



**Akoth & another v Oloo & 2 others (Environment and Land Appeal
E073 of 2021) [2023] KEELC 20867 (KLR) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20867 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E073 OF 2021
SO OKONG'O, J
OCTOBER 19, 2023**

BETWEEN

APOLLONIA AYOO AKOTH 1ST APPELLANT

MATHEWS ONYANGO 2ND APPELLANT

AND

DORICE AKINYI OLOO 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

THE DISTRICT LAND REGISTRAR-KISUMU 3RD RESPONDENT

*(Being an appeal from the judgment and decree of Hon. S.N.Telewa SRM
delivered on 29th September 2021 in Kisumu CMC ELC No. 130 of 2018)*

JUDGMENT

Background

1. All that parcel of land known as Kisumu/Kogony/3213 (hereinafter referred to as “the suit property”) was registered in the name of Hezron Oloo Adiedo, deceased on 15th January 1993 as the first registered owner thereof. The suit property was transferred to Hezron Oloo Adiedo’s wife, Peres Auma Oloo, deceased on 3rd June 2003 in unclear circumstances as there is no evidence that the process of succession was undertaken in respect of the estate of Hezron Oloo Adiedo, deceased. Peres Auma Oloo, deceased (hereinafter referred to only as “the deceased”) died of cancer on 27th October 2006. She was 85 years old. The deceased left behind 3 children namely, Risper Adongo Oloo, Dorice Akinyi Oloo and Ezekiel Oyas Oloo. As at the date of her death, the deceased was living on the suit property with two of her children, Dorice Akinyi Oloo and Ezekiel Oyas Oloo. Dorice Akinyi Oloo, the 1st Respondent herein was appointed as the administrator of the estate of the deceased on 12th February 2013. The Grant in her favour was confirmed on 6th November 2013.



2. On 6th June 2006, Peres Auma Oloo, deceased entered into an agreement for sale with the 1st Appellant in respect of the suit property. The deceased's children, Dorice Akinyi Oloo and Ezekiel Oyas Oloo were present during the execution of the agreement and Ezekiel Oyas Oloo was one of the witnesses to the agreement. The form and terms of the said agreement are contentious. While the 1st Respondent, Dorice Akinyi Oloo has contended that the deceased sold to the 1st Appellant only a portion of the suit property measuring 12m by 10m, the 1st Appellant has contended that the deceased sold to the 1st Appellant the whole land. The 1st Appellant caused the suit property to be transferred to her on 28th April 2004. The 1st Respondent also got registered as the proprietor of the suit property on 29th November 2012 in unclear circumstances and was issued with a title deed on the same date. The entries in the register of the suit property relating to the 1st Respondent's ownership of the property were subsequently cancelled. On 30th July 2014, a restriction was registered against the title of the suit property at the request of the 1st Appellant who claimed that the 1st Respondent had fraudulently obtained a confirmed Grant in respect of the estate of the deceased. On 28th May 2015, the 1st Appellant wrote to the 3rd Respondent requesting him to lift the said restriction because she had sold the suit property to a third party.
3. The said restriction was lifted by the 3rd Respondent on 28th May 2015, and on 21st July 2015, the suit property was transferred by the 1st Appellant to the 2nd Appellant. When the 1st Appellant transferred the suit property to the 2nd Appellant, the 1st Respondent had already filed a suit before this court namely, Kisumu ELC No. 350 of 2014 against the 1st Appellant and the 2nd and 3rd Respondents on 19th December 2014 questioning the legality of the transfer of the suit property to the 1st Appellant and the 1st Appellant had already filed a defence to the claim on 27th January 2015. The suit was transferred to the Chief Magistrate's Court at Kisumu and given a new case number, Kisumu CMCELC No. 130 of 2018 (hereinafter referred to as "the lower court suit").

