



**Ngei v Ngei & 4 others (Environment & Land Case 924B of 2018)
[2023] KEELC 20255 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20255 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 924B OF 2018
OA ANGOTE, J
SEPTEMBER 21, 2023**

BETWEEN

WINNIE WAIRIGI NGEI PLAINTIFF

AND

CHARLES NJOGU NGEI 1ST DEFENDANT

WAUTIE TECHNICAL SERVICES LTD 2ND DEFENDANT

GINTU HOLDINGS LIMITED 3RD DEFENDANT

THE HON ATTORNEY GENERAL 4TH DEFENDANT

REGISTRAR OF TITLES 5TH DEFENDANT

JUDGMENT

1. Vide a Complaint dated 8th September, 2015, the Plaintiff seeks the following reliefs as against the Defendants jointly and severally;
 - i. The Plaintiff along with Agnes Njoki Ngei, Esther Wambui Ngei and Patrick Mwangi Macharia be declared as lawful and legitimate owners and proprietors of all that parcel of land premises known as L.R No 12159/29 and I.R No 29956/20 delineated on the land survey plan no 208296 in Karen, Nairobi City County measuring approximately 0.3662Ha.
 - ii. The purported transfer of land premises known as L.R No 12159/29 and I.R No 29956/20 delineated on the land survey plan No 208296 in Karen, Nairobi City County measuring approx. 0.3662Ha by the 1st Defendant to the 2nd Defendant is illegal, null and void.



- iii. The purported transfer of land premises known as L.R No 12159/29 and I.R No 29956/20 delineated on the land survey plan No 208296 in Karen Nairobi City County measuring approx. 0.3662Ha by the 2nd Defendant to the 3rd Defendant is illegal, null and void.
 - iv. The 3rd Defendant to be ordered to forthwith deliver up the title to the 5th Defendant issued to the land premises known as L.R No 12159/29 and I.R No 29956/20 delineated on the land survey plan No 208296 in Karen, Nairobi City County measuring approx. 0.3662Ha for cancellation.
 - v. The 5th Defendant to be ordered to forthwith cancel the 3rd Defendants title to the property known as L.R No 12159/29 and I.R No 29956/20 delineated on the land survey plan No 208296 in Karen Nairobi City County measuring approx. 0.3662Ha and to forthwith cancel any consequential entries on the said title and revert its registration to the Plaintiff herein along with Agnes Njoki Ngei, Esther Wambui Ngei and Patrick Mwangi Macharia.
 - vi. A permanent injunction be issued restraining the 1st -3rd Defendants, their servants, employees or anybody else whatsoever from trespassing, constructing, disposing and/or in any way interfering with the Plaintiffs peaceful enjoyment of land premises known as L.R No 12159/29 and I.R 29956/20 delineated on the land survey plan No 208296 in Karen, Nairobi City County measuring approx. 0.3662 Ha.
 - vii. A mandatory and perpetual injunction be issued compelling the 3rd Defendant through its servants, employees or anybody else whatsoever acting on its behalf to forthwith remove themselves from the land premises known as L.R No 12159/29 and I.R No 29956/20 delineated on the land survey plan No 208296 in Karen, Nairobi City County measuring approx. 0.3662Ha.
 - viii. General damages to be jointly paid by the 1st, 2nd and 3rd Defendants hereof.
 - ix. In the alternative, an order be issued compelling the 1st, 2nd and 3rd Defendants to compensate and pay the Plaintiff her share at the prevailing market value of the parcel of the suit premises.
 - x. Costs and interest.
2. It is the Plaintiff's case that she together with Agnes Njoki Ngei, Esther Wambui Ngei, and Patrick Mwangi Macharia were at all material times the registered proprietors of all that parcel of land known as L.R No 12159/29 and I.R 29956/20 delineated on the land survey plan no 208296 in Karen Nairobi County measuring approximately 0.3662Ha(hereinafter the suit property).
 3. It was averred in the Plaintiff by the Plaintiff that vide a Certificate of Title dated 8th March, 2006, they were registered as proprietors of the suit property as Lessees and tenants in common in equal shares; that they duly paid all the statutory dues in respect of the suit property when called upon to do so and that on or about 9th June, 2010, the 1st and 2nd Defendants fraudulently interfered with the suit premises and purported to effect a transfer of the same in favour of the 2nd Defendant.
 4. The particulars of the fraud enumerated in the Plaintiff include: purporting to effect a transfer in favour of the 2nd Defendant using a forged Power of Attorney purportedly given by the Plaintiff in favour of



