



**Kioni v Kariuki (Environment and Land Appeal E003 of 2020)
[2023] KEELC 18507 (KLR) (29 June 2023) (Judgment)**

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**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT AND LAND APPEAL E003 OF 2020**

**YM ANGIMA, J
JUNE 29, 2023**

BETWEEN

ESAU KIHUMBA KIONI APPELLANT

AND

JAMES GATHAIYA KARIUKI RESPONDENT

(Appeal against the judgment and decree of Hon. S.N. Mwangi (SRM) dated September 23, 2020 in Nyabururu CM ELC Number 62 of 2018 (Formerly Nyabururu CMCC No 47 of 2013) – Esau Kihumba Kioni v James Gathaiya Kariuki.)

JUDGMENT

A. Introduction

1. This is an appeal against the judgment and decree of Hon SN Mwangi (SRM) dated September 23, 2020 in Nyahururu CM ELC No 47 of 2013 – Esau Kihumba Kioni v James Gathaiya Kariuki. By the said judgment, the trial court dismissed the Appellant’s claim and allowed the Respondent’s counterclaim in part only. The Respondent was awarded costs of both the suit and counter-claim.

B. Background

2. Vide a plaint dated and filed on March 26, 2013 the Appellant sued the Respondent seeking the following reliefs:
 - a. An order for eviction evicting the Defendant, his family and properties from LR No Laikipia/ UASO Narok/972 and damages for trespass.
 - b. Costs of suit.
 - c. Interest on (a) and (b) above at court rates.



3. The Appellant pleaded that at all material times he was registered proprietor of Title No Laikipia/UASO Narok/972 (the suit property). It was pleaded that the Respondent had wrongfully and unlawfully entered and occupied the suit property. It was further pleaded that despite service of a demand and notice of intention to sue the Respondent had failed to remedy the situation hence the suit.
4. In response to the suit, the Respondent filed a defence and counterclaim dated April 1, 2013. By his defence, the Respondent denied liability for the Appellant's claim. He denied that the Appellant was the registered proprietor of the suit property and pleaded that if he was so registered then such registration was illegally and fraudulently obtained.
5. The Respondent asserted that he was the lawful and legitimate allottee of the suit property from the Government of Kenya having been allocated the same on July 3, 2000. He further pleaded that one Lilian Wanjiku Kimani (Lilian) had illegally and fraudulently obtained title to the suit property before purporting to transfer the same to the Appellant. The Respondent pleaded several particulars of alleged fraud and illegality against Lilian who was joined as a Defendant in the counterclaim. It was contended that Lilian could not confer a good title to the Appellant on account of the alleged fraud and illegality.
6. The Respondent further pleaded that he had been in quiet and peaceful possession and occupation of the suit property since 2002 without any interruption by reason of being the legitimate owner thereof. He consequently prayed for dismissal of the Appellant's suit with costs.
7. By his counterclaim, the Respondent reiterated the contents of the defence and pleaded that he was the legitimate allottee and owner of the suit property by reason of a letter of allotment dated July 3, 2000 issued to him by the government of Kenya. The Respondent contended that he had been in peaceful possession of the suit property since 2002 and that Lilian had obtained registration thereof through fraudulent and illegal means. He pleaded several particulars of fraud and illegality against her.
8. It was the Respondent's counterclaim that Lilian did not obtain a legitimate title to the suit property hence she would not pass or confer a good title upon the Appellant. The Respondent also contended that the Appellant did not follow all the laid down procedures in obtaining transfer of the suit property from Lilian. He consequently sought the following reliefs in his counterclaim:
 - a. A declaration that the 1st Defendant's registration as proprietor and the subsequent transfer to the 2nd Defendant was fraudulent, illegal and unlawful and cancellation of the said title deed issued in respect to parcel of land number Laikipia/UASO Narok/972.
 - b. A declaration that the Plaintiff to counterclaim is the rightful owner of Laikipia/UASO Narok/972 which he has occupied since 2002 and issuance of title deed in his favour.
 - c. Costs of this suit plus interest at court rates.
 - d. Any other or further relief that this Honourable Court may deem fit and just to grant.
9. The record shows that the Appellant filed a reply to defence and defence to counterclaim dated April 24, 2013. By his reply to defence, the Appellant joined issue with the Respondent upon his defence and reiterated the contents of his plaint. The Appellant denied that either he or Lilian obtained registration of the suit property through illegal or fraudulent means. He also denied that Lilian was incapable of passing a good title to him.
10. The Appellant contended that Lilian's registration was a first registration under the repealed Registered Land Act the suit property since 2002 and pleaded that the Respondent only started interfering with the suit property in 2012.



