



**Waithaka & 2 others v Waiganjo (Environment and Land Appeal 62 of 2021 & 17 of 2022 (Consolidated)) [2023] KEELC 16924 (KLR) (24 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 16924 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL 62 OF 2021 & 17 OF 2022 (CONSOLIDATED)**

**JG KEMEI, J**

**APRIL 24, 2023**

**BETWEEN**

**JOSEPH WANJOGU WAITHAKA ..... 1<sup>ST</sup> APPELLANT**

**BETH WACEKE MACHERU ..... 2<sup>ND</sup> APPELLANT**

**JOSEPH NGANGA MUCHIRI ..... 3<sup>RD</sup> APPELLANT**

**AND**

**PATRICIA NJOKI WAIGANJO ..... RESPONDENT**

*(Being an appeal against the judgement of Hon M W Wanjala  
(SRM) in MCLE No 141 of 2018 delivered on the 1/7/2021)*

**JUDGMENT**

**Introduction leading to the Appeal**

1. The Plaintiff who is the Respondent in this appeal filed suit against the Defendants, the Appellants in the trial Court seeking the following orders;
  - a. Eviction orders and a permanent injunction restraining the Defendants their agents and or servants from illegally entering committing acts of waste on the parcel No RUIRU/RUIRU EAST /BLOCK 2/3516 (suit land).
  - b. General damages
  - c. Costs of the suit
2. It was the Plaintiff's case that she was the registered proprietor of the suit land at all times material to the suit. That the Defendants have entered the suit land and committed acts of waste thereon including erecting illegal structures without any colour and or consent and permission of the Plaintiff. She sought eviction of the trespassers as well as general damages thereon.



3. Vide a Statement of Defence and counterclaim dated the 24/1/2017 the 1<sup>st</sup> Defendant denied the Plaintiffs claim and stated that if ever the Plaintiff was registered as owner of the suit land then it was through fraud. That he lawfully purchased the suit land in 2009 from one Macharia Mwangi the legal representative of Njeri Mwangi for valuable consideration. That upon purchase he subdivided the land into smaller portions and sold the land to various purchasers who took possession and developed the lands.
4. In his counterclaim the 1<sup>st</sup> Defendant claimed that at the time he purchased the suit land in 2009 Mwangi Macharia, the legal representative of Njeri Mwangi, the land was yet to be registered. Njeri Mwangi was in occupation of the land and she put the 1<sup>st</sup> Defendant into occupation upon purchase. He subdivided the land and sold the resultant subdivisions as that in line with his business model. That the matter was investigated by the chief of the area in 2016 when a complaint on the suit land was lodged he was cleared of any fault. However, the Plaintiff in collusion with the Directors of Nyakinyua Investments issued the title of the land to the Plaintiff.
5. Particulars of fraud have been pleaded under Paragraph 13 of the counterclaim as; obtaining registration of the land belonging to the 1<sup>st</sup> Defendant; having the transfer executed by Directors who were not in office; obtaining title to the land already occupied and developed. In the end he prayed for orders that the title in the name of the Plaintiff be cancelled and the subject land be registered in the names of the 1<sup>st</sup> Defendant.
6. The Plaintiff in her reply to defence and defence to the counterclaim dated the 1/2/2017 reiterated the contents of his defence and denied all the particulars of fraud levelled against her by the 1<sup>st</sup> Defendant.
7. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants vide their statement of defence filed on the 4/5/2017 denied the Plaintiffs claim and contended that they purchased their plots from the 1<sup>st</sup> Defendant who held an original ballot No 3516 from Nyakinyua Investments Limited. They further denied acts of fraud alleged by the Plaintiff. They urged the Court to cancel the title in the name of the Plaintiff as it was acquired through fraud. That they are bonafide purchasers of the land, have occupied the suit land since 2009 and developed the same hence have acquired proprietary rights therein.
8. The Plaintiff vide a reply to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants statement of defence reiterated the contents of her Plaint and urged the Court to dismiss the 1<sup>st</sup> and 2<sup>nd</sup> Defendants defence with costs.
9. In cross, DW5 stated that he paid the last instalment of Kshs. 180,000/- on 30/8/2012 and issued with the certificate on the same day. DW4 confirmed that Dex. 15 showed that he was buying Plot No.2 from Nyakinyua Murera Farm. That the secretary forgot to write the block number. He stated that at the time of his purchase, only Plot No. 2 was remaining and he never conducted any official search on the land.