- the 1st Defendant, and failing to follow the lawful process in effecting the transfer and purporting to effect the transfer in favour of the 2nd Defendant without the Plaintiff's authority.
5. According to the Plaintiff, the 1st Defendant who is her younger brother uttered a forged Power of Attorney to deprive her of her share in the suit premises and that the 2nd, 3rd, 4th and 5th Defendants failed to verify the Power of Attorney used by the 1st Defendant to effect the transfer.
 6. According to the Plaintiff, on or about the 22nd October, 2012, the 2nd and 3rd Defendants fraudulently interfered with the suit property and purported to effect a transfer of the same to the 3rd Defendant; that the registered directors of the 2nd and 3rd Defendants are the same; that any purported transfer of the suit property from the 2nd and 3rd Defendants was done to defeat due process of the law and that the 1st, 2nd and 3rd Defendants actions are illegal and amount to trespass.
 7. The Plaintiff averred that she has not enjoined Agnes Njoki Ngei, Esther Wambui Ngei and Patrick Mwangi Macharia who are entitled to a share of the suit premises because she is not sure of their role in respect of the actions complained herein.
 8. Vide a Defence dated 18th November, 2015, the 1st -3rd Defendants denied the assertions set out in the Plaintiff stating that they lawfully acquired the property for due consideration and that Agnes Njoki Ngei, Esther Wambui Ngei and Patrick Mwangi Macharia who were tenants in common with the Plaintiff lawfully sold and transferred their shares in the property to them with the knowledge of the Plaintiff.
 9. It was averred by the Defendants that they were not privy to nor are they party to the alleged Power of Attorney nor its alleged fraudulent procurement; that they are purchasers for value without notice of fraud as alleged and as such cannot be impugned at all as pleaded by the Plaintiff and that the 3rd Defendant has invested over Kshs 100,000,000 (one hundred million) in the suit property with the knowledge of the Plaintiff.
 10. The 4th and 5th Defendants filed their Defence on 29th January, 2020. They denied the assertions as set out in the Plaintiff and averred that the suit property I.R 29956/20, L.R 12159/29 is part of sub-division of title I.R 29956 L.R 12159/7 and that pursuant to the sub-division, a transfer registered as I.R 29956/20 was registered in favour of Agnes Njoki Ngei, Winnie Wairigu Ngei, Esther Wambui Ngei and Patrick Mwangi Macharia.
 11. It was averred by the 4th and 5th Defendants that the declared value of the land was Kshs 4, 300,000/- and the duly executed transfer between Joyce Kihumba on one part and Agnes Njoki Ngei, Winnie Wairigu Ngei, Esther Wambui Ngei and Patrick Mwangi Macharia was registered on 8th March, 2006 at 1200hrs by G.G Gachihi Land Registrar as I.R No 29956/20 and that their records indicate that a transfer in respect of Grant I.R 100891 was booked for registration under booking no 695 on 9th June, 2010 at 11.20 hrs.
 12. It was averred that the aforesaid transfer was between Agnes Njoki Ngei, Winnie Wairigu Ngei, Esther Wambui Ngei and Patrick Mwangi Macharia in consideration of a sum of Kshs 17, 500,000/= to Wautie Technical Services Limited; that the declared value for stamp duty purposes was Kshs 17, 500,000/- and the transfer was dated 29th April, 2010 and that the transfer was drawn by Otieno Okeyo and Co Advocates.
 13. The 4th and 5th Defendants' further stated that a Power of Attorney for L.R No 12159/29, I.R No 100891/1 was booked on 17th May, 2010 under booking no 1536 at 15.45hrs; that the Power of Attorney was by Agnes Njoki Ngei to Charles Njogu Ngei of ID 13411241, and registered as P/



A54151/1 and that the Power of Attorney was drawn by Otieno Okeyo and Co Advocates and duly signed by Agnes Njoki Ngei.

