how the group had acquired titles to the suit land right from conducting due diligence, drafting of the sale agreement, subdivisions and transfers until the issuance of titles to its members. It was thus their submissions that the 1st to 23rd Defendants were bonafide purchasers without any defect in their titles, the 24th Defendant having passed a good title to them. That they were thus entitled to protection under the law.
 51. As to who should bear the costs of the suit, reliance was placed on the provisions of Section 27 of the [Civil Procedure Act](#) to submit that that costs follow the event and having proved that the Plaintiff's claim was not merited, he should bear the costs as his suit lacked merit and the same should be dismissed with costs.



Determination

52. I have carefully considered the Plaintiff's claim against Defendants, the oral and documentary evidence adduced in court, submissions, the authorities herein cited and the law applicable thereto.
53. The summary of the evidence adduced by the Plaintiff was that he was an administrator to the estate of his deceased wife Rosemary Nyambura Gachama whom he had introduced to one James Ngetha who had then assisted her in becoming a member of Mirera Suswa Company. That she had balloted for and had been registered as a sole proprietor of the suit land being land parcel Naivasha/Mwichiringiri Block 4/209 measuring 1.17 Hectares (suit land) having been issued with the title on 23rd December 1994 herein produced as Pf exh2.
54. That they had then taken up the land, fenced it and left a caretaker by the name Nyoro thereon. Subsequently in the year 1999 Mwana Mwireri Women Group bought the land from the same James Ngetha wherein they had subdivided it amongst themselves despite the fact that by that year 1999, the deceased was still the registered proprietor, was in possession of the title deed which had not been cancelled or gazetted as cancelled and there had been no pending case against her over the said title.
55. The Plaintiff's case was that Mr. Ngetha had fraudulently obtained the seconds title and therefore had no good title to pass to Mwana Mwirera Women Group. He therefore sought for the titles to the resultant subdivision parcels of land to be cancelled and the land reverts to Naivasha/Mwichiringiri Block 4/209 and thereafter the Defendants herein be evicted from the said parcel of land.
56. The Defendants' case on the other hand was that they were the legitimate proprietors of their respective parcels of land having arisen from the subdivision of Naivasha/Mwichiringiri Block 4/209.
57. That in the year 1998 whilst they were in Naivasha Town, they had learnt that James Ngetha Gachanga was selling his parcel of land. That they had looked for him wherein he had showed them the suit land, which had been bear with only bushes and no trees. That subsequently they had conducted due diligence, and having noted that the same was registered to James Ngetha Gachanga as per a title herein produced as Df exh 3, they had negotiated on the purchase price wherein in the year 1999, they had purchased the same for Ksh. 400,000/= via a sale Agreement dated 9th August 1999 herein produced as Df exh4. That the said suit land measured 3 acres (Approximately 1.174 hectares)
58. That later, the group had called a surveyor who had sub-divided the land into 24 plots running from Nos. 6637 to 6660 as per the mutation form dated 6th August, 1999 herein produced as Df exh5, wherein they had then been issued with their respective titles. She produced the copies therein as Df exh 6 (a-x). Her evidence was that whereas some members had settled and developed the said land, others had sold their portions to 3rd parties. That there had been no iota of evidence that James Ngetha Gachanga had fraudulently obtained title. He had therefore had a good title to pass, and therefore the Plaintiff's case should be dismissed.
59. From a summary of the evidence before the court it is clear that there are two competing titles over the original land parcel Naivasha/Mwichiringiri Block 4/209, and therefore as a court, my duty is to determine which of those two titles should be upheld.
60. In a persuasive case in *Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others*[2016] eKLR, Munyao J held as follows;

‘A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that



brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.'

61. Having said this the court finds that there is no contention that the original suit parcel of land was registered to Mirera Suswa Company wherein James Ngetha Gachanga was its Chairman.
62. Whereas the Plaintiffs case was that after his wife had been made one of the members of Mirera Suswa Company, she had balloted for and had been issued with title to land parcel No. Naivasha/Mwichiringiri Block 4/209 on the 23rd December 1994.
63. The Defendants on the other hand have argued that they had bought the land from James Ngetha Gachanga via a sale agreement of dated 9th August 1999 for Ksh 400,000/=.
64. None of the parties herein had produced any evidence that showed the root of the title being the Green card or parcel file, to show the land had been transferred from Mirera Suswa Company to either the Plaintiff's deceased's wife or to James Ngetha Gachanga, both parties having agreed that the land was initially registered to Mirera Suswa Company.
65. Needless to say that whereas the Plaintiff's deceased wife had obtained her certificate of title on 23rd December 1994, Mr. James Ngetha Gachanga was registered as proprietor of the suit properties on 25th May 1999 four years later wherein after he sold the same to the 1st -23rd Defendants who then subdivided the land and caused it to be registered in their individual names, wherein some of them had sold their portions to third parties. Now that Mr. James Ngetha Gachanga's title having been registered later in time it had been incumbent upon the Defendants to at least avail the Green Card, or the parcel file, or call evidence from an officer from the lands office, so as to confirm whether or not Mr. James Ngetha Gachanga's title was genuine or not.
66. This issue being the needle in the haystack, the court shall, using Solomon's wisdom further fall back on decisions on how the courts have pronounced themselves over the issue on competing titles such as this case to wit that, the first in time will prevail. This position was emphasized in the case of Wreck Motors Enterprises vs. The Commissioner of Lands and Others Civil Appeal Civil Appeal No. 71 of 1997, where the court held that:

