



**Mwashimba v Daido & 2 others (Environment & Land Case 13 of 2023)
[2024] KEELC 13882 (KLR) (Environment and Land) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13882 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
ENVIRONMENT & LAND CASE 13 OF 2023
EK WABWOTO, J
DECEMBER 19, 2024**

BETWEEN

PETER LENJO MWASHIMBA PLAINTIFF

AND

FRANK PEACE DAIDO 1ST DEFENDANT

JOHN MZONGA MWAKITAWA 2ND DEFENDANT

JACKSON MWANYUMBA MWAKITAWA 3RD DEFENDANT

JUDGMENT

1. This suit was instituted vide a plaint dated 1st November 2010 wherein the plaintiff sought the following reliefs;
 - a. An order that the defendants vacate and/or deliver up vacant possession of the suit property Mbololo/Tausa/3213.
 - b. Damages for trespass.
 - c. Costs.
 - d. Any other or further relief that this court Honourable Court deems fit to grant.
2. The suit was contested by the defendants. The 1st defendant filed a Statement of Defence dated 9th December 2020 seeking for dismissal of the suit while the 2nd defendant filed a Statement of Defence dated 10th March 2015 equally seeking the dismissal of the suit.
3. Pursuant to the orders issued by this court on 25th September 2017 and 2nd November 2017, Mombasa ELC Case No. 395 of 2020 Peter Lenjo Mwashimba -vs- Frank Peace Daido and John Mzonga



Mwakitawa was consolidated with Mombasa ELC No. 60 of 2015, Jackson Mwanyumba Mwakitawa -vs- Peter Lenjo Mwashimba wherein Mombasa ELC No. 395 of 2010 was designated as the lead file which upon transfer to Voi ELC it was assigned Voi ELC Case No. 13 of 2023.

The Plaintiff's case

4. The Plaintiff's case is that he is the registered proprietor of the land parcel known as Mbololo/Tausa/3213. It was averred that sometimes in 2008, the defendants herein without his consent and authority trespassed into his property and erected illegal structures therein.
5. During trial, two witnesses testified on behalf of the Plaintiff. Peter Lenjo Mwashimba testified as PW1 while Eliud M. Majani testified as PW2. PW2 adopted and relied entirely on his witness statement dated 16th April 2014 and bundle of documents entered in his evidence in chief. He added that he bought the land from John Mwanyika and he paid a sum of Kshs 25,000. He also stated that he met the seller in 1996 and got a title deed. He also stated that the grand children of John Mzonga Mwakitawa are the ones challenging his title on the reasons that the same was obtained fraudulently. He concluded his examination in chief by stating that before he bought the land, the said land was vacant and there was nobody residing in it.
6. When cross examined by counsel for the Plaintiff, he stated that he had bought the land from John Mwanyika and he paid Kshs 25,000, he also stated that he had an agreement made in respect to the same.
7. On further cross examination he stated that John Mwanyika passed away in 1998 while the title deed was issued in the year 2006 in his name. There was no entry for the name of John Mwanyika. There was no proof of transfer of land from Lenjo and the late John Mwanyika. There was no proof for payment of any stamp duty and levies. There was a letter dated 9th August 2007 confirming that they received a sum of Kshs 20,000 and released the title deed to him. He had no problem with the children of the deceased as the issues was referred to in the sale agreement of 5th August 1999.
8. When cross examined by Counsel for the 2nd and 3rd Defendants he stated that he visited the property and the office of the Land Adjudication Officer when he bought the land though he could not remember the specific dates when he did that. He has never lived on the land. He had never been told whether the land had been bought by someone else. He wanted to ensure that the children of mzee benefit. He has never been summoned to appear at any land offices. When the SGR was constructed, it was the defendants who were found on the land. A church had also been constructed on the land. The defendants had some temporary structures and they were compensated but the SGR regarded him as the owner of the land.
9. On reexamination, he stated that he does not have any sale agreement between the late and himself. The sum of Kshs 20,000 which was paid to the children of the late was not part of the purchase price. The compensation for the defendants was for the structures on the land.
10. Eliud M. Majani who testified as PW2 stated that he knew the family of the 2nd and 3rd defendants. Suleiman Mwabuja Mwashigadi had a title deed of the Plaintiff. He signed the letter dated 20th July 2007 showing that the title deed had been returned to the Plaintiff. The children of the late had acknowledge receipt of Kshs 20,000.
11. On cross examination by the 1st Defendant, he stated that he was not aware of the exact year when the land was sold. He does not have details of how the land was sold and he did not know who had sold the land to the 1st Defendant.