14. It is the 4th and 5th Defendants' case that in respect of Esther Wambui Ngei, a Power of Attorney appointing Charles Njogu Ngei dated 23rd April, 2010 was booked on 19th May, 2010 and registered on the same date as P/A 541521/1; that in respect of the Plaintiff, a Power of Attorney by Winne Wairigu Ngei appointing Charles Njogu Ngei was registered on 19th May, 2010 as P/A 54150/1 and that a transfer dated 16th October, 2012 between Wautie Technical Services Limited and Gintu Holdings was booked for registration on 22nd October, 2012 under the booking No 24017 for a consideration of Kshs 20,000,000.
15. In response to the assertions that they failed to exercise due diligence and professionalism, the 4th and 5th Defendants stated that all the transfers and Power of Attorneys were duly booked for registration and duly assessed; that the documents were proper on their face with attached copies of identification documents; that the documents were duly drawn by a firm of Advocates who attested to the same and that they have no knowledge of the occupation of the suit property and no cause of action can be instituted against the government premised on possession.

Hearing & Evidence

16. The matter proceeded for hearing on 19th February, 2020. The Plaintiff, PW1, adopted her witness statement dated 8th September, 2015 as her evidence in Chief and produced the bundle of documents of an even date as [PEXHB1].
17. PW1 testified that her brother, the 1st Defendant, fraudulently sold the suit property using a fraudulent consent; that the suit property was registered in her names together with others; that the alleged Power of Attorney dated 23rd April, 2010 is a forgery and was not signed by her as she was out of the Country at the time and that she never travelled to Kenya in 2010 and does not know the Advocate who purported to have witnessed her signature.
18. PW1 testified that she signed the Caveat which she crafted after realizing the property had been sold; that she was not involved in any of the transfers of the suit property to the two companies; that the suit property is in Karen and is about one acre; that she owns 25% of it and the current value is Kshs 60,000,000; that her brother did not give her a share of the sale proceeds and that she wants the suit property to be reverted into their four names or that she is given a share of the proceeds of the sale.
19. In cross-examination, PW1 stated that she acquired interest in the suit property in 2006 when she was working as an auditor in Ernst and Young; that she contributed Kshs 1, 200,000/= towards the purchase of the suit property; that her together with her sisters and Patrick Mwangi, her then husband, jointly bought the suit property and that she went to the UK in 2008 and left the title document with her brother Joseph Ngei.
20. It was the evidence of the Plaintiff, PW1, that her sister Agnes took the title from Joseph and gave it to Charles; that she realized the suit property had been sold in 2014; that the suit property had been partly developed when it was sold; that her sister Agnes passed away in 2016 after the suit had been filed and that she did not sue the other co-owners because she did not know the level of their involvement in the sale of the land.
21. In re-examination, PW1 stated that she held 25% of the property and was entitled to compensation; that the Caveat was not registered because all the co-owners did not sign it; that she did not sign the Power of Attorney; that there is no Affidavit shown to show the variation in the names of Agnes and



- that she was in the UK when the transfer was done and did not authorize her ex-husband to sell the suit property.
22. The 1st Defendant, DW1, adopted his witness statement dated 18th November, 2015 as his evidence in chief and produced the bundle of documents dated 4th February, 2021 as [DEXHB1]. It was his testimony that the Plaintiff is his elder sister and that he is the last born in their family; that his other sister, Agnes, called him from the United Kingdom and informed him that they had decided to sell the suit property.
 23. It was the evidence of DW1 that the Plaintiff was with Agnes when she called him; that Agnes was the one with the title as she was the biggest shareholder; that she sent him the title through DHL; that the Power of Attorney was sent to the UK where those who were in the UK signed before it was sent to the US for signing by his other sister living there and that his brother in law who was married to the Plaintiff had a share in the property and was also keen on selling the same.
 24. According to DW1, the Plaintiff and their sister Esther were not in good terms hence it was decided that he sells the property and shares the proceeds among them; that the Power of Attorney was duly signed and returned to him and that he sent it to the lawyer to proceed with the sale. It was the evidence of PW1 that all his sisters except the Plaintiff were happy with what he did and that they did not want the money to be sent to the UK because of taxes and agreed to have the money deposited in Agnes's account in Kenya because there was an ongoing divorce between the Plaintiff and Patrick.
 25. DW1 stated that he was paid the entire purchase price by the Defendant; that he paid Esther's share (the Plaintiff) directly to her account and gave Patrick his share; that the Plaintiff did not have an account in Kenya; that when he went to visit Agnes in the UK, the Plaintiff was there but did not raise the issue of the money; that the suit was filed while Agnes was alive; that the Plaintiff did not sue the other sisters and that the bad blood between him and the Plaintiff was occasioned by the fact that he did not lock Patrick out of the proceeds of the property.
 26. In cross-examination, DW1 stated that the Plaintiff was in the UK when the transaction happened; that there was a memorandum of understanding that Agnes owned 50% share, Esther 25% and Winnie and Patrick jointly 50%; that the purchase price was Kshs 15,000,000/= but the broker increased it to 17, 500,000/= and that he received the purchase price.
 27. It was the evidence of DW1 that Agnes and the Plaintiff knew how much they were entitled to get; that he deposited their shares in Agnes's account; that the instructions were given to her over the phone; that Agnes was alive when the transaction happened and confirmed that she gave Winnie (the Plaintiff) her share and that he has no resolution from the family to sell the property.
 28. According to PW1, he does not know if the Power of Attorney was witnessed because he gave it to the Advocates in a sealed envelope; that it is untrue that he defrauded the Plaintiff; that he has nothing to show that he sent the Power of Attorney to his sisters in the UK; that he has receipts evincing payment of monies into Agnes account at River Road and that it is his lawyers who lodged the Power of Attorney at the lands office.
 29. DW2 was Ian David Oloo, the Director of the 2nd and 3rd Defendants, who adopted his witness statement dated 4th February, 2020 as his evidence in chief. DW2 also relied on the documents adduced by DW1. Briefly, it was his evidence that the 3rd and 4th Defendants bought the suit property for valuable consideration in an open market where it was being offered for sale by its lawful owners and that they conducted due diligence on the same before buying it.