### **The impugned Judgment**

10. Upon considering the pleadings and evidence tendered before it, the Hon. trial Court rendered its Judgment in favour of the Respondent on 1/7/2021. The Court observed that the fraudulent/collusion allegations levelled against the Respondent were not proven to the Court's satisfaction and therefore the counterclaim failed for want of proof. The Court was satisfied on a balance of probabilities that the totality of the Respondent's evidence in asserting her claim, was weighty and accordingly entered Judgment in her favour in terms of prayers a and c of the Plaint.
11. Upon hearing the parties the trial Court delivered its judgement on the 1/7/2021 in favour of the Plaintiff and dismissed the counterclaim of the 1<sup>st</sup> Defendant.



## The Appeal

12. The 1<sup>st</sup> Appellant is also aggrieved with the impugned Judgement and filed his appeal against the Plaintiff on the 4/3/2022 on the following grounds that the Learned Magistrate erred in law and fact in;
  - a. Failing to appreciate that the ballot paper and that the certificate in possession of the Plaintiff did not entitle her to the suit land
  - b. In delving to discredit the defence case and consequently failed to see that the Plaintiff had not on a balance of probabilities proved her case
  - c. In failing to appreciate that the Plaintiff's ballot, the crucial documents in this case contained unexplained alterations
  - d. Failing to appreciate the Plaintiff's documents were issued in the year 2014 long after the Defendants had occupied and developed the suit land
  - e. Totally misguided himself on the burden of proof
  - f. Dismissing the 1<sup>st</sup> Defendant's counterclaim where there had clear evidence of the 1<sup>st</sup> Defendant's acquisition of the land and also his occupation of the land six years prior to the Plaintiff's acquisition of the title.
13. He sought orders that the judgement of the trial Court be set aside and his counterclaim be allowed.
14. Aggrieved by the said judgement the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants filed an appeal on the grounds that the learned Magistrate erred in law and fact in;
  - a. Failing to find that there was the owner of the land RUIRU/RUIRU/EAST2/3516 despite the Plaintiff not producing sufficient evidence to show ownership.
  - b. Finding that the Respondent was the owner of the parcel of land against the weight of the evidence tendered before the Court
  - c. Finding that the documents produced by the Plaintiff were authentic without corroborating evidence by an official from Nyakinyua Investment Limited
  - d. Finding that the ballot card which was produced by the Plaintiff was authentic despite it belonging to another parcel of land.
  - e. Completely disregarding all the evidence that was tendered by the Appellants.
15. The 2<sup>nd</sup> and 3<sup>rd</sup> Appellants sought the following orders;
  - a. That the appeal be allowed and the judgement of the Court be set aside
  - b. That the costs of this appeal be awarded to the 1<sup>st</sup> and 2<sup>nd</sup> Appellants.



## The Written submissions

16. As to whether the learned Magistrate misguided himself on the burden of proof the 1<sup>st</sup> Appellant, relied on Section 107 of the *Evidence Act* and Halsbury's Laws of England , 4<sup>th</sup> Edition Vol 17 describes the burden of proof as follows;

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the Court to take action; thus a claimant must satisfy the Court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden.” (Emphasis added)

17. The 1<sup>st</sup> Applicant relied on the case of *Mbuthia Macharia Vs Annah Mutua & Another* [2017]eKLR on the shifting nature of the burden of proof where the Court stated as follows;

“The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the Appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies so will the evidential burden shift to the party who would fail without further evidence.”

