



**Thua v Kirigo & 3 others (Environment and Land Appeal
9 of 2021) [2023] KEELC 19230 (KLR) (18 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19230 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT AND LAND APPEAL 9 OF 2021
AK BOR, J
JULY 18, 2023
(FORMERLY NYERI ELCA NO. 13/2020)**

BETWEEN

DOUGLAS GACHERU THUA APPELLANT

AND

EMILY WANGARI KIRIGO 1ST RESPONDENT

PETER NGECHU KAIRONGE 2ND RESPONDENT

MARTIN KAMAU WARUI 3RD RESPONDENT

LAND REGISTRAR, LAIKIPIA 4TH RESPONDENT

JUDGMENT

1. What is at the centre of this appeal is the ownership of the land known as Nanyuki/Marura Block III/310 (Sweetwaters) (“the suit property”). The 1st and 2nd Respondents filed suit on 29/8/2013, claiming ownership of the suit property on the basis that they bought it from the 3rd Respondent in July 2011. After purchasing the land, they took possession and carried out developments which at the time of filing suit were valued at Kshs. 1,960,000/=. They were summoned to the office of the 4th Respondent vide letters dated 22/1/2013 and 27/2/2013 following which their title was cancelled. They claimed that the 4th Respondent unlawfully cancelled their registration as proprietors of the suit property and registered the suit property in the Appellant’s name.
2. They contended that the 4th Respondent did not have power to cancel their registration as proprietors and to rectify the register. In the suit before the Magistrate’s Court, the 1st and 2nd Respondents sought a declaration that they were bona fide proprietors of the suit property and that the 4th Respondent’s action of cancelling their title was unlawful. They sought to be reinstated on the title and cancellation of the registration of the Appellant as the proprietor of the suit property.



3. In the Amended Defence and Counterclaim filed in January 2018, the Appellant averred that the 1st and 2nd Respondents did not have a valid title to the suit property and that the 4th Respondent acted within the law when he cancelled their title. He urged that there was no sanctity of title in an irregularly obtained title over land and that the developments done pursuant to such a title could not be compensated by the 4th Respondent. The Appellant averred that the 1st and 2nd Respondents were wrongly occupying his land and sought orders to have them forcefully evicted from the suit property and for the Officer Commanding Nanyuki Police Station to provide security during the eviction exercise.
4. The 3rd Respondent filed his Defence on 7/10/2013 in which he averred that he held a valid title over the suit land issued by the 4th Respondent which the 4th Respondent never questioned or rectified at the time he transferred the suit property to the 1st and 2nd Respondents. He pointed out that it was the 4th Respondent who issued the title deed to the 1st and 2nd Respondents after they submitted the original title which he previously held. He averred that he had no control over the actions of the 4th Respondent and any illegal action visited upon the 1st and 2nd Respondents by the 4th Respondent should not be attributed to him.
5. The 4th Respondent filed a Defence on 19/12/2018 and averred that according to the list of shareholders of Weruini Lands (Holding) Limited which was in its custody, the Appellant was the lawful owner of the suit property and if there was any contract of sale which the 1st to 3rd Respondents entered into, it was null because the 3rd Respondent was not the lawful owner of the suit property and had no title to transfer. He contended that the title issued to the 1st and 2nd Respondents was a nullity because it was obtained fraudulently through the collusion of the 3rd Respondent with the 1st and 2nd Respondents. He gave the particulars of fraud as presenting fake or forged documents purporting to be a shareholder of Weruini Land (Holding) Limited and as such purporting to be the owner of the suit property; and engaging in such a transaction with the 3rd Respondent when they were reasonably expected to know that the 3rd Respondent was not a shareholder of Weruini Lands (Holding) Limited.
6. The 4th Respondent contended that the cancellation of the registration of the 1st and 2nd Respondents as proprietors of the suit property and subsequent registration of the Appellant was done procedurally in accordance with the statutory powers and duties of the 3rd Respondent. He also maintained that the summons issued to the 1st to 3rd Respondent was lawful and that they failed to appear despite issuance of the summons. He clarified that the 1st and 2nd Respondents' registration over the suit property was cancelled following a complaint by the Appellant after being satisfied that the 3rd Respondent was never a member of Weruini Lands (Holding) Limited and that he never paid any fees for the suit property. He contended that there was no sanctity of title in the 1st and 2nd Respondents' irregularly obtained title and that they therefore could not be indemnified by the 4th Respondent.
7. The suit was heard by the Hon. L.K. Mutai, Chief Magistrate, who in her judgment delivered on 30/4/2020, found that the Appellant had failed to prove his counterclaim and granted the orders sought by the 1st and 2nd Respondent declaring them the bona fide owners of the suit property.
8. Being dissatisfied with that judgment, the Appellant lodged an appeal to this court on 5/5/2020 challenging the findings of the Learned Magistrate. He urged that the court erred in fact and in law in finding that the 1st and 2nd Respondents were the first registered owners of the suit property yet there was no evidence of a green card or search; that the trial court erred in holding that a first registration could never be defeated under any circumstances; that the court wrongly held that the 1st and 2nd Respondents had proved that they acquired the suit property regularly yet they had not proved that



