



Okoth v Okwach (Sued as a legal representative of the Estate of Jane Aoko Okwach - Deceased) & 2 others (Environment and Land Appeal E61 of 2021) [2023] KEELC 19173 (KLR) (27 July 2023) (Judgment)

Neutral citation: [2023] KEELC 19173 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E61 OF 2021
SO OKONG'O, J
JULY 27, 2023**

BETWEEN

DAVID NYAGUDI OKOTH APPELLANT

AND

DOUGLAS AGUMBI OKWACH (SUED AS A LEGAL REPRESENTATIVE OF THE ESTATE OF JANE AOKO OKWACH - DECEASED) 1ST RESPONDENT

THE COUNTY LAND REGISTRAR, NYANDO, MUHORONI & NYAKACH 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

(Being an appeal from the judgment and decree of Hon. E.M.Onzere P.M delivered on 13th July 2021 in Tamu PMCELC No. 16 of 2018)

JUDGMENT

Background

1. Barnabas Okwach Ogutta, deceased (hereinafter referred to only as “the deceased”) was at all material times registered as the proprietor of all that parcel of land known as Kisumu/Koru/412(hereinafter referred to only as “the suit property”). The deceased acquired the suit property from the Settlement Fund Trustees (hereinafter referred to only as “SFT”). The suit property was registered in the name of the deceased on 8th February 2012. The deceased was a polygamist. He married his first wife, Jane Aoko Okwach in 1957 or thereabouts, and his second wife, Serphine Amolo Okwach in 1969 or thereabouts. The deceased settled his two wives on the suit property but later moved one of the wives, Serphine Amolo Okwach to Otonglo area in Kisumu West in 1998. On 13th June 2013, the deceased’s first wife, Jane Aoko Okwach registered a caution against the title of the suit property claiming beneficial interest in the property. On 26th May 2015, the said caution was removed by the Land Registrar. On 11th August



- 2015, the title for the suit property was closed upon subdivision of the property into two portions namely; Kisumu/Koru/1980 and Kisumu/Koru/1981 (hereinafter referred to as “Plot No. 1980” and “Plot No. 1981” respectively). Plot No. 1980 and Plot No. 1981 were both registered in the name of the deceased on 11th August 2015. On 1st September 2015, the deceased transferred Plot No. 1981 to David Nyangudi Okoth following an agreement of sale said to have been entered into between the said David Nyangudi Okoth and the deceased on 14th August 2015.
2. On 27th April 2016, the deceased’s said first wife, Jane Aoko Okwach (hereinafter referred to only as “the 1st Respondent”) filed a suit before this court (Kisumu ELCC No. 90 of 2016) against the deceased, David Nyangudi Okoth (hereinafter referred to only as “the Appellant”), the County Land Registrar, Nyando, Muhoroni & Nyakach, and the Attorney General (hereinafter referred to only as “the 2nd and 3rd Respondents”). The 1st Respondent sought; a declaration that the suit property was a matrimonial property that was held in trust by the deceased for the benefit of the deceased and the 1st Respondent, a declaration that the subdivision of the suit property that gave rise to Plot No. 1980 and Plot No. 1981 without the consent of the 1st Respondent was unlawful, null and void, a declaration that the transfer of Plot No. 1981 to the Appellant was unlawful, irregular, null and void, an order for the rectification of the register for the suit property by the cancellation of the entries that closed the register for the suit property and created Plot No. 1980 and Plot No. 1981 and the restoration of the suit property, a permanent injunction restraining the deceased from having any dealing with Plot No. 1980 and Plot No. 1981 without the consent of the 1st Respondent, a permanent injunction restraining the Appellant from having any dealing with Plot No. 1981 adverse to the 1st Respondent’s rights and privileges as the owner of the property. The 1st Respondent also sought the costs of the suit and interest.
 3. The 1st Respondent contended that the suit property was a matrimonial property pursuant to the provisions of the *Matrimonial Property Act*, 2013, and the *Land Registration Act*, 2012 and that the same was owned by the deceased and the 1st Respondent having been acquired during the subsistence of their marriage. The 1st Respondent averred that the subdivision of the suit property by the deceased and the sale of a portion thereof, Plot No. 1981 to the Appellant without the consent of the 1st Respondent was illegal, null and void. The 1st Respondent averred that she had registered a caution against the title of the suit property to protect her interest in the same which caution was unlawfully removed by the Land Registrar (the 2nd Respondent) to facilitate the unlawful subdivision and transfer of the said portion of the suit property to the Appellant. The 1st Respondent averred that the subdivision of the suit property and the transfer of the said portion thereof to the Appellant was carried out fraudulently and through collusion between the deceased, and the 2nd and 3rd Respondents. The 1st Respondent averred further that the unlawful registration of Plot No. 1981 in the name of the Appellant came about as a result of the negligence on the part of the Appellant and/or through his collusion with the deceased.
 4. The deceased filed a statement of defence on 21st September 2016. The deceased denied that he acquired the suit property together with the 1st Respondent and that he sold the property without the 1st Respondent’s consent. The deceased admitted however that the suit property was a matrimonial property. The deceased denied the allegations of illegality, fraud and collusion in the subdivision and sale of a portion of the suit property to the Appellant that were pleaded against him by the 1st Respondent. The deceased averred that he acquired the suit property together with the 1st Respondent and his second wife, Serphine Amolo Okwach (hereinafter referred to only as “the 2nd wife”) and that he constructed homes on the property for each of his wives. The deceased averred that being a matrimonial property, he held the suit property in trust for himself and his two wives. The deceased averred that each of his two wives lived on and cultivated a distinct portion of the suit property and that at no time did the 1st Respondent have exclusive use of the suit property. The deceased averred that the portion