11. In his defence to counterclaim, the Appellant denied liability in toto. He denied knowledge of the Respondent's allocation of the suit property by the Government of Kenya and put him to strict proof thereof. He denied that he did not follow due process in obtaining the transfer of the suit property from Lilian. The Appellant denied that the court had jurisdiction to order cancellation of a title deed and to grant the declarations sought in the counterclaim. He consequently prayed for dismissal of the counterclaim with costs.
12. The record further shows that Lilian, who was the 1st Defendant in the counterclaim, filed a defence to counterclaim dated August 1, 2013 denying the Respondent's counterclaim in its entirety. She pleaded that she was not aware of the Respondent's allocation of the suit property or any payment made for the allotment. She denied that the Respondent took possession of the suit property in 2002 and put him to strict proof thereof.
13. She further pleaded that the Appellant was a *bona fide* purchaser for value without notice of the Respondent's purported claim. She contended that her registration was a first registration under the repealed *Registered Land Act* hence indefeasible in law. She denied that she could not pass a good title to the Appellant as claimed by the Respondent. She also denied the illegality and fraud alleged against her together with the particulars thereof as pleaded in the counterclaim. She further denied that she did not follow due process in obtaining her registration and contended that the court had no jurisdiction to grant the orders sought in the counterclaim. She consequently prayed for dismissal thereof.

C. Trial Court's Decision

14. The record shows that the Appellant and the Respondent called evidence at the trial but Lilian did not attend court or call any evidence at the trial. Upon consideration of the evidence tendered at the hearing the trial court found and held that the Appellant had failed to prove his claim to the required standard. The trial court held that Lilian had obtained registration of the suit property through illegal or fraudulent means hence the Appellant did not obtain a good title thereto. The trial court further held that the Appellant was not *bona fide* purchaser for value of the suit property since he was privy to fraud and illegality.
15. Although the trial court found that the Appellant's title deed was liable to be cancelled it did not declare the Respondent the legitimate owner of the suit property on account of failure to make full payment of all the dues to the Government of Kenya as per his letter of allotment. Consequently, the trial court directed that the Appellant's title to the suit property be cancelled and that the same do revert to the Government of Kenya.

D. Grounds of appeal

16. Being aggrieved by the said judgment and decree the Appellant filed a memorandum of appeal dated 21.10.2020 raising the following sixteen (16) grounds of appeal:
 - a. The learned Senior Resident Magistrate erred in law and fact in adjudicating on and determining issues not pleaded by the parties such as the issue of a Sale Agreement between the Appellant and Lilian Wanjiku Kimani, Section 23 of the *Law of Contract Act*, Cap 23 Laws of Kenya, Land Control Board Consent and Section 6 of the *Land Control Act* Cap 302 Laws of Kenya in total disregard of trite law that parties are bound by their pleadings. A miscarriage of justice was thereby occasioned.
 - b. The Learned trial Magistrate erred in Law in relying on the purported computerized register produced by DW2, Purity Wanjiru Mwangi, when it was not admissible in evidence for failure



to comply with Section 106 B (2) and (4) of the Evidence Act . A miscarriage of justice was thereby occasioned.