- they obtained the Land Control Board (LCB) consent and did not provide evidence of payment of stamp duty or that they obtained the necessary clearances.
9. The other ground of appeal was that the Learned Magistrate erroneously held that the 3rd Respondent had capacity to sell the suit property to the 1st and 2nd Respondents and could pass a good title to them yet he had admitted that he was not a member of Weruini Company and there was no evidence to show that he bought the land from the company such as the ballot card, clearing certificate and receipts issued by the company. He faulted the Learned Magistrate for misapplying the law regarding cancellation of titles by the Land Registrar and for finding that he failed to explain how his ballot no 1243 became 1310. He also faulted the Learned Magistrate for finding that the 3rd Respondent should have been summoned to the meeting of 13/3/2013. The Appellant argued that he was denied his rightful entitlement yet he was a shareholder of Weruini Land Buying Company.
 10. In her analysis of the evidence, the Learned Magistrate looked at the evidence of Pamela Mutege the Laikipia Land Registrar, who confirmed that from the search issued by her predecessor, the 1st and 2nd Respondent were the owners of the suit property but she could not say where the green card showing their names was. The court found the evidence of the Land Registrar unreliable because they failed to produce the minutes of the meeting in which the 1st and 2nd Respondents' registration was found to be irregular and the fact that the green card did not indicate the existence of the title that the Registrar cancelled.
 11. The court noted that the Land Registrar could not tell whether the 1st and 2nd Respondent held title to the suit property and had no proof that a formal hearing took place. The land registrar stated that to issue a title deed they considered the list from the land buying company and that nobody had complained of fraud in the registration of the suit property. She stated that the lands office could not be held responsible for the mess because the registrar had no duty to inquire into the history of the suit property.
 12. The court noted that the 3rd Respondent stated in evidence that he was summoned by the Land Registrar and that he provided all the documents required. In cross-examination, he stated that the Land Registrar issued a title to him after he supplied documents from Weruini Company and that he obtained clearance from that company. He also stated that he was not shown any list of shareholders of Weruini and that he did not deal with its directors.
 13. The court relied on section 143 of the Registered *Land Act* and the decision in *Joseph Marisin v Joseph Kibilat S. Bargaliet* Nakuru Civil Appeal No. 306 of 1997 where the court found that a title obtained on first registration was indefeasible even if it was obtained through fraud. The Learned Magistrate observed that the Land Registrar confirmed that the 1st and 2nd Respondents had initially been issued a title over the suit property which was cancelled by the predecessor of the land registrar. The court noted that those details did not appear in the green card and were surprisingly missing from the green card tendered in evidence.
 14. The court observed that the 4th Respondent confirmed that the 3rd Respondent did not attend the meeting regarding the 1st and 2nd Respondents' title. The other issue that the court considered was the Appellant's size of land based on his claim that the land he bought from Weruini Company measured 4 acres while the suit property measured 2.5 acres. In its determination, the court found that the Appellant failed to prove how his land changed from number 1243 to 1310. The court concluded that the 1st and 2nd Respondents had successfully proved their claim because they obtained registration before the Appellant and through the LCB.