The lower court suit

4. In her amended plaint filed in the lower court on 7th November 2019, the 1st Respondent averred that during her lifetime, the deceased who was the registered proprietor of the suit property which measured 0.24 Ha. sold to the 1st Appellant a portion thereof measuring 12m by 10m. The 1st Respondent averred that the deceased handed over to the 1st Appellant the original title deed for the suit property to enable the 1st Appellant to undertake the subdivision thereof and obtain two separate titles, one for the 1st Appellant's portion and the other for the deceased for the remaining portion. The 1st Respondent averred that contrary to what was agreed by the parties, the 1st Appellant transferred the whole of the suit property to her name thereby rendering the deceased and her family landless and without any source of livelihood. The 1st Respondent averred that the deceased never sold nor transferred the whole of the suit property to the 1st Appellant. The 1st Respondent averred that she only learnt that the suit property had been fraudulently transferred to the 1st Appellant when she sought to have the same transferred to her name through transmission upon obtaining of a Grant in respect of the estate of the deceased.
5. The 1st Respondent averred that while registering the transfer of the suit property to the 1st Appellant, the 3rd Respondent failed to confirm that the 1st Appellant had in its possession all the requisite consents and a duly executed instrument of transfer by the deceased in favour of the 1st Appellant. The 1st Respondent averred that the consent of the Land Control Board was not applied for and non was obtained and furthermore the deceased never executed a transfer of the suit property in favour of the 1st Appellant. The 1st Respondent averred that to avoid the disputes that had arisen over her ownership of the suit property, the 1st Appellant irregularly transferred the suit property to the 2nd Appellant. The 1st



Respondent averred that the 3rd Respondent acted fraudulently and/or negligently in the registration of the transfer of the suit property to the 1st and 2nd Appellants. The 1st Respondent averred further that by registering the purported transactions, the 3rd Respondent abused his office and breached his duty of care to the 1st Respondent. The 1st Respondent averred that the 1st and 2nd Appellants acted fraudulently by causing the suit property to be transferred to their names and colluding with the 3rd Respondent to perform irregular transfers. The 1st Respondent averred that as a result of the acts of the 1st and 2nd Appellants and the 3rd Respondent, the estate of the deceased had lost their source of livelihood. The 1st Respondent sought judgment against the Appellants and the 2nd and 3rd Respondents jointly and severally for;

- a. A declaration that the transaction that resulted in the transfer of the suit property to the Appellants was fraudulent, null and void and that the register of the suit property be rectified by the cancellation of the said transfers and the restoration of the property to the name of the deceased Peres Auma Oloo, deceased.
 - b. An order of eviction against the Appellants their successors, assigns, agents, servants or employees from the suit property.
 - c. Mesne profits occasioned by the Appellants' illegal occupation and control of the suit property.
 - d. Costs of the suit.
 - e. Any other reliefs the court may deem just under the circumstances.
6. The 1st Appellant filed a statement of defence in the lower court on 27th January 2015. The 1st Appellant denied the 1st Respondent's claim in its entirety. The 1st Appellant averred that the 1st Respondent's suit did not disclose any cause of action. The 1st Appellant averred that she purchased the whole of the suit property on 6th June 2003 at a consideration of Kshs. 145,000/-. The 1st Appellant averred that the agreement for sale between the 1st Appellant and the deceased was witnessed by among others, the deceased's son, Ezekiel Oyas Oloo. The 1st Appellant averred that she processed the transfer of the suit property in her favour and she was issued with a title deed in respect of the property on 24th April 2004 during the lifetime of the deceased. The 1st Appellant averred that prior to the death of the deceased in 2006 there was no dispute over the suit property. The 1st Appellant averred that neither the deceased nor her children raised a complaint against her.
7. The 1st Appellant averred that the 1st Respondent's allegation that the 1st Appellant acquired the suit property fraudulently was raised for the first time in January 2013. The 1st Appellant averred that the 1st Respondent's allegation was investigated by the Police in Kisumu who concluded that the allegations were false. The 1st Appellant averred that she was declared the lawful registered owner of the entire land. The 1st Appellant averred that she was the lawful owner of the suit property and that the 1st Respondent was a fraudster who was keen on interfering with the 1st Appellant's quiet enjoyment of the suit property. The 1st Appellant urged the court to dismiss the 1st Respondent's suit with costs and order the prosecution of the 1st Respondent for falsification of documents.
8. The 2nd Appellant filed a statement of defence on 9th December 2020. The 2nd Appellant averred that he purchased the suit property from the 1st Appellant after carrying out due diligence which included but was not limited to conducting an official search at the land registry and confirming that there was no dispute over the suit property. The 2nd Appellant averred that the 1st Respondent had caused him untold suffering by denying him quiet possession of the suit property. The 2nd Appellant averred that the 1st Respondent was not entitled to the reliefs that she had sought in the lower court.