- c. In so far as the Defendant does not prove to the Court that he met the special conditions in the letter of allotment, the Learned trial Magistrate erred in allowing his purported Counter-Claim. A miscarriage of justice was thereby occasioned.
- d. The Learned Magistrate erred in Law in framing the issues in totally ignoring the Plaintiff's Claim completely. A miscarriage of justice was thereby occasioned.
- e. The Learned trial Magistrate erred in Law in completely disregarding the sanctity of a certificate of title as provided by Section 26 of the Land Registration Act, Number 3 of 2012 and going behind such registration when the issue of Sale agreement and consent of the Land Control Board had not been pleaded. A miscarriage of justice was thereby occasioned.
- f. The Learned trial Magistrate erred in Law in shifting the burden of the validity of the title deed to Appellant Contrary to Section 107 (1), 108 and 109 of the Evidence Act Cap 80 Laws of Kenya which clearly provides that he who alleges must prove. A miscarriage of justice was thereby occasioned.
- g. The learned trial Magistrate erred in Law in failing to find and hold that the Defendant's Counter- Claim was statutorily barred under Sections 4 and 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya, a title deed having been issued to Lilian Wanjiku Kimani in the year 2002. A miscarriage of justice was thereby occasioned.
- h. The Learned trial Magistrate erred in Law in finding and holding that Lilian Wanjiku Kimani was issued with a title deed which she was not entitled to when there was no such evidence produced by the Land Registrar or anyone else. A miscarriage of justice was thereby occasioned.
- i. The Learned trial Magistrate erred in Law and fact in finding that it was improper and unprocedural for the Land Registrar Laikipia to issue the title deed to the Suitland to Lilian Wanjiku Kimani when the land Registrar, Laikipia and the Land Adjudication and Settlement Officer Laikipia had not been joined as parties to the Suit and there was no such evidence and was not an issue before the Court on record. A miscarriage of justice was thereby occasioned.
- j. The Learned trial Magistrate erred in Law in finding and holding that the Plaintiff obtained the title deed to the Suitland either by fraud, misrepresentation or unprocedurally when there is no such evidence and was not an issue before the Court.. A miscarriage of justice was thereby occasioned.
- k. The learned trial Magistrate erred in Law in finding and holding that the Plaintiff knew that he was receiving a property that was fraudulently acquired and was a party to the fraud when there is no such evidence on record.
- l. The Learned trial Magistrate erred in Law and fact in finding and holding that the Defendant is the rightful owner of the Suit Land when he had not produced evidence to show that he met the special conditions in the letter of allotment that the land had been transferred to him by the settlement fund trustees. The miscarriage of justice was thereby occasioned.
- m. The Learned trial Magistrate erred in Law in cancelling the Plaintiff's title deed even after finding that the Defendant did not comply with the special conditions of the Letter of allotment and when the Plaintiff was only a *bona fide* purchaser of value and there was no proof of fraud on the part of Lilian Wanjiku Kimani who transferred the land to the Plaintiff. A miscarriage of justice was thereby occasioned.



- n. The Learned Trial Magistrate erred in law in ordering the cancellation of the title deed to L.R Number Laikipia/ Uaso / Narok/972 issued to the Plaintiff and the same to revert to the Government of Kenya when there was no such pleading or prayer. A miscarriage of justice was thereby occasioned.
 - o. The Learned trial Magistrate erred in law in disregarding the Plaintiff's submissions and authorities which clearly set out the Law. A miscarriage of justice was thereby occasioned.
 - p. The learned trial Magistrate's judgment is not based on the evidence on record and relies on extraneous facts and issues. A miscarriage of justice was thereby occasioned.
17. As a result, the Appellant sought the following reliefs in the appeal:
- a. That the Judgment and the decree of the Senior Resident Magistrate dated September 23, 2020 in Nyahururu CM ELC Number 62 of 2018 (Formerly Nyahururu CMCC No 47 of 2013) be set aside and be substituted with an Order allowing the Plaintiff's claim and dismissing the Defendant's Counter- Claim.
 - b. That the costs of the appeal and proceedings of the trial court be borne by the Respondent.

E. Directions on Submissions

18. When the appeal was listed for directions it was directed, with the concurrence of the parties, that the same shall be canvassed through written submissions. Consequently, the parties were granted timelines within which to file and exchange their respective submissions. The record shows that the Appellant's submissions were filed on March 14, 2023 whereas the Respondent's submissions were filed on May 10, 2023.