15. The appeal was canvassed through written submissions. The Appellant submitted that the 3rd Respondent admitted that the suit property belonged to Weruini Company Limited. That the records of that land buying company to wit the list of members, their ballot numbers and their parcel numbers were tendered in evidence by the Land Registrar. The Appellant argued that since the 3rd Respondent admitted that he was not a shareholder of the land buying company then it was questionable how he acquired the ballot and was registered as the owner of the suit property. The Appellant pointed out that the 3rd Respondent's name was not in the register of members of the land buying company produced in court while his name appeared against no. 1310.
16. The Appellant introduced the issue of Kshs. 100,000/= which he claimed that the 3rd Respondent admitted that he paid some clerk and questioned what the money was for and the fact that there was no receipt to show he paid that sum. The Appellant reiterated that to be a shareholder, one had to have a ballot, pay survey fees and appear in the register of members, but the 3rd Respondent lacked these prerequisites. He contended that if he indeed he paid that sum money then it was a bribe.
17. The Appellant submitted that the documents which the 3rd Respondent presented to the lands office must have been forgeries and his title deed was therefore obtained through fraud. He pointed out that the 3rd Respondent admitted that he did not enter into a sale agreement with Weruini land buying company. He contended that the 3rd Respondent did not have a proper title that he could pass to the 1st and 2nd Respondents because a thief cannot pass good title.
18. The Appellant relied on *Funzi Island Development Limited & 2 others v the County Council of Kwale and 2 Others* [2014] eKLR where the judge observed that a court of law could not sanction an illegality or approve an illegal or irregularly obtained title on the basis of indefeasibility of title. He also relied on the definition of fraud in Blacks law dictionary. The Appellant cited the decision in *Alice Chemutai Too v Nickson Kipkurui Korir & 2 Others* [2015] eKLR where the court held that the protection afforded to titles could be removed if a title was procured through fraud or misrepresentation which the party participated in.
19. The Appellant submitted that there was no dispute that he was allocated parcel no. 1243 in accordance with his ballot or share and that it later became parcel on. 1310 when the land was surveyed. He added that the 3rd Respondent admitted that he used the ballot for shareholder no. 1243 to get parcel no. 1310. The Appellant maintained that the evidence of how the title numbers changed was before the Learned Magistrate and that there was no contention about the Appellant's entitlement to 4 acres of land from the land buying company even though he was only allocated 2.5 acres.
20. The Appellant was emphatic that the dispute was not over which title was issued first in time, rather that it was the case of a party obtaining title from a seller who had obtained the land through trickery or fraud. The Appellant relied on *Munyu Maina V Hiram Gathiha Maina* [2013] eKLR where the court held that when a registered owner's root of title was under challenge, the registered proprietor must go beyond the title and prove the legality of how he acquired the title and ensure that the acquisition was legal, formal and free from any encumbrances that need not be noted on the register.
21. He submitted that the 3rd Respondent had failed to satisfactorily explain the root of his title and it should be impugned because it was acquired unprocedurally. The Appellant concluded that by finding that the 1st and 2nd Respondents' title was canceled irregularly it did not sanitise the transaction that had been entered into and did not make the 1st and 2nd Respondents legitimate owners of the suit property.
22. The 1st and 2nd Respondents submitted that they were innocent purchasers for value and that once they were registered as proprietors of the suit property, they took possession and developed it. They submitted that they were issued with the title over the land upon following due process including