12. When cross examined by Counsel for the 2nd and 3rd Defendants, he stated that he did not know why the Plaintiff had the title. He knows where the land is located. There was no person staying in the land before it was purchased. The Plaintiff never showed him any agreement and he does not know the history of the land. The sum of Kshs 20,000 was not the purchase price.

The case of the 1st Defendant

13. The 1st defendant filed a statement of Defence dated 9th December 2010 denying the contents of the plaint. It was averred that prior to the year 1999, the suit parcel belonged to John Mwashigadi Mwanyika (now deceased) together with Margret and Joyce. The said persons had been identified by the government during the adjudication process as the owners of the suit property and given number Mbololo/Tausa/Plot No. 3213. The original owners met all the conditions for the allocation of the suit property as required by the relevant law. While the original owners were waiting for the title deed, they sold a portion of the suit property measuring approximately 1 acre for the sum of Kshs 18,000 to the 1st defendant and which sum the 1st defendant fully paid to the original owners. The original owners have never sold the suit property to the plaintiff and the 1st defendant owns an equitable interest within the suit property.
14. The 1st defendant Frank Peace Daido, testified during trial in support of his case. He stated that he went to Suleiman Mwashigadi, Joyce Mwendwa and Margret and was given 1 acre on plot No. 3213. He cleared the land which was vacant at that time and set up a church after paying the purchase price. He stayed in the land for about 5 years from the year 2000 to 2005. PW2 Eliud Majani was the then area chief. The title deed was issued in the year 2005. The names had been altered and changed to the name Peter Lenjo. He followed up with the land officers who informed him that it ought to have two names. He also stated that he declined to leave the land when he had been asked to do so by the plaintiff, he also relied on and adopted his witness statement and bundle of documents dated 18th August 2024 in his evidence in chief.
15. On cross examination he stated that he bought the land from John Mwashigadi. He has never been in the property from 1999 but has planted trees and other crops. The 2nd and 3rd defendants later came to the land in the year 2004 and constructed their houses and became his neighbours to date. He also denied ever knowing the plaintiff. He further stated that the SGR was constructed when he was in the land.
16. On Cross examination by counsel for the plaintiff he stated that when he bought the land Mwanyika had already passed away. He bought the land for Kshs 10,000 which he paid by installments. He denied being gifted the land and was compensated for structures on the said land.
17. Suleiman Mwashigadi was sworn as DW2 upon taking the witness stand, but was unable to testify after denying authorizing his statement on the court's record.
18. Joyce Mwashigadi testified as DW3 and she adopted her statement dated 18th August 2014 as her evidence in chief, it was her testimony that the plaintiff came to her father looking for the land and after being shown the land, he never came back. She also stated that when her father was diagnosed with cancer, he went to the 1st defendant who assisted him with Kshs 10,000 which was used for her father's treatment.

She also stated that later, the plaintiff came after his father had passed away and Suleiman gave him the title deed and he gave them Kshs 20,000.



19. When cross examined, she stated that she was present when Suleiman gave the plaintiff the title deed and the same was given out of fear of being arrested. She also stated that the sum of Kshs 20,000 was paid out as condolences for the death of her father and it was not purchase price, she also stated that she did not know when the adjudication was done.