of the suit property that he sold to the Appellant was held by the deceased in trust for his 2nd wife who consented to the sale. The deceased averred that the remaining portion of the suit property namely, Plot No. 1980 was held by him in trust for himself and the 1st Respondent. The deceased averred that he obtained the consent of the 1st Respondent to subdivide the suit property. The deceased urged the court to dismiss the 1st Respondent's suit. The 1st Respondent filed a reply to the deceased's statement of defence on 30th June 2017.

5. This court transferred the 1st Respondent's suit to Tamu Law Court (hereinafter referred to only as "the lower court") on 10th May 2018 where it was assigned case number, Tamu SRMC ELC No. 16 of 2018. The Appellant filed a defence and counter-claim against the deceased, the 1st Respondent and the 2nd and 3rd Respondents on 3rd November 2020. The Appellant denied the 1st Respondent's claim in its entirety. The Appellant averred that he was a stranger to the 1st Respondent's interest in the suit property. The Appellant denied that Plot No. 1981 was registered in his name illegally through fraud and collusion with the deceased and the 2nd Respondent. The Appellant averred that he acquired Plot No. 1981 lawfully and procedurally from the deceased who was the registered owner thereof. The Appellant averred that he was an innocent purchaser of Plot No. 1981 for value without notice of the defect if any in the title that was being held by the deceased.
6. In his counter-claim, the Appellant reiterated his statement of defence and averred that he purchased Plot No.1981 from the deceased on 14th August 2015 at a consideration of Kshs. 760,000/- which he paid in full. The Appellant averred that the deceased obtained all the requisite consents before the said parcel of land was transferred to him and registered in his name. The Appellant averred that during the transfer of Plot No. 1981 to the Appellant by the deceased, the deceased presented the 2nd wife as his spouse and the 2nd wife gave the requisite consent to the transaction. The Appellant averred that the 1st Respondent brought the suit fraudulently with the intention of defeating the Appellant's interest in Plot No. 1981. The Appellant averred in the alternative that in the event that the court found his title to have been irregularly acquired and as such void, he would contend that he acquired Plot No. 1981 innocently upon relying on fraudulent misrepresentations made by the deceased in collusion with the 1st, 2nd and 3rd Respondents.
7. The Appellant sought judgment against the deceased, and the 1st, 2nd and 3rd Respondents for; a declaration that the title held by the Appellant in respect of Plot No.1981 was valid and devoid of any fraud and the dismissal of the 1st Respondent's suit. The Appellant sought in the alternative, a refund by the deceased of the purchase price together with the attendant costs associated with the transaction. The Appellant also sought the costs of the counter-claim together with interest. The 1st Respondent filed a reply to the Appellant's defence and defence to the Appellant's counter-claim.