- obtaining consent from the Land Control Board. That when the Appellant discovered that they were in possession they took the dispute to the Land Registrar who demanded that they surrender their title and when they failed to do so, the Land Registrar cancelled their title and issued one to the Appellant.
23. They maintained that the 4th Respondent's action of cancelling their title deed was illegal because due process was not followed. They pointed out that the green card which the 4th Respondent produced concealed the entries showing the 1st, 2nd and 3rd Respondents as the registered proprietors. They added that the 4th Respondent confirmed that the entries of the 1st and 2nd Respondents on the register were cancelled yet those entries were not reflected on the green card produced in evidence.
 24. The 1st and 2nd Respondents contended that the Land Registrar did not have jurisdiction to cancel their title deed. They argued that at the time of their registration as proprietors of the land, the repealed Registered *Land Act* applied to the transaction. They urged that since a law does not operate retrospectively, the rights under Sections 27 and 28 of that Act had accrued to them. They relied on *Republic v District Land Registrar and 2 others (2019) eKLR* and *Republic v Chief Land Registrar & Another, Ex parte Yosabia Kerubo Manyura (2018) eKLR* where the court held that the land registrar did not have power to cancel titles.
 25. They pointed out that they did not consent to the rectification of the register or cancellation of their title to the suit property and added that they were not parties to any fraud, mistake or omission. They adverted to Section 79 of the *Land Registration Act* and argued that the 4th Respondent did not give them the 90 days' notice required by that section. They maintained that the Land Registrar acted in violation of the law and that such a decision should not be allowed to stand. They emphasised that the 4th Respondent violated their right to fair administrative action enshrined in Article 47 of *the Constitution*.
 26. They urged that there were glaring inconsistencies in the Appellant's documents such as to how parcel no. 1243 changed to 1310, whether the land was 2.5 acres or 4 acres and the fact that the share certificate showed 60 shares as opposed to the 4 shares which the Appellant claimed were allotted to him. They concluded that the Appellant had not demonstrated sufficient reasons for this court to interfere with the findings of the trial court and relied on *Selle & Another v Associated Motor Boat Co. Ltd & others (1968) EA 123* on the point that this court must reconsider the evidence, evaluate it itself and draw its own conclusions.
 27. The 3rd Respondent submitted that the Appellant did not plead in his Defence and Counterclaim that he obtained registration based on fraud or misrepresentation. Further, that he did not prove that the 3rd Respondent obtained his title illegally, unprocedurally or through a corrupt scheme as Section 26 of the *Land Registration Act* requires. That despite submitting that the registration of the 3rd Respondent as proprietor of the suit property was obtained by fraud and relying on decisions on illegality in the acquisition of title, the Appellant did not plead or prove fraud illegality or misrepresentation. Further, that no particulars of fraud, illegality or unwanted procedure were given by the Appellant. The 3rd Respondent relied on *Vijay Morjoria v Nansingh Madhusingh Darbar & Another [2000] eKLR* where the court held that it was settled law that fraudulent conduct must be distinctly alleged and distinctly proved and that it was not allowed to leave fraud to be inferred from the facts. He urged that the Learned Magistrate correctly analysed the pleadings and evidence and arrived at a sound judgment.
 28. The 4th Respondent relied on the list of shareholders of Weruini land holding limited which he urged that according to it the Appellant was the lawful owner of the suit property. He urged that if any contract for sale of the suit property was made between the 1st and 2nd Respondents with the 3rd Respondent, then it was unlawful because the 3rd Respondent was not the lawful owner of the suit property. He pointed out that the 3rd Respondent stated in evidence that he was not a shareholder