18. The 1<sup>st</sup> Appellant submitted that the Respondent failed to discharge her evidential burden of proof for it to shift to the 1<sup>st</sup> Appellant. Further that she failed to prove her case on a balance of probability as is required in civil cases.
19. The 1<sup>st</sup> Appellant urged the Court to take into account the various inconsistencies in the Respondents case. That the Learned trial magistrate ought to have taken judicial notice that; the Respondent failed to explain how she acquired the land that is to say when and where she balloted for the land; she did not state that she was allocated two parcels of land by Nyakinyua.
20. In particular the 1<sup>st</sup> Appellant took issue with the receipt No 2899 issued on the 5/12/95 which predates the share certificate No 6932 issued in 2003; the receipt dated the 6/7/2006 which bears ballot No 2166 refers to share certificate No 6932 and receipt No 11636 dated the 1/10/2014 makes reference to the same share certificate No 6932 but with parcel No 3516. The 1<sup>st</sup> Appellant submitted that the Respondent would not have been allocated two plots and the introduction of the second plot was an attempt to mislead the Court and explain away the phrase “2<sup>nd</sup> certificate“ affixed on the certificate No 6932 as well as offer an explanation to the receipt dated 6/7/2006 bearing the ballot card No 2166.
21. Further it was submitted that the cancellation on the ballot card was not explained and faulted the Learned Magistrate for putting less weight on the unexplained alteration which was not countersigned by the Directors of Nyakinyua Investment Limited. Relying on the case of *David Waweru Gathoni Vs Joseph Kipkemoi Ruto* (2015) eKLR the 1<sup>st</sup> Appellant submitted that the alteration of the Plaintiffs plot A19 to A54 without countersigning casts doubt as to its authenticity. Moreso, the seal on the ballot is not visible and therefore its authenticity is in doubt. That the receipts were full of



inconsistencies as they predate the share certificate and also the size of the land is not indicated. That the Respondent used the questionable and fraudulent documents to secure the registration of the title in her name. That the inconsistencies ought to have been held in favour of the 1<sup>st</sup> Appellant. The 1<sup>st</sup> Appellant faulted the Respondent for not calling the makers of her documents. Relying on the case of *ASSL Vs ASMB (2020)* the 1<sup>st</sup> Appellant stated that the makers of the documents did not fall under the exceptions provided under Section 35(2) of the *Evidence Act* as Summons and Warrants of Arrest were issued to secure the attendance of Mr Kinyua the Director of the Nyakinyua Investments Limited and Mr Githongo the legal officer of Nyakinyua however the same were not executed. The only logical conclusion for the failure to call the makers of her documents was because the evidence would be adverse to her.