F. Issues for Determination

19. Although the Appellant raised ten (10) grounds of appeal in his memorandum of appeal, the court is of the opinion that resolution of the following 5 issues shall effectively determine the appeal:
- a. Whether the trial court erred in law in framing wrong issues for determination which were not pleaded by the parties.
 - b. Whether the trial court erred in law in admitting electronic evidence contrary to Section 106 B of the *Evidence Act* (Cap. 80).
 - c. Whether the trial court erred in law and fact in holding that Lilian had obtained registration of the suit property illegally and fraudulently.
 - d. Whether the trial court erred in law in holding that the Appellant did not obtain a good title from Lilian.
 - e. Who shall bear costs of the appeal and of the proceedings before the trial court.

G. Applicable Legal Principles

20. This court as a first appellate court has a duty to analyze, reconsider and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial court. The



principles which guide a first appellate court were summarized in the case of *Selle & another v Associated Motor Boat Co. Ltd & others* [1968] EA 123 at P.126 as follows:

“...Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression on the demeanor of a witness is inconsistent with the evidence in the case generally.”

21. Similarly, in the case of *Peters v Sunday Post Ltd* [1958] EA 424 Sir Kenneth O’ Connor, P. rendered the applicable principles as follows:

“...it is strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion...”

22. In the same case, Sir Kenneth O’Connor quoted Viscount Simon, L.C in *Watt v Thomas* [1947] A.C. 424 at page 429 – 430 as follows:

“My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the class of cases in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a Tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other Tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.”

23. In the case of *Kapsiran Clan v Kasagur Clan* [2018] eKLR Obwayo J summarized the applicable principles as follows:

(a) First, on first appeal, the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;



- (b) In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
- (c) It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.”

H. Analysis and Determination

a. Whether the trial court erred in law in framing the wrong issues for determination which were not pleaded by the parties

24. The court has considered the material and submissions on record on this issue. The Appellant submitted that the trial court erred in law in framing and determining issues which were not pleaded by the parties. In particular, it was submitted that the existence and the validity of the sale agreement between Lilian and the Appellant and the issue of the consent of the Land Control Board (LCB) for the sale transaction were not pleaded by the parties hence it was not open to the trial court to determine those issues. The Appellant cited the case of *World Explorers Safaris Ltd v Cosmopolitan Travel Limited & another* [2021] eKLR for the proposition that a court of law ought not to determine an issue not pleaded by the parties unless the issue is left to the decision of the court by the parties.
25. The Respondent, on the other hand, submitted that the trial court did not err in determining those issues since he had pleaded that the Appellant did not follow due process in his acquisition of the suit property and the parties led evidence on the Appellant’s acquisition of the impugned title hence it was open to the trial court to make a decision thereon by taking onto account all the relevant factors. The Respondent also relied upon the *World Explorers Safaris Limited* Case cited by the Appellant in support of his submissions.
26. The court has perused the judgment of the trial court. It is evident from pages 364 – 365 of the record of appeal that the trial court framed the following issues for determination in the suit and counterclaim before it:
 - a. Whether the Plaintiff (now the Appellant) has a valid title.
 - b. Whether the title deed of the Plaintiff is liable to be cancelled.
 - c. Whether the Plaintiff can be said to be a *bona fide* purchaser for value without notice.
 - d. Whether the Defendant (now Respondent) is entitled to the prayers sought in the counterclaim.
27. The court is of the opinion that even though the trial court correctly framed the issues which arose from the pleadings of the parties, it delved into other matters which were not raised in the pleadings whilst considering the first issue of whether or not the Appellant held a valid title to the suit property. The court is of the view that in its consideration of the issue, the trial court ought to have confined itself to matters which were pleaded by the parties and to the evidence which was led thereon. The material on record shows that the Respondent’s defence and counterclaim was fundamentally based upon the alleged fraud and illegality on the part of Lilian in her acquisition of the title deed to the suit property.
28. The Respondent’s challenge to the Appellant’s title was not based on the validity of the sale agreement between Lilian and the Appellant. It was also not based on the lack of consent of the LCB for the transaction. It was primarily based upon the alleged fraud and illegality on the part of Lilian particulars whereof were pleaded in the defence and counterclaim. The court is thus of the opinion that the trial



court erred in law in considering and determining matters which were neither specifically pleaded nor left to the decision of the court by the parties.