- of Weruini land holdings limited even though he bought land from that company and was issued a clearance certificate. The 4th Respondent submitted that the 3rd Respondent did not have a receipt to show that he purchased the suit property and claimed that it was lost and did not have documents to prove that he owned the land.
29. The 4th Respondent set out the procedure of how one would purchase land from a land buying company. That the company would buy a big piece of land or be allocated the land by the Government then its shareholders would buy shares of one or several parcels of land after which they would ballot for the available parcels and would be issued ballot cards. Once the land was issued to the members, the land buying company would submit the list of shareholders to the land registrar for issuance of title deeds to the shareholders and their registration. It was up to the members to visit the Land Registrar's office with the share certificate or clearance certificate issued by the land buying company and the letter from the area Chief.
30. The land registrar would countercheck those documents against the list of shareholders in his custody to ascertain whether a person was a shareholder. The 4th Respondent questioned the manner in which the 3rd Respondent purchased the suit property from the land buying company and how he dealt with the secretary who the 4th Respondent maintained did not have authority to transfer land on behalf of the company while adding that the company could not transfer property belonging to its shareholders.
31. The 4th Respondent submitted that no instrument was produced before the trial court to show how the title over the suit property was conveyed from the Appellant to the 3rd Respondent and urged that the suit property therefore belonged to the Appellant. That according to the list of shareholders, the Appellant was the original holder of share certificate no. 1243 which became plot no. 1310 after the land was surveyed. The 4th Respondent emphasised that the green card tendered in evidence before the trial court showed that the Appellant was the registered proprietor of the suit property. He denied that the 3rd Respondent was the owner of the land and maintained that the evidence it gave of the list of shareholders did not include the 3rd Respondent as the owner of the suit property.
32. Regarding cancellation of the 1st and 2nd Respondents' title, the 4th Respondent submitted that the transfer of the suit property to the 1st and 2nd Respondents was effected without a valid transfer from the Appellant to the 3rd Respondent. Further, that no documents were produced by the 3rd Respondent to show that the transfer was processed in the proper manner. In the alternative, that the 3rd Respondent did not adduce evidence before the trial court to show that the suit property was properly transferred from the land buying company to his name hence he acquired the title fraudulently. The 4th Respondent concluded that she acted within her statutory duty in rectifying the register over the suit property and urged the court to allow the appeal.
33. On 23/2/2023 when the matter came up for judgment, the court directed parties to file additional submissions and authorities on the place of an innocent purchaser for value vis- a- vis one claiming to be the original owner of the land, as well as the question of indemnity. Parties filed their additional submissions. The Appellant reiterated that the 1st and 2nd Respondents did not obtain a good title. He relied on the decision in *James Mwangi Njehia & another v Janeta Wanjiku Mwangi & Another* [2021] eKLR where the court dealt with the issue of an innocent purchaser's title and whether it could be defeated. He submitted that the Court of Appeal held that the law had evolved and no legitimate owner of property should be divested of their property unlawfully under the guise that the purchaser was duped to buy land which he believed was genuinely owned by the person holding himself out as the vendor.



34. The Appellant relied on *Arthi Highway Developers Limited v West End Butchery Limited & Others Nbi Civil Appeal No. 4654 of 2019* on the finding by the Court of Appeal regarding a party who acquired a title from a legally registered proprietor through forgery of fraud. That the court found that a person who acquired a title through forgery, deceit or fraud did not have a valid title to pass to a third party. He reiterated that the 3rd Respondent acquired the suit land through a corrupt scheme and did not have a good title which he could pass to the 1st and 2nd Respondents. He concluded that the 1st and 2nd Respondents' remedy was compensation from the 3rd and 4th Respondents if they could prove that their rights were breached under Section 47 of *the Constitution*.
35. The 1st and 2nd Respondents relied on the definition of innocent purchaser for value and the decision in the *Katende* case. They maintained that they were registered as proprietors of the suit property on 3/8/2011 having purchased it from the 3rd Respondent in good faith for valuable consideration of Kshs. 300,000/= which they paid in full. They relied on the 3rd Respondent's evidence who did not dispute the transfer of the suit land. They urged that they presented all the relevant documents necessary to effect the transfer including a valid title from the 3rd Respondent issued by the 4th Respondent without any concerns being raised by the 4th Respondent. They relied on the official search and the green cards which came out of the due diligence that they conducted and emphasised that they had no notice of fraud or irregularity affecting the title to the suit property at the time of its purchase. They maintained that they were not party to any fraud having followed due process required of them under the law.
36. Regarding indemnity, they relied on Section 142 of the Registered *Land Act* (RLA) which they claimed was in force when they acquired the suit property and pointed out that the 4th Respondent's power of rectification was limited to correcting typographical errors and that it was only the court which had power to rectify on grounds of fraud. Further, that Section 143 (2) of the RLA provided that the register could not be rectified to affect the title of a proprietor who was in possession and who acquired the land for valuable consideration without notice of any fraud. They urged that they had demonstrated that they were bona fide purchasers of the land without any notice of fraud having acquired in good faith and having paid valuable consideration.
37. They reiterated that the 4th Respondent unlawfully cancelled their title without affording them a chance to defend their title. They added that the copy of the minutes of the meeting in which the 1st and 2nd Respondent's registration was found to be irregular should have been produced in court to confirm their legitimacy. They also relied on Section 81 of the *Land Registration Act* on indemnity as they concluded that the Land Registrar did not follow the law when canceling their registration. They urged the court to restore the parties to the position they were in before the Land Registrar's actions. They submitted that the right to indemnity would accrue in favour of the Appellant as against the 4th Respondent for the current market value of the suit land.
38. The 3rd Respondent relied on the definition of an "innocent purchaser for value" in Black's Law Dictionary 8th edition as one who buys something for value without notice of another's claim to the property and without notice of any defects or claims against the seller's title or one who has in good faith paid valuable consideration for a property without notice of adverse claim.
39. The 3rd Respondent relied on *Katende v Haridar & Co. Ltd* [2008] 2 EA 173 where the court dealt with the prerequisites for one to successfully rely on the doctrine of a bona fide purchaser. He has to prove that he holds a certificate of title, purchased the property in good faith, had no knowledge of fraud, purchased for valuable consideration from a vendor who had a valid title and he purchased without notice of any fraud and was not a party to any fraud.