22. That the Appellants share certificates bears the original company stamp and seal. Its authenticity was never challenged or rebutted by any documentary and or testamentary evidence. That the evidence of the 1<sup>st</sup> Appellant has been corroborated by the DW2, the legal representative of Njeri Mwangi who was the original owner of the suit land. Upon her demise the DW2 sold the land to the 1<sup>st</sup> Appellant and put him in possession but upon application to the Directors of Nyakinyua they wilfully refused to transfer land on the grounds that it could only be transferred to a woman, it having been a women only company. It is at this particular point that the Directors purported to allocate the land to the Respondent.
23. It was submitted that the meaning of the phrase 2<sup>nd</sup> certificate is that the land in question was allocated to Njeri Mwangi first in 1998 vide share certificate no 6136 then in 2003 it was subsequently allocated to the Plaintiff. By this time the land was in the ownership of Njeri Mwangi. The 1<sup>st</sup> Appellant relied on the presupposition that once land is allocated the same cannot be allocated unless the first allocation is validly and lawfully cancelled. See the case of *M'Mukanga Vs M'Mbijjiwe (1984)* and *Elijah Wachiuri Nduru Vs Timothy Githaiga Mwangi (2016) eKLR*.
24. Further the 1<sup>st</sup> Appellant stated that instead of the company facilitating the transfer of the land to Njeri Mwangi it fraudulently conferred title to the Respondent. Borrowing from the maxim that where there are two equal equities the first in time shall prevail. That is to say the first that acquired the interest first should prevail in equity.
25. Relying on Section 26 of the *Land Registration Act* the 1<sup>st</sup> Appellant submitted that the conduct of the Respondent in colluding with the Directors of Nyakinyua Investments Limited is fraudulent. The Respondent having obtained the registration of the land fraudulently in her favour the appeal should succeed.
26. The 2<sup>nd</sup> and 3<sup>rd</sup> Appellants submitted that they purchased the plots from the 1<sup>st</sup> Defendant who was the holder of ballot No 3516 from Nyakinyua Investment Limited. That they have continued to construct residential houses since 2009 where they live upto today. That the Respondent did not raise any objection till 2016 when she filed suit. Like the 1<sup>st</sup> Appellant they took fault with the Respondent's documents and focused on the alleged inconsistencies on the Respondent's documents. Equally they faulted the Court in laying the burden of proof on the Appellants instead of the Respondent to proof that her title was genuine in the presence of the many consistencies.
27. That the burden of proof was not discharged by the Respondent .That she did not proof the root of her title and in the absence of a register from the company and or documentation leading to the issuance of a title there was n proof of her case on a balance of probabilities. They faulted the trail Court for being a witness and not an adjudicator by finding the documents produced by the Respondent authentic despite the discrepancies.



28. The Respondent summarised and condensed the grounds of the Appellants appeal into two questions for the Courts determination; the learned trial Court misguided himself on the burden of proof and that in dismissing the counterclaim despite clear evidence of the 1<sup>st</sup> Appellants acquisition and occupation of the land.
29. On the issue as to whether the learned trial Court misguided itself on the burden of proof, the Respondent relied entirely on the provisions of Section 107 (i) and (ii) on the proposition that the 1<sup>st</sup> Appellant did not proof his case on a balance of probabilities. That to the contrary the Respondent proved her case as follows; she is the registered owner of the suit land; purchased the suit land as supported by receipt Nos 2899 and 11636; clearance certificate from Nyakinyua Investment, transfer forms and Land control board consent
30. That the share certificate No 6136 in the name of Njeri Mwangi does not indicate a corresponding ballot number for the plot. The confirmation of grant in the estate of the late Njeri Mwangi did not include ballot No 3516 as part of the deceased estate and as such had no authority to sell the suit land to the 1<sup>st</sup> Appellant thus rendering the sale null and void.
31. Relying on Section 26 of the Registered *Land Act*, the Respondent submitted that none of the vitiating factors of a title have been demonstrated to impugn the title held by the Respondent.

#### **Analysis and determination.**

32. Having considered the Record of Appeal, the pleadings, the evidence led in the trial Court and all the materials placed before the Court the key issues for determination are;
  - a. Whether the Plaintiff proved her case.
  - b. Whether the 1<sup>st</sup> Appellant proved his case in the counterclaim.
  - c. Whether the learned trial magistrate misguided himself on the issue of burden of proof.
  - d. Whether the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants were bonafide purchasers for value without notice.
  - e. Whether the appeal has merit.
  - f. Who meets the cost of the appeal?

#### **The undisputed facts**

33. It is not disputed that the suit land emanates from Nyakinyua Investment Co. Limited. It is unfortunate that the said company was not enjoined so as to shed light on who the true owner of the share and ballot is.
34. The Plaintiff and the 1<sup>st</sup> Appellant claim the same ballot No 3516. The Court has been called upon to determine who between the two have discharged the burden of proof with respect to the ownership of the suit land.
35. The Plaintiff holds a title No RUIRU/RUIRU EAST BLOCK 2/3516 issued on the 8/2/2016, which title forms the source of the controversy in this dispute.