30. It was the evidence of DW2 that the 2nd Defendant bought the suit property and transferred it to the 3rd Defendant who had the financial capacity to develop the same; that the 3rd Defendant has developed the suit property a commercial building worth over Kshs 100,000,000 as at 2013 and that the Plaintiff was well aware of the same and did not raise any complaints.
31. According to DW2, he negotiated for the purchase of the sale from Patrick Mwangi Macharia and Charles Ngei; that Charles Ngei represented the interests of Agnes Njoki Ngei, Esther Wambui Ngei and the Plaintiff as their attorney and brother as they were living abroad and that Charles Ngei and Patrick Mwangi had the original title and all the vendors' documents necessary for the transfer of the suit property including copies of the proprietors' ID's, PIN Certificates and photographs.
32. According to DW2, the 2nd Defendant paid the purchase price to Charles Ngei and Patrick Mwangi; that the 2nd Defendant is being victimized after the completion of the transaction because of differences between the Plaintiff, her former husband Patrick Mwangi and her brother the 1st Defendant and that the 2nd Defendant confirmed with the proprietors, Agnes Ngei, Esther Ngei and Patrick Mwangi that the Plaintiff had been paid her share of the property.
33. On cross-examination, it was his testimony that he purchased the suit property from Charles Ngei; that although he verified the number of the owners of the property, he did not meet any of them but interacted with them through his Advocate; that he paid the purchase price through the Advocate; that he does not have the schedule of payments; that he is convinced that if the Plaintiff was listed as an owner, she received payment and that the 2nd Defendant transferred to the 3rd Defendant the suit property for Kshs 20,000,000/=.
34. DW3, the Deputy Chief Land Registrar working at the Office of the Chief Land Registrar, adopted his witness statement as his evidence in chief and produced into evidence the bundle of documents dated 29th January, 2020 [DEXB1-2]. Vide his testimony, he stated that the suit property was a sub-division of I.R 29956/20, L.R 12159/29 which was a sub-division of the Certificate of Title I.R 29956/L.R 12159/7.
35. According to DW3, upon sub-division, a transfer registered as I.R 29956/20 was registered in favour of Agnes Njoki Ngei, Esther Wambui Ngei, Winnie Wairigu Ngei and Patrick Mwangi Macharia for a term of 99 years from 1st November, 1972 and that a transfer duly executed in favour of the four proprietors was registered on 8th March, 2006.
36. It was the evidence of DW3 that on 9th June, 2010, a transfer in respect of the suit property was booked for registration, which transfer was between the four proprietors to Wautie Technical Services Limited for a consideration of Kshs 17, 500,000/=; that the transfer was drawn by Otieno Okeyo and Company Advocates and the transferors and transferees appeared before Fredrick Otieno Okeyo and that Powers of Attorney were registered in favour of the 1st Defendant donated by Agnes Njoki Ngei on the 17th May, 2010, Esther Wambui Ngei on 19th May, 2010 and the Plaintiff on 19th May, 2010 and that by a transfer dated 16th October, 2012 and registered on the 22nd October, 2012, the 2nd Defendant transferred the suit property to the 2nd and 3rd Defendants.
37. It was DW3's testimony on cross-examination that the Mother title was in the name of Roberts Gordon; that an excision was done out of the Mother Title which parcel was transferred to the four proprietors; that the Power of Attorney donated to the 1st Defendant by the Plaintiff was genuine having been registered by them and that documents are usually presented by Advocates.