b. Whether the trial court erred in law in admitting electronic evidence contrary to Section 106 B of the *Evidence Act* (Cap. 80)

29. The Appellant submitted that the trial court erred in law in admitting the two computer print outs of the register for the settlement scheme the subject of the dispute without a certificate from the person who printed the register in violation of Section 106 B of the *Evidence Act*. The said registers were produced at the trial and marked as exhibits 6(a) and (b). The Appellant cited the case of *Peter Wabiga Kabiru & 2 others v Republic* [2019] eKLR in support of his submission.
30. The Respondent submitted that the Appellant did not challenge the admissibility of the registers at the trial and during his submissions before the trial court. The court was, therefore, urged to dismiss this ground of appeal and hold that the registers were properly admitted in evidence.
31. Section 106 B of the *Evidence Act* (Cap 80) stipulates as follows:
 1. Notwithstanding anything contained in this act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as "computer output") shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.
 2. The conditions mentioned in subsection (1), in respect of a computer output, are the following:
 - (a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer.
 - (b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;
 - (c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and
 - (d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.
 3. Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in paragraph (a) of subsection (2) was regularly performed by computers, whether—
 - (a) by combination of computers operating in succession over that period; or
 - (b) by different computers operating in succession over that period; or



- (c) in any manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers,

Then all computers used for that purpose during that period shall be treated for the purposes of this section to constitute a single computer and references in this sections to a computer shall be construed accordingly.

- 4. In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—

- (a) identifying the electronic record containing the statement and describing the manner in which it was produced;
- (b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;
- (c) dealing with any matters to which conditions mentioned in subsection (2) relate; and
- (d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate),

Shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.

- 5. For the purpose of this section, information is supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of an appropriate equipment, whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purpose of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities.”

- 32. In the [Peter Wabiga Kabiru](#) Case (*supra*) which was cited by the Appellant, it was held by the Court of Appeal, inter alia, that:

“In a recent case by this Court sitting at Kisumu, County Assembly of Kisumu 2 Others vs. Kisumu County Assembly Service Board 6 Others [20151 KLR, it was held that the provisions of Section 106 B of the said Act were mandatory in nature and that a court should not admit in evidence or rely on manipulated electronic evidence or record. At paragraph 67 of the judgment in relation to production of electronic evidence, it was held that:

“...the relevant conditions in that section are (a) if the computer output was recorded by a person having lawful control over the computer used; (b) if the output was recorded in the ordinary course of that persons activities using a computer or some other electronic device and fed into a computer that was properly operating throughout the material period; and (c) if that person gives a certificate that to the best of his knowledge, the output is an electronic record of the information it contains and describes the manner in which it was produced.”

- 33. The court is satisfied from the material on record that the conditions for the admission of the 2 computer printouts produced by DW2 were not satisfied as required under Section 106 B of the [Evidence Act](#). It is evident from the record that DW2 did not know which computer printed out the



documents and who had printed them. She was not even the person who had stamped the documents hence she could not tell whether the output was recorded in the ordinary course of duty and whether the relevant computer was properly operating and functioning at the material time. The court is thus of the opinion that the trial court erred in law in admitting the computer print-outs in the circumstances.

34. The court does not agree with the Respondent's submissions that their admission should be upheld simply because the Appellant did not object to their production at the trial. The court takes this view because the requirements of Section 106 B of the Evidence Act (Cap. 80) are mandatory in nature.

c. Whether the trial court erred in law and fact in holding that Lilian had obtained title to the suit property illegally and fraudulently