9. The 2nd and 3rd Respondents filed a joint statement of defence on 13th April 2015. The 2nd and 3rd Defendants denied the 1st Respondents claim in its entirety. The 2nd and 3rd Respondents averred that if there was any registration and transfer that was undertaken by the 2nd Respondent as claimed by the 1st Respondent, the same was carried out in accordance with the laid down rules and regulations.
10. The lower court suit was heard by Hon. S.N.Telewa SRM. In a judgment delivered on 29th September 2021, the lower court framed 5 issues for determination namely; whether the 1st and 2nd Appellants had acquired the suit property legally, whether the 1st and 2nd Appellants should pay mesne profits to the 1st Respondent, and whether the 1st and 2nd Appellants should be evicted from the suit property. The lower court considered these issues together in its judgment. The lower court found that there was no evidence placed before it showing that the Land Control Board Consent was obtained in respect of the sale of the suit property by the deceased to the 1st Appellant. The lower court found that the transfer of the suit property from the deceased to the 1st Appellant was unprocedural. The lower court found that the 1st Appellant had failed to demonstrate that she acquired the suit property procedurally and lawfully. In conclusion, the lower court entered judgment for the 1st Respondent against the 1st and 2nd Appellants and the 2nd and 3rd Respondents for;
 1. A declaration that the transaction that resulted in the transfer of the suit property to the Appellants was fraudulent, null, and void.
 2. An order to the 3rd Respondent to rectify the register by canceling the said transfers and restoring the suit property to the name of the deceased.
 3. An order of eviction against the Appellants from the suit property.
 4. Mesne profits in the sum of Kshs. 100,000/- against the Appellants.
 5. The costs of the suit.

The appeal

11. The Appellants were aggrieved by the said judgment and filed the present appeal on 13th October 2021. In their Memorandum of Appeal dated 13th October 2021, the Appellants challenged the lower court's judgment on the following grounds;
 1. That the Learned Trial Magistrate erred in fact and in law by ignoring documentary evidence of sale of the suit property by the deceased to the 1st Appellant thereby displacing the contractual intention of the parties and replacing it with the court's own intention and opinion.
 2. That the Learned Trial Magistrate erred in fact and in law in arriving at a conclusion that the transfer of the suit property from the deceased to the 1st Appellant was fraudulent without any evidence of fraud or unlawful conduct on the part of the Appellants.
 3. That the Learned Trial Magistrate erred in fact and in law in failing to consider the evidence of fraudulent transactions by the 1st Respondent that were recorded in the register of the suit property.
 4. That the Learned Trial Magistrate erred in fact and in law in assuming without evidence that the transactions involving the suit property required Consent under the [Land Control Act](#), Chapter 302 Laws of Kenya.