The deceased died on 24th February 2019 before the commencement of the hearing of the suit. The deceased was not substituted in the suit by his legal representative and as such the 1st Respondent's claim and the Appellant's counter-claim against him abated.

The judgment of the lower court

8. The lower court heard the 1st Respondent's claim and the Appellant's counter-claim and delivered a judgment on 13th July 2021. In the judgment, the lower court framed five (5) issues for determination namely; whether the consent of the 1st Respondent was required before the suit property could be subdivided and a portion thereof sold to the Appellant, whether the caution that was registered against the title of the suit property by the 1st Respondent was lawfully lifted, whether the Appellant held a lawful title over Plot No. 1981, whether the 1st Respondent was deserving of the reliefs sought, and whether the Appellant was deserving of the reliefs sought in the counter-claim.



On the first issue, the court found that the suit property was a matrimonial property of the deceased and his two wives, the 1st Respondent and the 2nd wife and that the consent of both wives had to be sought and obtained before the deceased could deal with the property in a manner adverse to the interest of any of the wives. The court found further that the consent of the 1st Respondent was not obtained before the suit property was subdivided and a portion thereof sold to the Appellant. On the second issue, the lower court found that the 1st Respondent was not served with the requisite notice before the caution that she had lodged on the title of the suit property was removed, and as such the removal of the caution was unlawful. On the third issue, the lower court found that the Appellant did not conduct adequate due diligence before purchasing Plot No. 1981 from the deceased. The court observed that the deceased had informed the Appellant that he had two wives and that Serphine Amolo Okwach had described herself in the spousal consent as the deceased's second wife. The court was of the view that these disclosures should have led the Appellant to make inquiries about the deceased's first wife and whether she had consented to the transaction. The court held that in the absence of the 1st Respondent's consent, the sale of Plot No. 1981 which was a portion of the suit property to the Appellant was irregular, null and void. On the issue of whether the 1st Respondent was entitled to the reliefs sought, the lower court held that the 1st Respondent had established her claim on a balance of probabilities and as such she was entitled to the reliefs sought in her plaint. In its final orders, the lower court declared that the suit property was a matrimonial property and that the same was held by the deceased in trust for himself and his two wives. The court declared further that the subdivision of the suit property that gave rise to Plot No. 1980 and Plot No. 1981 was irregular. The court revoked the subdivision thereby restoring the suit property. The court also issued a permanent injunction restraining the Appellant from entering, cultivating or in any manner dealing with any portion of the suit property. The 1st Respondent was also awarded the costs of the suit. With regard to the Appellant's counter-claim, the lower court found that the Appellant's claim against the 1st Respondent was not proved while the claim against the deceased had abated.

The appeal

9. The Appellant was aggrieved by the said judgment and lodged the present appeal. In his memorandum of appeal dated 27th July 2021, the Appellant challenged the lower court's judgment on the following grounds;
 1. The Learned Magistrate erred in law and fact in declaring that the suit property that had ceased to exist was a matrimonial property while she had no jurisdiction to make such declaration that was reserved for the High Court.
 2. The Learned Magistrate erred in law and fact in issuing a permanent injunction against the Appellant restraining him from dealing with the suit property while the property had ceased to exist and no such order was sought by the 1st Respondent against the Appellant who had purchased Plot No. 1981.
 3. The Learned Magistrate erred in law and fact in failing to hold that Plot No. 1981 was sold and transferred by the deceased to the Appellant during his lifetime and as such the same did not form part of the 1st Respondent's matrimonial property.
 4. The Learned Magistrate erred in law and fact when she held that Plot No. 1981 that was registered in the name of the Appellant was the 1st Respondent's matrimonial property while there was no spousal relationship between the Appellant and the 1st Respondent.