Submissions

38. The Plaintiff's counsel submitted that pursuant to the provisions of Section 3(3) of the Law of Contract Act, a contract for disposition of an interest in land must be writing, signed by all the parties thereto and the signature of each party signed must be attested by a witness who is present when the contract was signed by such party.
39. It was submitted that in the case of *Munyu Maina vs Hiram Gathiha Maina*[2013]eKLR, it was held that where a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title that is in challenge and that the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title.
40. Counsel submitted that in this instance, the Plaintiff did not sign any transfer forms pertaining to the suit property and this among others points to fraud; that pursuant to Section 26 of the Land Registration Act, whereas a Certificate of Title is conclusive proof of ownership of the property, the same may be impeached on the ground of fraud or misrepresentation to which the person is proved to be a party or where the Certificate of Title has been acquired illegally, unprocedurally or through a corrupt scheme., which was the case herein.
41. The 1st, 2nd and 3rd Defendants' Counsel submitted that the adduced evidence makes it clear that the Plaintiff was a co-proprietor of the suit property with her sisters and former husband and together they sold the property to the 2nd Defendant who thereafter sold it to the 3rd Defendant.
42. It was submitted that whereas Patrick Macharia executed the transfer on his own behalf, the others, including the Plaintiff, gave the 1st Defendant a Power of Attorney and the whole process was above board as confirmed by the 4th and 5th Defendants.
43. It was submitted that the 1st Defendant demonstrated that the Plaintiff donated to him a Power of Attorney and there is no dispute that the other sisters donated similar Powers of Attorney and that subsequently Section 3(3) of the Contract Act and Section 26 of the Land Registration Act have been complied with.

Analysis & Determination

44. Having carefully considered the pleadings, testimonies and submissions herein, the issues that arise for determination are;
 - i. Whether the Plaintiff has established her case on a balance of probabilities?
 - ii. What are the appropriate orders to issue?
45. The Plaintiff, vide this suit, seeks to impugn the 3rd Defendant's title to the suit property. According to the Plaintiff, she together with her sisters Agnes Ngei Njoki, Esther Wambui Ngei and ex-husband Patrick Mwangi Macharia were the registered owners of the suit property owning the same as tenants in common.
46. It is the Plaintiff's case that sometime in June, 2010, the 1st Defendant purported to effect a transfer of the suit property to the 2nd Defendant who thereafter transferred the same to the 3rd Defendant; that she did not give any consent for the transfer of the suit property and that the Power of Attorney allegedly granted by her to the 1st Defendant is fraudulent and was used by the 1st Defendant to deprive her of her share in the suit property. It was the Plaintiff's case that she was further not given the proceeds of the sale of the property.



47. The Plaintiff adduced into evidence the title to the suit property, the Caveat dated 5th June, 2015, the transfer to the 2nd Defendant dated the 16th October, 2012, the Power of Attorney dated 23rd April, 2010 and a demand letter.
48. The 1st, 2nd and 3rd Defendants' filed a joint statement of Defence. They asserted that the transfer of the suit property from the 1st to the 2nd Defendants and from the 2nd Defendant to the 3rd Defendant were above board and that all the co-tenants lawfully transferred and sold their shares in the suit property. They adduced into evidence copies of the title to the suit property, the Powers of Attorney, the consent to transfer dated 10th June, 2010, the transfer dated 29th April, 2010, and the Plaintiff's ID, photo and PIN.
49. The 4th and 5th Defendants equally filed a joint Defence in which they affirmed that as per their records, all the transactions with respect to the suit property were duly registered by their office and were on the face of them legitimate.
50. They also adduced into evidence copies of the title to I.R 29956, the transfer between Joyce Kihumba and the proprietors of the suit property dated 31st December, 2005, title I.R 100891, L.R 12159/29 dated 8th March, 2006, the Power of Attorneys registered as PA 54151/1 on 19th May, 2010, PA 54152/1 on 19th May, 2010, PA 541501/1 on 19th May, 2010, the consent to transfer dated 10th June, 2010, the transfer of I.R 100891 registered as I.R 100891/2 on 9th June, 2010, the letter of consent to transfer dated 16th October, 2012, and the transfer between the 2nd and 3rd Defendants dated 16th October, 2012.
51. As aforesaid, the Plaintiff herein seeks to assert proprietorship of the suit property claiming that the suit property was fraudulently transferred to the 2nd and 3rd Defendants. That being so, the Plaintiff was obligated to prove her case on the required standard of proof being on a balance of probabilities.
52. This principle is succinctly captured in Sections 107, 109 and 112 of the *Evidence Act*, CAP 80, Laws of Kenya. Section 107 provides as follows:
- “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
53. And Sections 109 and 112 of the same Act states;
- “
- “109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
- “112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”
54. In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in *Mumbi M'Nabea vs David M. Wachira* [2016] eKLR stated as follows:
- “In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence



advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.”

55. It is not in dispute that the suit property is currently registered in the name of the 3rd Defendant herein pursuant to a transfer of 16th October, 2012. Subsequently, the law applicable to the 3rd Defendant’s title is the *Land Registration Act*, 2012. Section 26 (1) of the *Land Registration Act*, No. 3 of 2012 embodies the doctrine of indefeasibility of title as envisaged under the Torrens System of registration. It provides thus;

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... 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 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.”

56. It can be seen from the above provisions that whereas a title is protected, the protection can be removed and the title impeached, if it is proved to have been procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, un-procedurally, or through a corrupt scheme. This was discussed by the Court in *Alice Chemutai Too v Nickson Kipkurui Korir & 2 Others* [2015] eKLR thus;

“It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part. I had occasion to interpret the above provisions in the case of *Elijah Makeri Nyangwara v Stephen Mungai Njuguna & Another*, Eldoret ELC Case No. 609 B of 2012 where I stated as follows :-

“...it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions. I stand by the above words and I am unable to put it better than I did in the said dictum.”



57. The Black's Law Dictionary defines fraud thus:

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

58. It is trite law that fraud must not only be pleaded and particularized but strictly proven. This position was affirmed by the Court of Appeal in the case of *Kinyanjui Kamau v George Kamau* [2015] eKLR as follows; -

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs Ndolo* [2008] 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

59. Similarly, the Court of Appeal in *Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) v Stephen Njoroge Macharia* [2020] eKLR, observed as follows:

“... Fraud is a quasi-criminal charge which must, as already stated, not only be specifically pleaded but also proved on a standard though below beyond reasonable double doubt, but above balance of probabilities...”

60. The Plaintiff asserts that the transfer of the property was actuated by fraud. As against the 1st -3rd Defendants, she sets out the particulars to include effecting a transfer in favour of the 2nd and 3rd Defendants without her consent and using a forged Power of Attorney to effect a transfer contrary to the law, and as against the 4th and 5th Defendants, failing to exercise due diligence in effecting the transfer.

61. According to the Plaintiff, she did not execute any Power of Attorney in favour of the 1st Defendant, neither did she appear before any Advocate to have the same witnessed. It was her testimony that on the date of the purported execution indicated in the Power of Attorney, she was living in the United Kingdom. The fact that she was not in the Country at the time was admitted by the 1st Defendant during his testimony.



62. It is trite that evidential burden of proof can shift depending on the circumstance of the case. This was stated by the Supreme Court in *Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others* [2017] eKLR, thus:

“(132) Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and “remains constant through a trial with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.”

63. In the circumstances, upon the Plaintiff’s denial of having signed the Power of Attorney or appeared before any Advocate who witnessed the same, and the affirmation that she was out of the Country at the time the Power of Attorney was signed, the burden shifted to the Defendants, to call evidence to prove the authenticity of the Power of Attorney as alleged. The Defendants failed to discharge this burden. In fact, the advocate who purportedly attested the Power of Attorney and had it registered was not called to testify.

64. Nonetheless, even if the Power of Attorney was validly signed, a question arises as to whether its attestation was proper noting that it was witnessed by an Advocate in Nairobi while the Plaintiff was in the United Kingdom. Section 91 of the Registration of Documents provides as follows;

“The court shall presume that every document purporting to be a power of attorney, and to have been executed before and authenticated by a notary public or commissioner for oaths or any court, judge, magistrate, or Kenya consular officer or diplomatic agent, was so executed and authenticated.”