5. That the Learned Trial Magistrate erred in fact and in law in making adverse orders affecting the rights and interests of a Chargee (National Youth Fund) without according them an opportunity to be heard in the proceedings.
6. That the Learned Trial Magistrate erred in fact and in law in overlooking the admission by the 1st Respondent and her witnesses to the effect that the suit property was actually sold by the deceased to the 1st Appellant.
7. That the Learned Trial Magistrate erred in fact and in law in ignoring the evidence of the 3rd Respondent.
8. That the Learned Trial Magistrate erred in fact and in law in overlooking the documentary evidence adduced by the Appellants and the 2nd and 3rd Respondents.
9. That the Learned Trial Magistrate erred in fact and in law in ignoring the standard of proof required to be met before cancellation of a title.
10. That the Learned Trial Magistrate erred in fact and in law in shifting the burden of proof of allegation of fraud and unlawfulness in the transfer of the suit property to the Appellants from the deceased, to the 1st Appellant.
11. That the Learned Trial Magistrate erred in fact and in law by ignoring the testimony of the 1st Appellant thereby arriving at a wrong conclusion that the 1st Appellant did not obtain the consent of the Land Control Board for the sale transaction between her and the deceased in respect of the suit property.
12. That the Learned Trial Magistrate erred in fact and in law in failing to address the factual and legal questions that arose before her.
13. That the Learned Trial Magistrate erred in fact and in law in finding that the Appellants were trespassers on the suit property.
14. That the Learned Trial Magistrate erred in fact and in law in overlooking the powers and responsibilities of the 3rd Respondent under Sections 9 and 14 and the legal presumption of the completeness of records under Section 35 of the [Land Registration Act](#) and the [Land Act](#) respectively.
15. That the Learned Trial Magistrate erred in fact and in law in finding that the signatures of the witnesses in the sale agreement between the deceased and the 1st Appellant were not attested and that the agreement had alterations without evidence to support the same.
16. That the Learned Trial Magistrate erred in fact and in law in overlooking the testimony of the 1st Appellant to the effect that he obtained Land Control Board Consent and she appeared before the Land Registrar together with the deceased where a second agreement was executed confirming the intention of the parties.
17. That the Learned Trial Magistrate erred in fact and in law in failing to take judicial notice of the orders made in Kisumu High Court Succession Cause No. 696 of 2012 stopping the transfer of the suit property to the 1st Respondent by transmission and the investigations by the Land Registrar that revealed fraud on the part of the 1st Respondent.
18. That the Learned Trial Magistrate erred in fact and in law in overlooking her own finding that no mesne profit was proved by the 1st Respondent and proceeding to award her Kshs. 100,000/-



without a proper basis against the 2nd Appellant even after finding that he had committed no wrong.

19. That the Learned Trial Magistrate erred in fact and in law in finding that the 1st Appellant had a duty to keep a record of land transactions already completed.
 20. That the Learned Trial Magistrate erred in fact and in law in failing to appreciate the use of land on the basis of a license that expires at the death of the licensee.
 21. That the Learned Trial Magistrate erred in fact and in law in failing to consider the Appellants' submissions.
 22. That the Learned Trial Magistrate exhibited bias against the Appellants.
 23. That the Learned Trial Magistrate erred in fact and in law in failing to hold that the 2nd Appellant was an innocent purchaser of the suit property for value without notice of any defect in its title.
 24. That the Learned Trial Magistrate misdirected herself on matters both of fact and law to the extent that a miscarriage of justice against the Appellants was committed.
12. The Appellants urged the court to allow the appeal, set aside the judgment of the lower court, and order that the 2nd Appellant holds a valid title to the suit property. The Appellants also prayed for the costs of the Appeal and of the lower court suit.
 13. The appeal was heard by way of written submissions.