40. The 3rd Respondent maintained that the evidence on record showed that he held a valid title which he transferred to the 1st and 2nd Respondents for valuable consideration. He urged that the Appellant did not plead fraud in his pleadings and did not sue him in the counterclaim. The 3rd Respondent urged that the Appellant was introducing new evidence in his submissions and that the main issue before the trial court was whether or not the Land Registrar had power to revoke the title held by the 1st and 2nd Respondents. That the applicable law for Sections 27 and 28 of the repealed Registered Land Act (RLA) pursuant to which the court found that the Land Registrar did not have power to revoke the title. He added that the Land Registrar had confirmed in his evidence that they checked documents availed before issuing a title deed and that they did not keep the parcel file.
41. On indemnity, the 3rd Respondent submitted that this was provided for under Section 144(1) of the repealed RLA. However, he pointed out that the 1st and 2nd Respondents' title was cancelled on 20/3/2013 hence Section 81 of the Land Registration Act applied. That the right to indemnity arises where a person suffers damage as a result of rectification of the register under that Act or because of an error in a copy of or extract from the register or plan certified under the Act.
42. The 3rd Respondent maintained that the Land Registrar lacked jurisdiction to rectify the register on the ground of fraud under the repealed RLA and that that was the preserve of the court. The 3rd Respondent faulted the 4th Respondent for cancelling the 1st and 2nd Respondents' title without the power to do so and for issuing a new title to the Appellant when by then the Land Registration Act was in force and required the involvement of the National Land Commission (NLC). Further, he faulted the 4th Respondent for omitting from the register the entries in favour of the 1st and 2nd Respondents thereby creating the impression that the 1st and 2nd Respondents had never been registered as proprietors of the suit property.
43. He submitted that the 4th Respondent acted negligently by revoking the 1st and 2nd Respondents' title when he did not have power to do so; by tampering with the register to imply that the 1st and 2nd Respondents were never registered as proprietors; and by issuing a new title to the Appellant. He urged that had the Land Registrar produced the parcel file, that would have set the record straight.
44. The 3rd Respondent maintained that the Appellant did not plead fraud or indemnity against the Respondents and that he was therefore not entitled to indemnity. In any event, that if he was so entitled, that would have been against the 4th Respondent whose conduct in the entire process was questionable. He concluded that the procedure for claiming indemnity and recovering it were covered under Sections 83 and 84 of the Land Registration Act respectively.
45. The 4th Respondent further submitted that the mere issuance of a title was not everything and that the process through which it was acquired was material. The 4th Respondent reiterated that property which had been unlawfully acquired was not protected by the law. It urged that the 1st and 2nd Respondents were active participants in fraud rather than innocent purchasers for value without notice and relied on *Chemey Investment limited v Attorney General & 2 Others* [2018] eKLR. The 4th Respondent submitted that fraud must be distinctly pleaded and straightly proved because fraud was a matter of evidence.
46. The Registrar submitted that the registration of proprietorship in Kenya was largely based on presentation of documents rather than the physical presence of the purchaser and that whenever documents were presented to the 4th Respondent, they were deemed to be regular. That if at all any title was issued to the 3rd Respondent, then it was issued on the basis that the documents presented by the 3rd Respondent were proper and the 4th Respondent did not have a basis for suspecting fraud unless it was quite evident on the face of the record.