35. The court has considered the material and submissions on record on this issue. Whereas the Appellant submitted that there was no evidence before the trial court to demonstrate that Lilian had obtained registration of the suit property through illegal and fraudulent means, the Respondent contended otherwise.
36. It is evident from the material on record that Lilian was sued as the 1st Defendant in the counterclaim. The Respondent alleged fraud and illegality in her acquisition of the suit property and pleaded several particulars of fraud and illegality against her. Although she filed a defence to the counterclaim, she did not tender any evidence at the trial to demonstrate that she was allocated the suit property and that she was not party to any fraud or illegality in her acquisition of the title deed. She did not produce a copy of her letter of allotment, if any, and any documents supporting the root of her title. It is only the Respondent who produced his letter of allotment and payment receipt for the suit property. The production of a copy of a title deed in one's name does not necessarily demonstrate that one was allocated the property by the Government of Kenya.
37. The court has further noted that although Lilian's letter of allotment was not produced at the trial, the Appellant sneaked in a purported letter of allotment in the name of Lilian Wanjiku Kimani dated July 3, 2000. It is strange that although the Appellant produced a copy of the Respondent's letter of allotment at the trial, he did not produce any in the name of Lilian. The question which then arises is why Lilian's letter was never produced at the trial if it actually existed at the time. Be that as it may, the court finds no evidence on record to support Lilian's purported allocation of the suit property. Even without considering the computer print-outs which were produced by DW2, her oral evidence at the trial indicated that it was the Respondent and not Lilian who was allocated the suit property by the government.
38. The court is thus of the opinion that the trial court was right in holding that there was no evidence of allocation of the suit property to Lilian and that her registration as proprietor without any supporting allocation was both fraudulent and illegal. The court finds no error on the part of the trial court in reaching that conclusion on the basis of the evidence on record.

d. Whether the trial court erred in law in holding that the Appellant did not obtain a good title from Lilian

39. The Appellant submitted that the trial court erred in holding that he did not obtain a good title from Lilian since there was no evidence that he obtained registration through fraud. It was further submitted that no fraud, misrepresentation or illegality was pleaded against the Appellant by the Respondent hence the trial court erred in law and fact in holding that the Appellant was privy to fraud or illegality.
40. The court agrees with the Appellant's contention that there was no fraud or illegality pleaded against him by the Respondent in his defence and counterclaim. There were no particulars of fraud or illegality



pleaded against him. However, being privy to fraud and illegality are not the only factors which can vitiate a title to property. For instance, Section 26 (1) of the [Land Registration Act](#) under which the Appellant's title was issued stipulates as follows:

- (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.”

41. It is evident that whereas under Section 26(1) (a) the proprietor is required to be party or privy to the fraud or misrepresentation for the title to become impeachable, there is no such requirement under Section 26(1) (b) of the Act as long as the title was obtained illegally, irregularly or through some corrupt practice. See [Elijah Makeri Nyangwara v Stephen Mungai Njuguna & Another](#) [2013] eKLR.
42. Similarly, in the case of [Munyu Maina v Hiram Gathia Maina](#) [2013] eKLR it was held by the Court of Appeal, *inter alia*, that:

“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 legality of how he acquired the title and show that the acquisition was legal, and free from any encumbrances including any and all interests which need not be noted in the register.”

43. The court has already found and held that there is no evidence on record to demonstrate that Lilian was ever allocated the suit property by the government. There is no evidence that she ever complied with the terms and conditions of any such allotment. In fact, the evidence on record shows that it was the Appellant who was allocated the suit property. In the premises, there was no legal basis upon which Lilian could have been legitimately registered as a proprietor and issued with a title deed. The said title must have issued illegally and irregularly within the meaning of Section 26 (1)(b) of the [Act](#).
44. It would therefore follow that if she had no valid title to the suit property she had none to pass to the Appellant as the purported purchaser. A person who has no legal interest in property cannot pass a good title to a purchaser. The Supreme Court has recently held in the case of [Dina Management Ltd v County Government of Mombasa & 5 Others](#) Petition No 8 (E010) of 2021 that a person who has acquired property through illegal and unlawful means cannot pass a good title to a purchaser.
45. Although the Appellant faulted the trial court for determining the question of whether or not he was a *bona fide* purchaser for value, the court is of the opinion that the trial court was entitled to determine the issue because it was pleaded in Lilian's defence dated August 1, 2013. [Black Law Dictionary](#) 10th Edition defines a *bona fide* purchaser as follows:

“Someone who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims. Generally, a *bona fide* purchaser for value is not



affected by the transferor's fraud against a third party and has a superior right to the transferred property as against the transferor's creditor to the extent of the consideration that the purchaser has paid.”