The Appellants' Submissions

14. The Appellants filed their submissions on 29th May 2023. The Appellants submitted that the 1st Appellant purchased the whole of the suit property from the deceased lawfully and that the transfer of the property to the 1st Appellant was regular. The Appellants submitted that the 1st Respondent failed to prove that the deceased only sold a portion of the suit property to the 1st Appellant. The Appellants submitted that the fact that the 1st Appellant was registered as the proprietor of the suit property lawfully was supported by; the sale agreement that was produced in evidence, the report of investigation that was conducted by the Directorate of Criminal Investigations, and the evidence of the Land Registrar(DW1). The Appellants submitted further that the 1st Respondent did not prove fraud against the Appellants to the required standard. The Appellants submitted further that the 2nd Appellant was an innocent purchaser of the suit property for value without notice of any defect in its title and as such his title to the suit property was protected by the law. The Appellants submitted that the 2nd Appellant purchased the suit property from the 1st Appellant in good faith for valuable consideration without notice of the alleged fraud on the part of the 1st Appellant. The Appellants Submitted that the 1st Respondent did not prove that the 2nd Respondent had any notice of the alleged fraud in the manner in which the 1st Appellant acquired the suit property. On the issue of consent of the Land Control Board for the sale and transfer of the suit property to the 1st Appellant by the deceased, the Appellants submitted that the consent was obtained and the same was produced during the registration of the transfer in favour of the 1st Appellant. The Appellants submitted that that fact was confirmed by the Land Registrar(DW1) in his testimony before the lower court. The Appellants submitted that the lower court erred in its finding that the consent of the Land Control Board was not obtained. On the issue of the eviction of the Appellants from the suit property, the Appellants submitted that they had established that the 1st Appellant acquired the suit property regularly before he lawfully transferred the same to the 2nd Appellant. The Appellant averred that the order of eviction of



the Appellants from the suit property was erroneously issued by the lower court. The Appellants urged the court to allow the appeal. The Appellants cited several authorities in support of their Submissions which I have considered and some of which I will refer to later in the judgment.

The 1st Respondent's Submissions.

15. The 1st Respondent filed submissions dated 29th June 2023. The 1st Respondent submitted that contrary to the provisions of Order 42 Rule 4 of the Civil Procedure Rules, the Appellants had abandoned their grounds of appeal and directed their submissions on issues not set out in the said grounds of appeal without leave of the court. On the merit of the appeal, the 1st Respondent submitted that the agreement for sale between the deceased and the 1st Appellant was handwritten and not typed. The 1st Respondent submitted that the agreement was signed in the deceased's house and the 1st Respondent was present. The 1st Respondent submitted that the typed agreement for sale that was produced in evidence by the 1st Appellant contained different terms and was not the one that was signed by the deceased. The 1st Respondent submitted that the deceased sold to the 1st Appellant only a portion of the suit property measuring 12m by 10m to put up a posho mill which the 1st Appellant did. The 1st Respondent submitted that the agreement for sale produced in evidence by the 1st Appellant was full of contradictions and alterations. The 1st Respondent submitted that the lower court could not be faulted in its finding that the deceased did not sell the whole of the suit property to the 1st Appellant.
16. The 1st Respondent submitted that the deceased did not sign an instrument of transfer in favour of the 1st Appellant. The 1st Respondent submitted that the documents that were produced by the Land Registrar(DW1) in evidence did not include the instrument of transfer of the suit property by the deceased to the 1st Appellant and the consent of the Land Control Board. The 1st Respondent submitted that she produced in evidence a certificate of official search dated 4th October 2012 which showed that as at that date, the suit property was still registered in the name of the deceased. The 1st Respondent submitted that this search certificate was not disputed by the Land Registrar. The 1st Respondent submitted that the purported transfer registered on 28th April 2004 was a forgery and fraudulent since the deceased did not transfer the suit property to the 1st Appellant during her lifetime and that explained why a copy of the alleged transfer was not produced in evidence either by the 1st Appellant who was a beneficiary thereof and the Land Registrar who was supposed to be the keeper of such records. The 1st Respondent submitted that in the absence of an instrument of transfer and the consent of the Land Control Board, the 1st Appellant could not obtain a good title to the suit property. The 1st Respondent submitted that the lower court did not err in its finding that the transaction between the 1st Appellant and the deceased was null and void and for making an order that the suit property be restored to the name of the deceased. The 1st Respondent submitted that there was also no error in the order of eviction against the Appellants and for them to pay mesne profits of Kshs. 100,000/-. The 1st Respondent urged the court to uphold the decision of the lower court and dismiss the appeal with costs to the 1st Respondent.