47. Regarding indemnity, the 4th Respondent submitted that no notice of claim of indemnity had been issued to it and hastened to add that the remedy applied to situations where a title holder suffers damage arising from negligence, mistake or fraud on part of the Land Register while registering land or rectifying the register including double registration. The AG maintained that the 1st and 2nd Respondents did not demonstrate at the trial that there was double allocation of the suit property or negligence, fraud or mistake on the part of the 4th Respondent.
48. The 4th Respondent submitted that his powers were limited under Sections 44, 45 and 46 where he was only required to confirm whether the instrument was fit for registration having been executed and verified and that the land registrar was not required to check the documents for fraud or improper dealings. That as long as the documents met the statutory requirement, they would proceed with registration.
49. The 4th Respondent reiterated that neither the 3rd Respondent nor the 1st and 2nd Respondents had legitimate title to the suit land because the suit land was obtained through fraud and the court should not uphold such fraud. The 4th Respondent urged that the Appellant had established his proprietary interest over the suit property by adducing evidence before the trial court to show that he acquired the suit property from Weruini company and that the validity of the 3rd Respondent's title could not be ascertained.
50. The 4th Respondent faulted the 1st and 2nd Respondents for not conducting due diligence over the suit properly. The 4th Respondent argued that if there was a valid contract then the 3rd Respondent failed to fulfill his part of the contract and had the obligation to refund the purchase price to the 1st and 2nd Respondents. The 4th Respondent concluded that the court should not enforce an illegal contract or allow itself to be made an instrument of enforcing obligations arising out of an illegal contract.
51. The main issue for determination in this appeal is whether the court should allow the appeal and grant the orders sought in the Appellant's counterclaim before the trial court. In determining this question, there is also the related issue as to whether the 4th Respondent had power to rectify the land register and cancel the 1st and 2nd Respondents title as the Land Registrar did.
52. The Appellant did not plead or prove fraud on the part of the 1st to 3rd Respondents. Fraud must not only be pleaded specifically, but must also be proved to the required standard.
53. The 1st and 2nd Respondents claimed that the 3rd Respondent sold the suit property to them in July 2011 and transferred it to them on 3/8/2011. Further, that they took possession and carried out developments on the land. The Appellant pleaded in the counterclaim that according to the records of Weruini (Holdings) Limited, he was the original shareholder under share certificate number 1243 which was given plot number 1310 after the land was surveyed and that that was reflected in the company's records. His evidence was that in 1978, he bought 60 shares from Weruini Company and that he progressively paid all the requisite survey fees.
54. The court notes that the receipts which the company issued for the payment of survey fees and which the Appellant produced are dated 23/2/1981 and 30/7/86. He explained that he was dissatisfied with the size of land given to him since he was entitled to 4 ½ acres and not the 2 ½ acres comprised in parcel number 1310. He stated that he did not collect his title because he went to sort out the matter with the company. Those efforts did not yield fruit and the company was wound up before his complaint was addressed. That he decided to go to the lands office and collect his title in January 2013 and discovered the land was already registered in the names of the 1st and 2nd Respondents who had even built homes on the land.