46. It is evident from the material on record that there was no evidence before the trial court to demonstrate that the Appellant actually bought the suit property from Lilian for valuable consideration. Neither the Appellant nor Lilian produced any sale agreement or evidence of payment at the trial. There was no evidence that the Appellant bought it without notice of any adverse claim because the material on record shows that the Respondent was in possession of the suit property at the material time and had been in possession for several years prior to the purported sale. Consequently, the trial court was justified in finding and holding that there was no evidence to demonstrate that the Appellant was a *bona fide* purchaser for value without notice of the Respondent's claim to the suit property.

e. Whether the trial court erred in law and fact in dismissing the Appellant's suit

47. The court has already found and held that the trial court was right in holding that Lilian had obtained title to the suit property illegally and fraudulently. The court has also found that the trial court was right in holding that Lilian did not pass a good title to the Appellant. Although the trial court erred in considering some questions which were not placed before it by the parties and although the trial court erred in admitting electronic evidence which was not admissible under the *Evidence Act*, the court is, nevertheless, of the opinion that the admissible evidence on record still leads to the same conclusion which the trial court reached. The Appellant did not obtain a good title to the suit property hence he was not entitled to the reliefs sought in his suit.
48. The only other issue to be considered on the ownership of the suit property is the appropriate orders to be made in the circumstances. The material on record shows that the Respondent was the legitimate allottee of the suit property and that he paid the allotment fee of Kshs 5000/= to the Settlement Fund Trustees. The balance of Kshs 1,375.00 was to be paid at the Land Registry. The material on record, however, shows that the Respondent was unable to make the payment because Lilian had already obtained title to the suit property through fraudulent means. The Respondent was always ready and willing to pay the balance to the Land Registry but his file could not be traced. There is a letter of complaint on record by the Respondent complaining about his inability to pay due to unavailability of the relevant file.
49. The powers of an appellate court are provided for under Order 42 rule 32 of the *Civil Procedure Rules* as follows:
- “The court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the Respondents although such Respondents may not have filed any appeal or cross-appeal.”
50. The court is thus of the opinion that in order to meet the ends of justice and to achieve completeness in the adjudication of the appeal, the court should make an order restoring the suit property to the Respondent under Order 42 rule 32 of the *Civil Procedure Rules*. Accordingly, the court shall make an order directing the Chief Land Registrar to restore the suit property to the Respondent upon payment of the outstanding balance in the sum of Kshs 1,375.00.



f. Who shall bear costs of the appeal and the suit before the trial court

51. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso 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. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason why the successful party should not be awarded costs of the appeal and of the proceedings before the trial court. The Appellant shall bear the costs of the appeal whereas Lilian shall bear the costs of the proceedings before the trial court by paying the Appellant and the Respondent costs because of her illegal and fraudulent dealings with the suit property.

I. Conclusion and Disposal Order

52. The upshot of the foregoing is that the court finds no merit in the Appellant’s appeal. The court is further of the opinion that it should make an appropriate order under Order 42 rule 32 of the *Civil Procedure Rules* restoring the suit property to the Respondent as the legitimate allottee thereof. Consequently, the court makes the following orders for disposal of the appeal:

- (a) The Appellant’s appeal be and is hereby dismissed with costs to the Respondent.
- (b) The declaration be and is hereby made that the Respondent is the lawful allottee of Title No Laikipia/UASO Narok/972.
- (c) The order of the trial court directing that the suit property shall revert to the Government of Kenya is hereby set aside.
- (d) The Chief Land Registrar shall cause the Respondent, James Gathaiya Kariuki, to be registered as proprietor of the suit property upon payment of the outstanding fees.
- (e) The 1st Defendant before the trial court, Lilian Wanjiku Kimani, shall pay the Appellant and the Respondent costs of the suit and counterclaim before the trial court.

It is so ordered.

JUDGMENT DATED AND SIGNED AT NYAHURURU AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 29TH DAY OF JUNE, 2023.

In the presence of:

Ms. Wandia for the Appellant

N/A for the Respondent

C/A - Carol

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Y. M. ANGIMA

JUDGE