The case of the 2nd and 3rd Defendants

20. The 2nd Defendant filed a statement of Defence dated 10th March 2015. It was averred that while the plaintiff was the correct registered owner of Mololo/Tausa/3213, the said registration was done fraudulently. The following particulars of fraud and illegality were pleaded at paragraph 3 of the defence; -
- a. Causing his name to be entered in the register alongside that of the deceased.
 - b. Causing title deed for land parcel MBOLOLO/TAUSA/3213 to be issued in his name.
 - c. Causing him to be registered as the owner of the deceased's land
 - d. Misleading the lands officers to believe he was the owner of land parcel MBOLOLO/TAUSA/3213.
 - e. Transferring the deceased's land to himself.
21. John Mwakitawa, the 2nd defendant herein testified as DW4. He adopted and relied on his witness statement dated 10th March 2015 in his evidence in chief. He added that the land belonged to his father and he was not aware that it had been sold to the plaintiff. He also stated that the 1st defendant used to stay in the land and he moved out after being compensated by Kenya Railways.
22. On cross examination he stated that he has been staying on the land since 2006 when the title was issued and the land was part of their inheritance.
23. Jackson Mwakitau Mwanyumba testified as DW5. He adopted his witness statement dated 7th April 2015 in his evidence in chief. He also produced the 2nd defendants bundle of documents dated 18th August 2015 as part of his evidence in chief.
24. On cross examination he stated that the land had been given to their mother Veronica. He never saw the adjudication register and never saw the green card. The plaintiff had attempted to evict them from the land through the area chief.
25. Okina Otieno testified as DW6. He stated that as per his records, the names of John Mwanyika and Peter Lenjo appeared in the adjudication record. He stated that there could have been an omission when other names didn't appear at the title. His office did an investigation and it was found that the error was an omission from the land adjudication office. The family objected to the register.
26. When cross examined, he stated that he is the Land Adjudication Officer in charge of Voi, Mwatate and Wundanyi sub counties. He also stated that an objection entry was entered in 1996. The objection can only be taken within 60 days. No objection can be considered after that period, investigations were carried out as desktop investigations. No action was taken from the objection in this case and that the omission of one name was in error. No dispute was recorded. He did not see the letter dated 18th August 2014.
27. When reexamined, he stated that the demarcation officer cancelled out two other names in respect to 3213. He also sought to clarify that the 60 days period is for filing of objections and not for



determination of disputes. The errors can only be corrected during objections. After that it is for the court to determine the matter.

28. On cross examination by the 1st defendant he stated that only the rightful claimant gets the land and, in this case, it was Peter Lenjo and John Mwanyika. He also stated that the officer on the ground captured the names of the persons claiming interest in the land and he may not have known if the family of John Mwanyika Mwashigadi was present after the objection process.

The Plaintiff's submissions

29. The plaintiff filed written submissions dated 29th October 2024. Counsel for the plaintiff submitted on the following issues; -
- a. Whether the plaintiffs title is impeachable to any extent or at all and if so, what orders are appropriate.
 - b. Whether the plaintiff is entitled to the reliefs sought vide ELC 395 of 2010.
30. It was argued that the title in question is a first registration and hence indefensible for fraud to which the title holder is a party, it was further argued that the process of adjudication under the [land adjudication act](#) contains a comprehensive dispute resolution mechanism and the court's jurisdiction is only capable of being invoked at the tail end of the appellate process.
31. It was submitted that under Section 26 of the [Land Adjudication Act](#), a 60 day window following publication of the completion of the register for any party aggrieved by the process to file an objection is reserved which then kicks off the dispute resolution mechanism. Counsel submitted that in the instant case, the deceased passed away in the year 2008, which would be two years since the objection window closed and hence there was time for them to inspect the register and lodge any objections.
32. On the aspect of fraud, it was argued that there was no fraud on the part of the plaintiff when the title deed was issued in his name since he was known to the deceased and had previously visited the deceased at his home. It was also submitted that the parties did not deny appending their signatures on the letter dated 9th August 2007 and hence the plaintiffs right to the property can't be wished away.
33. In respect to the presence of the 1st defendant, it was submitted that he cannot claim to have entered lawfully on the land since he confessed to have entered the land after the deceased's death.
34. The court was urged to uphold the plaintiff's title and grant the reliefs sought in the plaint dated 1st November 2010.