5. The Learned Magistrate erred in law and fact in issuing a declaration that the suit property was a matrimonial property which order could only be made against the deceased against whom the 1st Respondent's suit had abated, and not against the Appellant.
6. The Learned Magistrate erred in law and fact in holding that the 1st Respondent had proved her case against the Appellant despite the fact that the suit against the deceased had abated and as such allegations made against him were not proved.
7. The Learned Magistrate erred in law and fact in revoking the Appellant's title that he had acquired for valuable consideration from the previous registered owner.
8. The Learned Magistrate erred in law and fact by ordering that Plot No. 1981 reverts to the deceased without making provision for the refund of the consideration that the Appellant had paid to the deceased thereby allowing the deceased to keep both the land and the purchase price.
9. The Learned Magistrate erred in law and fact in issuing orders for and against the deceased while the suit against the deceased had abated, and in favour of Serphine Amolo Okwach who was not a party to the suit.
10. The Learned Magistrate erred in law and fact in failing to consider the evidence and submissions that were made before her by the Appellant.
11. The Learned Magistrate erred in law and fact in issuing orders in favour of the 1st Respondent against the deceased against whom the suit had abated while denying the Appellant similar orders against the deceased.
12. The Learned Magistrate erred in law and fact in holding that the 1st Respondent was not served with a notice of intention to withdraw the caution that she had registered against the title of the suit property.
13. The Learned Magistrate erred in law and fact in holding that the subdivision of the suit property and the sale of a portion thereof namely, Plot No. 1981 to the Appellant were null and void while such holding could only be made against the deceased against whom the suit had abated.
14. The Learned Magistrate erred in law and fact in failing to consider the totality of the pleadings and evidence that were before her and to fully analyze and appreciate the legal effect of the complaints that were raised by the 1st Respondent against the deceased who sold Plot No. 1981 to the Appellant.
15. The Learned Magistrate erred in law and fact in failing to analyze and appreciate the nature of the case that was before her and the issues for determination thereby arriving at a wrong decision.
16. The Learned Magistrate erred in law and fact in making orders that violated the Appellant's right to property under Article 40(3) of the *Constitution* of Kenya.
17. The Learned Magistrate erred in law and fact in failing to determine the dispute that was before her in a manner that was just and equitable.
18. The Learned Magistrate erred in law and fact in exercising her discretion wrongly by awarding the costs of the suit to the 1st Respondent against the Appellant.



10. The Appellant urged the court to find that the 1st Respondent's suit against the deceased in the lower court having abated, the 1st Respondent's suit against the Appellant before that court should have been dismissed. The Appellant also prayed for the costs of the appeal and of the lower court suit. The Appeal was heard by way of written submissions. The Appellant filed his submissions on 20th April 2023. The 1st Respondent filed his submissions on 17th May 2023 while the 2nd and 3rd Respondents filed their submissions on 20th September 2022.

Analysis and determination

11. I have considered the pleadings and proceedings of the lower court, the judgment of the court, the grounds of appeal put forward by the Appellant, and the submissions by the advocates for the parties. This being a first appeal, this court has a duty to consider and re-evaluate the evidence on record and to draw its own conclusions on the issues that were raised for determination before the lower court. However, the court has to bear in mind that it did not have the advantage of seeing and hearing the witnesses who testified before the lower court. See, *Verani t/a Kisumu Beach Resort v. Phoenix of East Africa Assurance Co. Ltd* [2004] 2 KLR 269 and *Selle v. Associated Motor Boat Co. Ltd.* [1968] E.A 123 on the duty of the first appellate court. The court will also not interfere with the findings of fact by the trial court unless they were not based on evidence at all or they were based on a misapprehension of the evidence, or where it is demonstrated that the court acted on wrong principles in reaching its conclusion. See, *Peter v. Sunday Post Ltd.* [1958] E.A 424 and *Makube v. Nyamuro* [1983] KLR 403.