65. If the Advocate was in Nairobi and the donor of the Power of Attorney in the UK, then the Power of Attorney cannot be said to have been executed before the Advocate. The Power of Attorney should have been notarized in the United Kingdom by a notary public for it to be a valid document.

66. What then is the effect of this invalid Power of Attorney on the transaction leading to the transfer of the suit property? To answer this question, it is key to note that from the Certificate of Title produced herein, the Plaintiff was a co-owner of the suit property as a tenant in common with equal shares together with Agnes Ngei, Esther Wambui Ngei, Patrick Macharia Mwangi. It is also noted that no issue has been raised as regards the transfer of the property by the other co-owners.

67. The nature of a tenancy in common was succinctly discussed in *Megarry & Wade, The Law of Real Property*, 17th Edition at pages 493 and 494 paragraphs 13-009 to 13-012, thus;

“1. The tenants hold in undivided shares. Unlike joint tenants, tenants in common hold in undivided shares. Each tenant in common has a distinct share in property which has not yet been divided among the co-tenants. Thus tenants in common have quite separate interests. The only fact which brings them into co-ownership is that they both have shares in a single property which has not yet been divided among them. While the tenancy in common lasts, no one can say which of them owns any particular parcel of land.

2. There is no right of survivorship. The size of each tenant’s share is fixed once and for all and is not affected by the death of one of his companions. When



a tenant in common dies, his interest passes under his will or intestacy, for his undivided share is his to dispose of as he wishes...

3. Only the unity of possession is essential. Although the four unities of a joint tenancy may be present in a tenancy in common, the only unity which is essential is the unity of possession. In particular, it should be noted that the unity of interest may be absent and the tenants may hold unequal interests, so that one tenant in common may be entitled to a one-fifth share and the other to four-fifths, or one may be entitled for life and another in fee simple.”

68. In the case of *Kurshed Begum Mirza v Jackson Kaibunga* [2017] eKLR, the court stated thus;

“By definition, a tenancy in common is a tenancy by two or more persons, in equal or unequal undivided shares, with each person having the right to possess the whole property but no right of survivorship. The central characteristic of a tenancy in common is that each tenant is deemed to own by himself, a physically undivided part of the entire parcel (see. Black’s Law Dictionary, 9th Edn and Thomas F. Bergin & Paul G. Haskell, ‘Preface to Estates in Land and Future interests 54 2nd Edn, 1984).”

69. In the case of *Getao v Mokare & 4 Others* (Petition 9 of 2020) [2021] KESC 36 (KLR) (16 July 2021) (Judgment) the Supreme Court stated thus;

“At common law, each co-owner is as much entitled to possession of any part of the land as the others. He cannot point to any part of the land as his own to the exclusion of the others; if he could, there would be separate ownership and not co-ownership. No one co-owner has a better right to the property than another. Tenants in Common hold in undivided shares. Each tenant in common has a distinct share in property which has not yet been divided among the co-tenants. The only fact which brings them into co-ownership is that they both have shares in a single property which has not yet been divided among them. Therefore, while the tenancy in common lasts, no one can say which of them owns any particular parcel of land.”

70. In the present case, the suit property was registered pursuant to the provisions of the Registration of Titles Act (repealed). Whereas Section 22(4) of the Registration of Titles Act recognizes tenancy in common, unlike the Registered *Land Act*, it does not specifically state that the consent of a co-owner must be obtained before sale by any of the co-owners.

71. In the case of *Dipa Pulling vs Suchan Investments Limited & 3 others* [2019] eKLR, the Court stated thus

“... I am of the view that at the time when the 3rd and 4th defendants sold their shares in the suit property to the 1st defendant, there was no law prohibiting an owner of a share in a property held under tenancy in common registered under the Registration of Titles Act, Chapter 281 Laws of Kenya (now repealed) from selling his share in the property without the consent of the other tenants in common or the court. Whether or not a purchaser could take possession of such share is a different issue and depended on the circumstances of each case.”

72. The Court agrees. There was no requirement for tenants in common in land held under the Registration of Titles Act to seek permission to sell their share of the property. This however only applied to their individual shares and cannot be taken to mean that they could sell what did not belong to them as happened here.



73. The transfer of the Plaintiff's share of the property, having been founded on a forged Power of Attorney was of no consequence. In *Macfoy vs United Africa Co. Ltd.* (1961)3 All ER 1169, Lord Denning stated as follows at page 1172:

“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.”