#### **The burden of proof**

36. The question as to whether the burden of proof was discharged by the parties has triggered grounds No 5 of the 1<sup>st</sup> Appellants appeal and 1, 2, 3, and 4 of the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants appeal.



37. The legal framework governing the burden of proof is enunciated in Sections 107, 108 and 109 of the Evidence Act. I shall reproduce them for effect as follows;

“ 107. Burden of proof

- (1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

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 that fact shall lie on any particular person.”

38. The standard of proof is the degree to which a party must prove its case to succeed. The burden of proof also known as the “onus” is the requirement to satisfy that standard. In civil cases, the burden of proof is on the claimant, and the standard required of them is that they prove the case against the Defendant “on a balance of probabilities”. This is unofficially described as the 51% test. This means the Court must be satisfied that on the evidence, the occurrence of an event was more likely than not. See the case of *Miller Vs. Minister Of Pensions* [1947] 2 ALL ER 372 as affirmed by the Court of Appeal in the case of *Palace Investments Limited Vs Geoffrey Kariuki Mwenda & Another* [2015] eKLR.

39. There were basically two cases in one in the trial Court; the Respondents case based on trespass and the 1<sup>st</sup> Appellants counterclaim was anchored on fraudulent acquisition of the title by the Plaintiff. The 2<sup>nd</sup> and 3<sup>rd</sup> Appellants supported the claim of the 1<sup>st</sup> Appellant on the grounds that the Respondent acquired the title fraudulently and the title should be revoked. In addition that they purchased the plots from the 1<sup>st</sup> Appellant who was the lawful owner and have been in possession since 2009 claim as purchasers. She sought orders inter alia of eviction.

40. I shall now inquire whether the parties have discharged their burden of proof and if the evidential burden shifted who bore the final onus to discharge it.

41. Trespass is defined to mean any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence. It is trite that a registered land owner, lease and or occupier has a right to bring a claim of trespass on land. In this case the Respondent has claimed that he is the rightful owner of the land and that the Appellants have without any colour of right permission and consent entered into her land and constructed illegal structures and should be evicted.

42. I shall now analyse the basis of the Respondent ownership of the land that is to say how she acquired the property. The Respondent led evidence that she acquired shares in Nyakinyua and was allocated two plots, one of which is the suit land. That upon balloting she was shown the suit land but she had no capacity to till the land. That she went to the suit land in 2014 and found no houses thereon.



43. The Respondent presented a ballot No 3516 with another number erased thereon. The ballot has been impugned by the 1<sup>st</sup> Appellant on this ground among others. The Learned Magistrate pronounced himself as thus on the issue;

“The Plaintiff on the other hand too had a ballot card bearing the number 3516. Just like the ballot card that had been produced by the defence, the number 3516 had been typed. On the ballot card that the Plaintiff produced, the number 1209 (D) had been written and then crossed out. Even though the Defendant raised an issue with the said alteration in his submissions, this Court did not consider it a material factor as it relied on the number that had been typed and not the one that had been handwritten. The Plaintiff further produced receipt numbers 2899 and 11636 onto which was endorsed the number 3516 as the parcel number. Apart from that, the Plaintiff availed a Clearance Certificate from Nyakinyua Investments dated August 5, 2016, transfer forms duly executed by Nyakinyua, as well as a consent from the Land Control Board having basis on how she got issued with a title deed over the land in issue in this case. All these documents, including the application for the Land Board Consent had been executed by Nyakinyua Investments. The weight that they carried was bigger compared to the weight that the defense documents carried. That weight could only be impeached had the defense tendered evidence to prove that the Plaintiff acquired the said documents through fraud and forgery. That was not done. It is on this basis that I find the Plaintiff to have proved her case on a balance of probabilities. Her suit is allowed in terms of prayer (a) of the Plaintiff.”