The 1st Defendant's submission

35. The 1st defendant filed written submissions dated 19th November 2024. It was submitted that he bought 1 acre from Joyce, Margret and Suleiman Mwashigadi for Kshs 10,000 on 5th August 1999, he also submitted that the title deed should be cancelled to reflect the name of the late John Mwashigadi Mwanyika. No sale agreement was produced by the plaintiff to support his claim that he paid Kshs 20,000 towards the purchase of the suit property since he could not claim to have bought the land on 9th August 2007 when he had already bought the same on 5th August 1999. He urged the court to cancel the title and have it reverted to the names of the deceased.

The 2nd and 3rd Defendants' submissions

36. The 2nd and 3rd Defendants filed written submissions dated 19th November 2024. Counsel submitted on the following issues; -



- a. Whether the plaintiff herein purchased the suit property Mbololo/Tausa 3213 from the deceased John Mwashigadi Mwanyika during his lifetime.
 - b. Whether the plaintiff fraudulently caused his name to be entered into the register alongside that of John Mwashigadi Mwanyika (deceased).
 - c. Whether the plaintiffs title is absolute and or indefeasible.
 - d. Costs of the suit.
37. It was argued that pursuant to section 38 of the Land Act, there was no written agreement between the deceased and the plaintiff and there was also no evidence of payment and there was no witness and hence the plaintiff only acquired the land fraudulently as the deceased never sold any land to the plaintiff.
38. Citing the case of Muthara Njuri Ncheke Council of Elders & Austin -vs- Committee of Ngaremara/ Gambella Adjudication Sector & 3 Others (2022) eKLR, it was submitted that during the adjudication process, the beneficiaries to the deceased were all aware that their kin was the registered owner of the suit land since the name of John Mwashigadi appeared in the demarcation book and that is why they picked the title to follow up.
39. It was submitted that pursuant to section 26 and 80 of the Land Registration Act together with the cases of Munyu Maina -vs- Hiram Gathiha Maina (2013) eKLR and Dr. Joseph Arap Ngok -vs- Justice Moiyo Ole Kina & 5 Others Civil Appeal No. CA 60 of 1997, the plaintiff had failed to prove how he acquired the title. The court was urged to dismiss the suit with costs and grant the prayers in the counter claim.

Analysis and Determination

40. The court has considered the pleadings in the consolidated cases, the oral and documentary evidence adduced together with the written submissions filed by the parties and proceeds to determine the suit on the following issues; -
- I. Whether the plaintiff lawfully and legally acquired the suit parcel known as Mbololo/ Tausa/3123.
 - II. Whether the particulars of fraud as pleaded and particularized as against the plaintiff have been proven.
 - III. What are the appropriate reliefs to issue herein

Issue 1 Whether the plaintiff lawfully purchased the suit parcel

41. The plaintiff herein has laid a claim to the suit parcel. It was his case that he is the registered owner of the suit land and that the defendants have trespassed on the same and hence ought to be evicted. It is trite law that whoever alleges must prove. Section 107 (1) of the Evidence Act, Cap 80 Laws of Kenya provides that:
- ‘Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.’
42. On evidentiary burden of proof, Sections 109 and 112 of the Evidence Act provide as follows:



109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.”

112. in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.”

The two provisions were dealt with in the case of *Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, in which the Court of Appeal held that:

“As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden, that is, placed upon a party..... the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”

43. Article 40 of *the Constitution* of Kenya, 2010, elaborates on the right to own property in Kenya. It provides as follows;

- (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
 - (a) of any description; and
 - (b) in any part of Kenya.