From the Appellant's grounds of appeal, the issues arising for determination in this appeal in summary are; whether the lower court erred in its finding that the Appellant acquired Plot No. 1981 irregularly and unlawfully, and as such, his title to the property was null and void, whether the lower court erred in its finding that the 1st Respondent had proved her case and in granting her the reliefs that she had sought, whether the lower court erred in dismissing the Appellant's counter-claim, whether the lower court erred in awarding the 1st Respondent the costs of the suit against the Appellant, and whether the appeal should be allowed. I will consider these issues together one after the other.

12. Before I consider the said issues, I wish to dispose of an issue that seems to be overarching in all the grounds of appeal put forward by the appellant. The issue is the effect of the abatement of the suit against the deceased on the claims that had been brought against him by the 1st Respondent in the main suit and the Appellant in his counter-claim. According to the Appellant, the 1st Respondent's suit was unmaintainable in the absence of the deceased as a party to the suit. The following is my view on the matter. Order 1 Rule 9 of the *Civil Procedure Rules* provides as follows;

“9. No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”

13. Under Order 1 Rule 9 of the *Civil Procedure Rules*, non-joinder and misjoinder of a party is not fatal to a suit. It follows therefore that the abatement of the suit as against the deceased per se was not fatal to the 1st Respondent's suit or the Appellant's counter-claim. The lower court had jurisdiction to determine the issues that were raised in the main suit and the counter-claim as regards the rights and interests of the parties that remained in the suit. In the circumstances, I am not in agreement with the Appellant that the abatement of the suit against the deceased rendered the 1st Respondent's suit unmaintainable. It is also not correct as claimed by the Appellant that the lower court made orders against the deceased. The lower court was alive to the fact that the 1st Respondent's claim and the Appellant's counter-claim against the deceased had abated. The court declined to grant the reliefs that the Appellant had sought



against the deceased. I have not seen any order that the lower court made against the deceased in favour of the 1st Respondent. I therefore find no merit in the Appellant's claim that the lower court did not treat him and the 1st Respondent equally.

Having disposed of that issue, I will now consider the substantive issues of law and fact raised in the appeal. The suit property was registered under the Registered Land Act, Chapter 300 Laws of Kenya (now repealed). As at the time the Appellant acquired Plot No.1981 which was a portion of the suit property from the deceased, the Registered Land Act had been repealed by the Land Registration Act, 2012. Section 26 of the Land Registration Act, 2012 provides 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.
- (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.”

14. I am in agreement with the finding by the lower court that the suit property was a matrimonial property and that the same was held by the deceased in trust for himself and his two wives. As mentioned earlier, the deceased admitted in his defence that the suit property was a matrimonial property. I am also in agreement with the lower court that being a matrimonial property in which the 1st Respondent had a beneficial interest, the deceased could not deal with the suit property in a manner that was prejudicial to the interest of the 1st Respondent without her consent. I am further in agreement with the lower court that the consent of the 1st Respondent was not obtained prior to the subdivision of the suit property, and sale and transfer of a portion thereof namely, Plot No. 1981 to the Appellant. It is not contested that the act of dealing with the suit property without the consent of the 1st Respondent was unlawful. The subdivision of the suit property into two portions, Plot No. 1980 and 1981 was unlawful. The transfer of Plot No. 1981 to the Appellant was similarly unlawful. Plot No. 1981 having been created and registered in the name of the deceased unlawfully, the sale and transfer thereof to the Appellant could not sanitise the tainted title. In Wambui v. Mwangi & 3 others, (Civil Appeal 465 of 2019) [2021] KECA 144 (KLR) the Court of Appeal stated as follows:

70. Sixth, the title was also tainted with nullity in that the court process on the basis of which the title to the suit property was anchored was subsequently declared null and void ab initio. The position in law as we have already highlighted above is that anything founded on nullity is also null and void and of no consequence. The title allegedly vested in the 3rd respondent and subsequently passed on to the appellant having stemmed from court proceedings that were subsequently declared null and void also stood vitiated by the same nullity and of no consequence. The Judge cannot therefore be faulted for stating the correct position in law in the manner done.