'Where there are two competing titles the one registered earlier is the one that takes priority'
67. The same position was held in the case of Gitwany Investment Ltd vs. Tajmal Ltd & 3 Others (2006) eKLR where the Court held that:-

'...the first in time prevails, so that in the event such as this one whereby a mistake that is admitted, the Commissioner of Lands issues two title in respect of the same parcel of land, then if both are apparently and on the face of them issued regularly and procedurally, without fraud save for the mistake then the first in time must prevail'
68. I find that the Plaintiff's title was the first in time and as equity teaches in its maxim that; "when two equities are equal, the first in time prevails", then the Plaintiff's title deed which was the first in time and should prevail there having been no evidence called by the Defendants to challenge the same and



there having been no evidence was called to confirm how the 2nd title deed initially registered to Mr. James Ngetha Gachanga came into being.

69. Ordinarily, no land should be registered more than once and having two separate title deeds held by separate persons. Therefore in this case, there must be one title deed which is genuine and one which was issued either unlawfully or through mistake and thus double allocation.
70. Balancing the two competing titles, it is my view that the Plaintiff holds good title to the suit property. The title of the 1st -23rd Defendant in my view, and in the absence of evidence to rebut the same, could only have been obtained either by the fraud, or by the mistake of the Land Registry, or both.
71. I note that these properties were registered under the repealed Registered Land Act which is now governed by The Land Act, 2012 and The Land Registration Act, 2012. Indeed the law is very clear on the position of a holder of a title deed in respect of land. Section 26(1) of the Land Registration Act provides as follows:

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

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

72. As may be observed, the law is extremely protective of title and provides only two instances for the challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.
73. The import of Section 26 (1)(b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, un-procedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1)(b) is to protect the real title holders from being deprived of their titles by subsequent transactions.
74. Indeed the Court of Appeal in the case of *Munyu Maina vs. Hiram Gathiha Maina* [2013] eKLR, had held as follows:

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”



75. Section 80 (1) of the [Land Registration Act](#) provides that:-

“Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”

76. From the above provisions it is clear that the court has powers to order rectification of a register by directing that the registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

77. That said and done I hold that the Plaintiff has proved his case on a balance of probabilities and is entitled to the prayers sought in the Plaint. Consequently, I hereby enter judgment for the Plaintiff against the Defendants in the following terms:

- i. It is herein declared that the Plaintiff is the lawful and legal owner of the parcel of land known as Naivasha/Mwichiringiri Block 4/209.
- ii. It is herein ordered that the registration of the 1st to 23rd Defendants as the owners of Naivasha/Mwichiringiri Block 4/209 was illegal, null and void and that the said registration be cancelled within 30 days and the title be registered in the Plaintiff's name.
- iii. The registration of the following sub-divided titles was and is illegal, wrongful and was procured by fraud and the same are herein cancelled:
 - a. Naivasha/Mwichiringiri Block 4/6666
 - b. Naivasha/Mwichiringiri Block 4/6644
 - c. Naivasha/Mwichiringiri 4/6657
 - d. Naivasha/Mwichiringiri Block 4/6642
 - e. Naivasha/Mwichiringiri Block 4/6649
 - f. Naivasha/Mwichiringiri Block 4/6660 (Mirera)
 - g. Naivasha/Mwichiringiri Block 4/6050
 - h. Naivasha/Mwichiringiri Block 4/6658 (Mirera)
 - i. Naivasha/Mwichiringiri Block 4/6638
 - j. Naivasha/Mwichiringiri Block 4/6646
 - k. Naivasha/Mwichiringiri Block 4/6659
 - l. Naivasha/Mwichiringiri Block 4/6645 (Mirera)
 - m. Naivasha/Mwichiringiri Block 4/6648 (Mirera)
 - n. Naivasha/Mwichiringiri Block 4/6639 (Mirera)
 - o. Naivasha/Mwichiringiri Block 4/6649 (Mirera)
 - p. Naivasha/Mwichiringiri Block 4/6653 (Mirera)
 - q. Naivasha/Mwichiringiri Block 4/6656



- r. Naivasha/Mwichiringiri Block 4/6637
 - s. Naivasha/Mwichiringiri Block 4/6654
 - t. Naivasha/Mwichiringiri Block 4/6643
 - u. Naivasha/Mwichiringiri Block 4/6641
 - v. Naivasha/Mwichiringiri Block 4/6651
 - w. Naivasha/Mwichiringiri Block 4/6652
 - x. Naivasha/Mwichiringiri Block 4/6640
- iv. The Defendants shall by themselves their agents, servants and families of each of the above title deeds vacate forthwith from the said suit parcels of land initially known as Naivasha/Mwichiringiri Block 4/209, together with all their structures, buildings and other developments so that vacant possession can be handed over to the Plaintiff, within 45 days upon delivery of this judgment.
 - v. The eviction shall be carried out by an auctioneer of the Plaintiff's choice at the Defendant's cost.
 - vi. Security shall be provided for by the O.C.P.D Naivasha Sub-county.
 - vii. The Plaintiff is further granted costs of the suit.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 14TH DAY OF NOVEMBER 2024

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