The Defendants have challenged the Plaintiff’s ownership to the suit property. Where a court is faced with two competing interests over the same suit property, it must look into the root of ownership of the said property. This approach was well appreciated in the case of *Hubert L. Martin & 2 Others vs Margaret J. Kamar & 5 Others* [2016] eKLR. Equally in the case of *Nairobi High Court Civil Suit No. 1024 of 2005(O.S), Milankumar Shah & 2 others v The City Council of Nairobi & another*, the court stated as follows:

“We hold that the registration of title to land is absolute and indefeasible to the extent firstly that the creation of such title was in accord with the applicable law and secondly where it is demonstrated to a degree higher than the balance of probability that such registration was not procured through fraud and misrepresentation to which the person or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law, and the public interest”.

44. Equally it is not automatic that simply accepting titles as conclusive, incontestable and indefeasible or the concomitant argument that in the face of two or more competing titles, the first in time automatically prevails. It is not enough to wave an instrument of title or rest easy on the former rock of chronological primacy. What must now be established by he who would prevail is the solidity of the root of title. No flowery foliage, absent a sturdy and settled root speaking to a regular and legal process preceding the product that is the title, will avail the holder. That much is now the law pronounced in a lengthening line of authorities such as *Munyu Maina vs Hiram Gathiha Maina* [2013] eKLR and *Funzi Development Ltd & Others vs Country Council of Kwale* [2014] eKLR, and by the Supreme Court in its authoritative and all-binding decision of *Dina Management Limited vs County Government of Mombasa & 5 Others* [2023] eKLR.



45. Section 26 of the *Land Registration Act, Act No. 3 of 2012*, provides that a title which was acquired by way of fraud or misrepresentation, where a person is proved to be a party can be attacked. So too a title which was acquired illegally, procedurally or through a corrupt scheme. The said Section is drawn as follows: -

26.

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

It cannot therefore be overemphasized that where the fact of registration of an individual as a proprietor of a parcel of land is challenged, the registered proprietor has to show that the land was lawfully registered in his name.

46. As earlier stated and without appearing to be repetitive, a court when faced with two competing interests over the same land has to make an investigation so that it can be discovered who is the bonafide and lawful owner. This investigation must start at the root of the title and follow all processes and procedures that brought forth the interests of each party to the land. 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 case solely on the title document that they hold. The Court of Appeal in the case of *Jacob Wekesa Bokoko Balongo vs. Kincho Olokio Adeya & another* [2020] eKLR emphasized on the importance of deciphering the historical acquisition of title.

47. From the evidence that was tendered during trial it was evident that the suit property was initially unregistered and pursuant to the adjudication process which was undertaken, a title deed was issued in the name of the plaintiff. From the evidence that was tendered which the court has considered, the plaintiff was unable to adduce any evidence in support of his claim to the land. While the plaintiff testified that he had acquired the land after purchasing the same from the deceased, he did not produce any sale agreement nor any evidence of payment. The testimony of all the defence witnesses was to the effect that the sum of Kshs 20,000 which was paid to the children of the deceased was not the purchase price.



48. It is imperative to note that the plaintiff never placed any evidence of how he acquired the suit property and as such it is the finding of this court that the plaintiff has failed to demonstrate at all his purchase and lawful acquisition of the suit property.

Issue II On whether the particulars of fraud as pleaded have been proved as against the Plaintiff.

49. The 2nd defendant pleaded the following particulars of fraud;

- a. Causing his name to be entered in the register alongside that of the deceased.
- b. Causing title deed for land parcel MBOLOLO/TAUSA/3213 to be issued in his name.
- c. Causing him to be registered as the owner of the deceased's land
- d. Misleading the lands officers to believe he was the owner of land parcel MBOLOLO/TAUSA/3213.
- e. Transferring the deceased's land to himself.

50. Whether there was fraud or not needs production of evidence. Fraud is defined under the Black's Law Dictionary 10th Edition as "A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment". To decipher that there was fraud it is important that knowledge of the existence of fraud be established.

51. Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities. As regards the standard of proof, the court of Appeal in the case of Kinyanjui Kamau Vs George Kamau (2015) eKLR expressed itself as follows: -

"It is trite law that any allegations of fraud must be pleaded and strictly proved. (See Ndolo Vs Ndolo (2008) 2 KLR (G & F) 742 wherein the court stated that:-

"...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...