71. Seventh, section 80 of the Act is explicit that any title founded on irregularity, unprocedurally or a corrupt scheme stands vitiated. The title purportedly acquired by the 3rd respondent and subsequently passed on to the appellant having been demonstrably shown to have been



tainted with fraud, deceit and nullity fits the description of title that has been acquired not only irregularly and unprocedurally but also through a corrupt scheme. The corrupt scheme herein arises from the facts informing the vitiated High Court proceedings which we find no need to rehash but adopt as already highlighted above.

72. In light of all the above, we reiterate that the Judge’s reasoning as to why appellant’s title to the suit property was vitiated was well founded both in fact and in law and is therefore unassailable.”
15. The Appellant had contended that he was an innocent purchaser of Plot No. 1981 without notice of any defect in the title held by the deceased. In *Mwangi James Njehia v. Janetta Wanjiku Mwangi & another* [2021] eKLR, the Court of Appeal stated as follows:

“37. In *Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v. Attorney General & 4 Others*, Nairobi Civil Appeal No. 146 of 2014 this Court cited with approval the case of *Katende v. Haridar & Company Ltd* (2008) 2 EA 173, where the Court of Appeal in Uganda held that: -

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as 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 as was held in the case of *Hannington Njuki v William Nyanzi* High Court civil suit number 434 of 1996, he must prove that:

1. he holds a certificate of title;
2. he purchased the property in good faith;
3. he had no knowledge of the fraud;
4. he purchased for valuable consideration;
5. the vendors had apparent valid title;
6. he purchased without notice of any fraud; and
7. he was not party to the fraud.”

16. I am not persuaded that the Appellant was an innocent purchaser of Plot No. 1981. From the evidence that was produced in the lower court, I am of the view that the Appellant was either aware of the 1st Respondent’s interest in the suit property but chose to ignore the same or failed to undertake adequate due diligence that would have brought to his attention the 1st Respondent’s interest in the suit property. From the evidence on record, the 1st Respondent registered a caution against the title of the suit property on 13th June 2013 to protect her beneficial interest in the property. The caution remained in place until 26th May 2015 when it was removed in unclear circumstances. The title of the suit property was closed on 11th August 2015 upon subdivision. The evidence on record shows that the sale of a portion of the suit property by the deceased to the Appellant started in June 2015 before the subdivision of the suit property in August 2015. The bank deposit slips produced by the Appellant in evidence show that he made payments to the deceased on account of the purchase price of a portion of the suit property on 17th June 2015 and 23rd June 2015. There is also evidence showing that it was the Appellant who paid for the subdivision of the suit property into two portions on 31st July 2015. If the



Appellant had bothered to carry out proper due diligence, he would have learnt that the 1st Respondent had registered a caution against the title of the suit property which was removed less than a month prior to the sale of a portion of the suit property to him. This would have led him to make inquiries on the circumstances under which the caution was registered and removed. The Appellant also admitted in evidence that he went to the suit property prior to the purchase of a portion of the same and found the 1st Respondent's residence thereon but did not meet the 1st Respondent. The existence of the 1st Respondent's residence on the suit property should have acted as a warning to the Appellant that the 1st Respondent whom he was aware was the deceased's first wife could have a claim over the suit property. I am of the view that all telltale signs that the deceased was hiding something were there but the appellant chose to ignore the same. A party who fails to carry out proper due diligence or who is negligent in doing so while purchasing a property has only himself to blame when it turns out that the person who sold the property to him had a defective title. He cannot be heard to claim that he purchased the property innocently and in good faith. In this case, there was plenty of evidence showing that the deceased's title to the suit property was not absolute. I am therefore not persuaded that the Appellant purchased Plot No. 1981 in good faith without notice of the 1st Respondent's interest therein.

17. I am also in agreement with the lower court that the caution that was registered against the title of the suit property was removed unlawfully by the 2nd Respondent so that the property could be subdivided and a portion thereof sold to the Appellant. As correctly found by the lower court, the 2nd and 3rd Respondents placed no evidence before the court showing that the 1st Respondent was served with a notice of intention to remove the caution. In the absence of such notice, the removal of the caution was unlawful.