55. The Appellant did not adduce any evidence to show when the suit property was surveyed and the efforts he made to pursue Weruini Limited or when that company was wound up. The conclusion one can draw is that from 1986 when he paid the survey fees until January 2013, the Appellant did not take any steps to secure ownership of the land which he had acquired from Weruini Company or to process his title.
56. In issuing the title to the Appellant and cancelling the title held by the 1st and 2nd Respondents on 13/3/2013, the Land Registrar claimed that he relied on the list of shareholders of Weruini Holdings Limited. The Registrar's evidence was that the sale transaction between the 3rd Respondent with the 1st and 2nd Respondents over the suit property was void because the 3rd Respondent could not have passed a good title to the 1st and 2nd Respondents. The Registrar failed to explain the basis upon which that office issued the title to the 3rd Respondent in the first place, which by extension was the basis for registration of transfer of the land to the 1st and 2nd Respondents but only emphasised that they process titles based on the documents presented for registration, which they presume are authentic.
57. The 3rd Respondent told the trial court that he supplied all the relevant documents to the Registrar before the suit property was registered in his name. He explained that he paid Kshs. 100,000/= to the company after the owners of the suit land either disappeared or failed to clear the balance. The Registrar admitted that their records were not well kept. Had the Registrar produced the parcel file containing the record of the transactions over the suit property, it would have shed light on how the 3rd Respondent was registered by the Registrar as the owner of the suit property.
58. If indeed the Registrar had the list of shareholders of Weruini Company all along and was using it for purposes of verification before issuing titles to the shareholders, how did they issue a title to the 3rd Defendant? In cancelling the 1st and 2nd Respondents' title. the Registrar merely relied on the list of shareholders presented by the Appellant without the input of the directors of Weruini company. A witness from that company was not called to give evidence in support of the Appellant's claim to the suit land made more than 27 years after the Appellant paid survey fees for the land he was allocated by the company.
59. The 1st Respondent produced his original title over the suit land in evidence. It was duly signed by the Land Registrar and was issued on 3/11/2011. He also produced the search dated 24/1/2013 showing the 1st and 2nd Respondents as the registered proprietors of the land. The green card or abstract of title which the Registrar tendered in evidence does not show the previous registered owners of the land and instead a new register was opened yet ordinarily the previous registration is cancelled on the register and the next transaction is registered as the next entry.
60. The Land Registrar is substantially responsible for the circumstances the Appellant and the 1st to 3rd Respondents find themselves in regarding ownership of the suit land. The Registrar cancelled the 1st and 2nd Respondents' title over the suit land and issued another one to the Appellant on 13/3/2013. By then, the *Land Registration Act* (LRA) had come into force on 2/5/2012. Part VIII of LRA deals with rectification and indemnity. Section 79 (1) under that part gave the Registrar the discretion to rectify the register or any instrument in specified circumstances which were: in formal matters and in the case of errors or omissions not materially affecting the interests of any proprietor; in any case and at any time with the consent of all affected parties; or where the area shown in the register was found to be incorrect upon resurvey of the land, after giving notice to all persons with an interest in the rectification of the parcel.
61. Section 79 (2) gave the Registrar power to rectify the register or document where the document in question was obtained by fraud. Section 79(4) stipulated that NLC could prescribe guidelines through



regulations which the Registrar would follow before rectifying the register. The regulations were to provide for the process of investigation including notification of affected parties, hearing of the matters raised and the criteria to be followed in coming up with the decision. The amendments made to the LRA in 2016 would not apply to the rectification of the title over the suit land which was done in 2013.

62. The Land Registrar failed to prove that the cancellation of the title held by the 1st and 2nd Respondents was done in accordance with the applicable law. No evidence was given of the existence of regulations developed by NLC setting out guidelines that the Registrar followed in rectifying the register.
63. The legal position under Section 80 of LRA before 2016 was that the court could order rectification of the register directing cancellation of any registration if it was satisfied that it was obtained by fraud as long as it would not affect the title of the proprietor who was in possession and had acquired the land for valuable consideration if they did not have knowledge of the fraud. Back then, the law protected the rights of registered proprietors who were innocent purchasers for value without notice of the fraud. This would have included the 1st and 2nd Respondents had it been that the court was moved to rectify the register. In this case, it was the Land Registrar who rectified the register by cancelling the title held by the 1st and 2nd Respondents without adhering to the law.
64. The appeal is dismissed with costs to the 1st and 2nd Respondent, which will be borne by the Appellant.

DELIVERED VIRTUALLY AT NANYUKI THIS 18TH DAY OF JULY 2023.

K. BOR

JUDGE

In the presence of:

Ms. Anne Thungu for the Appellant

Mr. Muchiri Mwangi for the 1st and 2nd Respondents

Mr. Amos Chweya for the 3rd Respondent

Ms. Mumbi Kiarie for the 4th Respondent