74. As the Power of Attorney did not grant any authority to the 1st Defendant to deal with the Plaintiff's share of the suit property, it follows that the 1st Defendant did not have any title to pass to the 2nd Defendant who equally could not pass it, with respect to the Plaintiff's share to the 3rd Defendant.

75. Indeed, this is encompassed in the principle *nemo dat quod non habet*, which is a general principle that one cannot pass a better title than one has. Whereas the principle was initially with respect to sale of goods, the same has been given recognition in property law. The Court of Appeal in the case of *Arthi Highway Developers Ltd vs West End Butchery & 6 Others* [2015]eKLR expressed it best when, in dealing with a fraudulent title which had been sub-divided and sold off to unsuspecting purchasers stated as follows:

“It is our finding that as between West End and Arthi, no valid Title passed and the one exhibited by Arthi before the trial court was an irredeemable fake. It follows that Arthi had no Title to pass to subsequent purchasers, and therefore KMAH, Yamin and Gachoni cannot purport to have purchased the disputed land or portions thereof.”

76. In view of the foregoing, can the 3rd Defendants claim being a bonafide purchaser for value hold? However, it is key to note that the import and tenor of the doctrine of bona fide purchaser for value and in particular the decision in *Katende vs Haridar & Company Ltd* (2008) 2 E.A 173, has since been reviewed by the Court of Appeal in *Mwangi James Njehia vs Janet Wanjiku Mwangi & Another* [2021] eKLR, as follows:

“...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, 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.”

We nonetheless wish to state that the law, including case law is not static and the above requirements which were crafted over twenty years ago cannot be said to have been cast in stone. We hold the view that (5) above will need to be revisited and the word “apparent” be done away with altogether.

We have no hesitation in concluding that the appellants do not fall in the category of innocent purchasers. Their appeal is destined to fail for two reasons. First, because as we have demonstrated in this judgment, the deceased had no good Title to pass to anybody; second because the appellants were not innocent purchasers for value without notice and they cannot call in aid the provisions of Section 26 (1) of the *Land Registration Act*.”

77. The new position as set out in Mwangi James Njenga (supra) is that before one can benefit from the doctrine of bona fide purchaser for value, it must be established that the vendor had a valid title, as opposed to apparent valid title. Consequently, the plea of bona fide purchaser fails.
78. As the Plaintiff has not established that the 3rd Defendant was party to the fraud in the acquisition of her share of the property, the title is not impeachable under Section 26(1)(a). However, the Court finds that the Plaintiff's share of the suit property was obtained illegally, unprocedurally and through a corrupt scheme.
79. Having made a finding to the effect that the Plaintiff is the legitimate owner of a share of the suit property, it follows that the Plaintiffs' rights in her share are protected under Article 40 of *the Constitution* and Sections 24, 25 and 26 of the *Land Registration Act*.
80. In the circumstances, the Plaintiff is only entitled to a portion of and not the entirety of the suit property. It is noted that the Plaintiff seeks in the alternative, an order for compensation of what is due to her as a result of the sale of her portion of the suit property.
81. The 1st Defendant, while admitting to have received the full purchase price from the 2nd Defendant, failed to rebut the assertion that he did not pay her share of the proceeds from the sale property. In the circumstances, the Court finds that the most appropriate order is the order for the payment to the Plaintiff of her share at the current market rate of the suit property, excluding the developments. This payment will be made by the 2nd and 3rd Defendants.
82. In the end, the court finds that the Plaintiff has proved her case on a balance of probabilities and proceeds to enter judgment in the following terms;
 - i. An order does hereby issue compelling the 2nd and 3rd Defendants to compensate and pay the Plaintiff her share of 25% of the suit property at the current prevailing market value of the suit property without developments.
 - ii. The valuation report in respect of order number (i) above to be conducted by a registered valuer who will be appointed by the President of the Institution of Surveyors of Kenya.
 - iii. The fees of the said Valuer to be paid by the 2nd and 3rd Defendants.
 - iv. The Plaintiff shall have the costs of the suit payable by the 2nd and 3rd Defendants.



**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 21ST DAY OF
SEPTEMBER, 2023**

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Allan Kamau for 4th and 5th Defendants

Mr. Karauka for Plaintiff

Mr. Okayo for 1st, 2nd and 3rd Defendants

Court Assistant - Tracy