It follows from the foregoing that the creation of Plot No. 1981 from the suit property and the transfer of the same to the Appellant was marred with several irregularities and illegalities. I am therefore in agreement with the lower court that the deceased did not have a valid title to Plot No. 1981 that he could transfer to the Appellant. As stated earlier, the title was created and registered in the name of the deceased unlawfully. It was a void title. The Appellant could not acquire a better title from the deceased. An illegality could only beget an illegality. In *Macfoy v United Africa Co. Ltd.* (1961) 3 All E.R. 1169, Lord Denning stated as follows at page 1172 concerning an act that is a nullity:

if an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the Court to declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse”.

18. Due to the foregoing, I am in agreement with the lower court's finding that the title that was held by the Appellant in respect of Plot No. 1981 was illegal, null and void.

On whether the 1st Respondent had proved her case against the Appellant, I am unable to fault the finding of the lower court that she did. The 1st Respondent proved that the suit property was a matrimonial property in which she had a beneficial interest, the 1st Respondent also proved that the caution that she had registered against the title of the suit property to protect her interest was removed unlawfully, the 1st Respondent proved that her consent was not obtained prior to the subdivision of the suit property to create Plot No. 1980 and 1981, and the 1st Respondent proved that Plot No. 1981 was sold and transferred to the Appellant illegally without her consent. All these rendered the entire transaction between the deceased and the Appellant null and void. The lower court was entitled in the circumstances to grant the reliefs that had been sought by the 1st Respondent.



19. With regard to the Appellant's counter-claim, I am in agreement with the lower court that the same was not proved as against the 1st Respondent. I am also in agreement with the finding by the lower court that the alternative prayer for a refund could only be granted against the deceased and that since the counter-claim against the deceased had abated, the prayer could not be granted. On the issue of costs, the law is settled that the costs of and incidental to a suit is at the discretion of the court and that as a general rule, costs follow the event. The lower court exercised its discretion in awarding the costs of the suit to the 1st Respondent who had succeeded in her claim against the Appellant and the 2nd and 3rd Respondents. The Appellant has not convinced me that the lower court exercised its discretion wrongly.

What I have stated above is sufficient to dispose of the appeal before me. However, the Appellant raised some issues in his grounds of appeal and submissions that I wish to comment on for the completeness of this judgment. The Appellant had contended that the lower court had no jurisdiction to determine whether or not the suit property was a matrimonial property. I find no merit in this argument. The authority cited by the Appellant does not also support his position on the issue. What was before the lower court was not a suit for the division of matrimonial property. The dispute revolved around the issue of whether the deceased could dispose of a matrimonial property without consent of the 1st Respondent who had a beneficial interest in the property. As I mentioned earlier in the judgment, the issue of whether or not the suit property was a matrimonial property was not disputed by the deceased. I am of the view that the lower court had jurisdiction to determine the issues that were raised before it. The Appellant contended further that the 1st Respondent's suit was directed against a non-existent parcel of land. The 1st Respondent had a beneficial interest in the suit property. She claimed that the property was unlawfully subdivided and a portion thereof namely, Plot No. 1981 sold and transferred to the Appellant. The 1st Respondent had every right to seek the cancellation of the subdivision of the suit property and restoration of the property to its status prior to the illegal subdivision and transfer of the said portion to the Appellant. I do not, therefore, understand the Appellant's argument about the non-existence of the suit property.

Conclusion

20. In the final analysis and for the foregoing reasons, I find no merit in the Appellant's appeal. The appeal is dismissed with costs to the 1st Respondent.

DELIVERED AND DATED AT KISUMU ON THIS 27TH DAY OF JULY 2023

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:**

Ms. Achieng for the Appellant

Ms. Nyanchera h/b for Mr. Mamboleo for the 1st Respondent

N/A for the 2nd and 3rd Respondents

Ms. J. Omondi-Court Assistant