44. My analysis of the ballot does not support any fraud on the part of the Respondent. The erased number is not in issue and for that reason I find no ground to fault the Learned Trial Magistrate.
45. The Respondent presented share certificate No 6932 issued on the 8/7/2003. The certificate is witnessed by the Directors of Nyakinyua namely; Nduta Ndirangu and Lucia Nyagaki. On the 5/12/95 a receipt was issued for the sum of 3000/- for the payment of the 2<sup>nd</sup> Murera share. on it is endorsed the words “certificate issued on the 8/7/2003” and “land parcel 3516”. There is another receipt issued on the 6/9/2006 for ¼ acre of land with ballot No 2166 superimposed thereon in her name. This was for titling and survey. This supports the averment by the Respondent that she was allotted two parcels of land. The receipt No 11636 issued on the 1/1/2014 in the name of the Respondent contains the certificate No 6932 parcel 3516 and the size of the land is one acre which corresponds with the acreage on the title RUIRU/RUIRU EAST BLOCK2/3516 measuring 0.400 ha or 1 acre.
46. On the 5/8/2006 the Respondent was issued with a clearance certificate Ref No RRE/1204 addressed to the Registrar of Lands confirming that the Respondent is the owner of parcel 3516. The clearance letter is signed by Nduta Ndirangu, a Director of Nyakinyua. The same Nduta Ndirangu signed the application for Land Control Board on the part of Nyakinyua leading to the issuance of the Land Control Board consent on the 4/11/2014 transferring the suit land to the Respondent. A transfer form was subsequently executed by the said Directors of Nyakinyua and the Respondent leading to the issuance of the title on the 8/2/2016.
47. It is this title that has been impugned by the 1<sup>st</sup> Appellant on grounds of fraud as set out in his counterclaim as follows;

“Particulars of fraud;

- a. Obtaining registration to the land belonging to the 1<sup>st</sup> Defendant



- b. Having a transfer executed by the Directors who were not in office
  - c. Obtaining title to land already occupied and developed”
48. The immediate inquiry is whether the 1<sup>st</sup> Appellant discharged his burden on proof with respect to the charge of fraud and whether he has successfully impeached the title of the Appellant.
49. Courts have uncompromisingly held that title in Kenya is protected under *the Constitution* of Kenya and any title with a taint is not protected under Article 40 (6) of *the Constitution* of Kenya. Additional legal protections of a valid title are found in the framework of Section 24, 25 and 26 of the *Land Registration Act*. I shall quote the Sections for relevance and emphasis;

“24 Subject to this Act-

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25. Rights of a proprietor

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
  - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
  - (b) to such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

26. Certificate of title to be held as conclusive evidence of proprietorship

- (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.”

50. The Court is mandated to take a certificate of title as prima facie evidence that the person named as the proprietor of the land is the absolute and indefeasible owner subject to the limitations permitted in law and may be challenged on the ground of fraud or misrepresentation to which the person is proved to be a party or where the certificate has been acquired illegally unprocedurally or through a corrupt scheme.

51. Fraud is defined as-

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a Court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.”

52. Where a title is challenged on account of fraud, the law is clear that fraud must be pleaded and proved. This has been buttressed in the Court of Appeal case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR, where Tunoi, JA. (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

53. In the Court of Appeal case of *Arthi Highway Developers Limited Vs. West End Butchery Limited & 6 Others* [2015] eKLR it was settled that a person who holds a bad title cannot pass a good title to a purchaser.

54. It is now my turn to analyse the documents presented by the 1<sup>st</sup> Appellant in support of his case. The Appellant claims to be the owner of the land. That he acquired it from Mwangi, the son of Mary Njeri, deceased who is the legal administrator and beneficiary of the estate of Mary Njeri.