In cases where fraud is alleged, it is not enough to simply infer fraud from the facts".

52. Okina Otieno testified that the names of John Mwanyika Mwashigadi and Peter Lenjo had been captured in the register and hence at the very least the two names ought to have appeared in the title that was issued. The defendants were also able to prove that they indeed followed up with the relevant officers but the same was not rectified. From the evidence that was tendered herein, the plaintiff had not lawfully acquired the suit parcel, he was not residing in the same and hence the said title deed could not have been lawfully issued in his name and as such it is the finding of this court that the title deed that was issued to the plaintiff was irregularly issued to the sole names of the Plaintiff.

Issue III What are the appropriate reliefs to grant herein**

53. Both the plaintiff and defendants have sought for various reliefs in their pleadings.



54. The plaintiff has sought inter alia for eviction of the defendants and damages of trespass while the 2nd defendant has sought for inter alia an order for a declaration that the suit property belongs to the estate of the deceased John Mwashigadi and cancellation of the plaintiff's title.
55. This court, having dealt with issues No. (I) and (II) herein finds that the plaintiff did not lawfully acquire the suit parcel and in view of the foregoing, it becomes apparent that the plaintiff's case has not been proved to the required standard and hence the reliefs sought by the plaintiff are not for granting.
56. In respect to the reliefs sought by the 2nd defendant, counsel for the second defendant submitted that the plaintiff's title is impeachable and this court ought to cancel the same.
57. On whether or not the title to the suit land is impeachable, it is trite law that a title can only be impeached in two instances, one, where the title is obtained by fraud or misrepresentation and secondly, where the certificate of title has been acquired illegally, unprocedurally or through corrupt scheme.
58. During trial, the plaintiff was unable to discharge his burden on how he acquired the title for the suit property and the court has equally found that the said title was acquired irregularly. The case of *Alice Chemutai Too – Vs – Nickson Kipkurui Korir & 2 Others* [2015] eKLR the Court held that:-

“It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part. I had occasion to interpret the above provisions in the case of *Elijah Makeri Nyangwara –vs- Stephen Mungai Njuguna & Another*, Eldoret ELC Case No. 609 B of 2012 where I stated as follows:- “...it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent titleholder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally, or through a corrupt scheme. The titleholder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions. “I stand by the above words and I am unable to put it better than I did in the said dictum.”

59. Section 80(1) of the *Land Registration Act* comes into play. It provides: -

“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.”

60. Being guided by the aforementioned decision and provision of the law, this court is satisfied that the certificate of title held by the Plaintiff was procured irregularly and as such it is impeachable and ought to be cancelled. The court equally finds that the other reliefs sought by the defendants are for granting.



61. On the issue of costs, the general rule is that costs follow the event in accordance with the provision to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court for good reason directs otherwise. I find no reason to hold otherwise and hence the court shall proceed to grant costs to the 2nd and 3rd defendants herein.

Final Orders

62. The end result is that the consolidated suit hereby determined as follows; -
- i. The Plaintiff suit instituted vide a plaint dated 1st November 2010 is hereby dismissed in its entirety.
 - ii. It is hereby declared that the land parcel number Mbololo/Tausa/3213 is the sole property of the estate of John Mwashigadi Mwanyika.
 - iii. The registration of Peter Lenjo as the owner of Mbololo/Tausa/3213 is hereby cancelled and the Land Registrar is hereby directed to rectify the same and replace with the beneficiaries of the estate of John Mwashigadi Mwanyika.
 - iv. Costs of the suit are hereby awarded to the 2nd and 3rd Defendants.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 19TH DAY OF DECEMBER 2024.

E. K. WABWOTO

JUDGE

In the presence of:-

N/A for the Plaintiff.

Frank Peace Daido the 1st Defendant appearing in person.

Ms. Isika for the 2nd and 3rd Defendants.

Court Assistant: Mary Ngoira.