55. The 1<sup>st</sup> Appellant relied on the documents as follows; certificate of share Nos 5602 dated the 27/8/1993, certificate No 6136 dated the 11/3/1998 and certificate No 3117 which was not produced



but mentioned in the confirmation of grant dated the 6/3/2009. There is a receipt No 3539 for one acre of land issued on the 1/1/1995 and a ballot No 3516. In all these documents there is no nexus between the ballot and the share certificates produced. It was the 1<sup>st</sup> Appellants case that he purchased ballot No 3516 represented by share certificate No 6136. I have carefully perused this share certificate which has a ballot No 931 superimposed on it. There is therefore no nexus whatsoever between ballot No 3516 and the share certificate No 6316. This gap is consistent in the share certificates, the receipts, the Chief's letter dated the 31/3/2008 and the confirmation of grant dated the 12/6/2008. The 1<sup>st</sup> Appellant failed to present a members register which would create a nexus between the shareholder, the ballot and the share certificate. There is no evidence that share certificate No 6316 or ballot No 3516 is the suit land.

56. Further the agreement of sale between Mwangi and the 1<sup>st</sup> Appellant does not disclose the land reference number nor the share certificate Number. It only mentions ballot No 3516.
57. I agree with the Learned Magistrate that the share register ought to have been presented by calling the officials of the company to testify and shed light on the issue. I have seen that witness summons were issued including warrants of arrest but the same were not procured. It is trite that the one who stands to lose the most should procure the evidence in support of his case. Regrettably the 1<sup>st</sup> Appellant fell in this trap. By failing to present or cause the register from being presented he failed to demonstrate the nexus between the share certificate No 6316 and the ballot No 3516. To the contrary the Respondent has produced unbroken evidence leading to the title.
58. For the above reasons the weight of evidence therefore does not favour the case of the 1<sup>st</sup> Appellant. It weighs in favour of the Respondent.
59. The third issue that I wish to address is the claim of the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants. They aver that the purchased the property from the 1<sup>st</sup> Appellant after due diligence. Evidence was led by Mwangi that he did not succeed in transferring the land to the name of the 1<sup>st</sup> Appellant at the offices of Nyakinyua. The 1<sup>st</sup> Appellant alleges to have purchased the land taken possession and subdivided and sold to the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants who claim to be bonafide purchasers.
60. On the definition of a bonafide purchaser, I rely on the decision in the case of Lawrence Mukiri v. Attorney General & 4 Others [2013]eKLR where the Court stated what amounts to "bonafide purchaser for value" thus:

".... bona fide purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following:

- a. He holds a Certificate of Title.
- b. He purchased the Property in good faith;
- c. He had no knowledge of the fraud;
- d. The vendors had apparent valid title;
- e. He purchased without notice of any fraud;
- f. He was not party to any fraud.

A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner. "



61. The 2<sup>nd</sup> and 3<sup>rd</sup> Appellants have not demonstrated that the 1<sup>st</sup> Appellant held a valid title, that there was an apparent title nor that they carried out any due diligence to satisfy themselves that the 1<sup>st</sup> Appellant held a valid title. They were contented with mere land certificates which have no force of the law. I find that they acquired no valid title from the 1<sup>st</sup> Appellant who also did not acquire an identifiable and good title from the estate of Mary Njoki.
62. Between the 1<sup>st</sup> Appellant and the Respondent the Respondent holds a better title protected in law.

### **Conclusion**

63. For the reasons above I find that the Appellants have failed to prove their case. The Learned Magistrate did not misguide himself in interpreting the burden of proof. The 1<sup>st</sup> Appellant acquired nothing and conveyed nothing to the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants. They are however without a remedy as their relief lies elsewhere. I say no more.

### **Costs.**

64. The Respondent having succeeded in the lower Court and on appeal I find no reason to deny her costs.
65. Final orders
  - a. In the end I find the appeal is without merit.
  - b. It is dismissed with costs in favour of the Respondent.
66. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 24<sup>TH</sup> DAY OF APRIL, 2023  
VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

Delivered online in the presence of;

Ms Waithira Mwangi for 1<sup>st</sup> Appellant

Ms. Etole for 2<sup>nd</sup> and 3<sup>rd</sup> Appellants

Ms. Wakori HB Ngigi for Respondent

Court Assistants – Kevin/Lilian