Analysis and Determination

17. I have considered the pleadings and proceedings of the lower court, the judgment of the court the subject of the appeal, the grounds of appeal put forward by the Appellants, and the submissions by the advocates for the parties. In their submissions, the Appellants summarised their 24 grounds of appeal into 6 issues for determination by this court namely; whether the 1st Appellant validly purchased the whole of the suit property from the deceased, Peres Auma Oloo, whether the transfer of the suit property to the 1st Appellant was lawful, whether the 1st Respondent proved fraud against the



Appellants, whether the 2nd Appellant's title was protected under the principle of bona fide purchaser for value without notice, whether the consent of the land control board was obtained in respect of the transaction between the 1st Appellant and the deceased, and whether the orders of eviction were properly issued against the Appellants. I will consider these issues shortly.

18. This being a first appeal, the 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.
19. I have carefully reviewed the evidence that was adduced by the parties in the lower court. I am unable to fault the lower court in its finding that the 1st Appellant acquired the parcel of land known as Kisumu/ Kogony/3213(the suit property) irregularly and unlawfully. I am not in agreement with the submissions by the Appellants that the lower court shifted the burden of proof of fraud and other alleged illegalities in the transfer of the suit property to the 1st Appellant from the 1st Respondent to the Appellants. In *Kurshed Begum Mirza v. Jackson Kaibunga* [2017] eKLR, the court stated as follows:

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- “(16) Turning to the second issue; according to section 107 of the *Evidence Act*, the burden of proof in any case lies with the party who desires any court to give judgment as to any legal right or liability. It is for that party to show that the facts which he alleges his case depends upon exist. This is known as the legal burden.

The *Halsbury's Laws of England, 4th Edition*, Volume 17, at paras 13 and 14: describes it thus:

- “ 13. The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.
14. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.” (emphasis added)”

20. Apart from the legal burden of proof, there is the evidential burden of proof which keeps shifting during the trial. The majority of the Supreme Court in Presidential Election Petition No. 1 of 2017,



Raila Amolo Odinga & Another v. IEBC & 2 Others [2017] eKLR had the following to say on the evidential burden of proof in paras 132 and 133 of the judgment:

“(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.

(133) It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce ‘factual’ evidence to prove his/her allegations of breach, then the burden shifts and it behoves the respondent to adduce evidence to prove compliance with the law...”

21. The 1st Respondent produced before the lower court evidence showing that Peres Auma Oloo (deceased) was registered as the owner of the suit property on 3rd June 2003. The 1st Respondent was present when the deceased entered into an agreement for sale with the 1st Appellant. The 1st Respondent and Ezekiel Oyas Oloo who was also present during the execution of the said agreement told the court that the deceased sold to the 1st Appellant only a portion of the suit property and that the agreement of sale between the 1st Appellant and the deceased was handwritten. The 1st Respondent told the court that the deceased never executed an instrument of transfer transferring the suit property to the 1st Appellant. The 1st Respondent told the court further that the deceased never applied for Land Control Board consent in respect of the sale of the suit property and that none was issued. The 1st Respondent also placed before the court evidence showing that the suit property was registered in the name of the 1st Appellant on 28th April 2004 during the lifetime of the deceased without a transfer having been executed by the deceased in favour of the 1st Appellant. The 1st Respondent also placed before the court evidence showing that after the 1st Respondent filed a suit against the 1st Appellant on 19th December 2014 before this court which suit was later transferred to the lower court, the 1st Appellant transferred the suit property to the 2nd Appellant on 21st July 2015 so as to defeat the 1st Respondent’s claim.
22. The evidence that was placed before the lower court by the 1st Respondent if not rebutted was sufficient to prove that the 1st Appellant acquired the suit property unlawfully and fraudulently through forgery of documents. The evidence that was adduced by the 1st Respondent shifted the evidential burden of proof to the Appellants and the 2nd and 3rd Respondents to prove that the Appellants acquired the suit property in accordance with the law. What was shifted was the evidential burden of proof that keeps shifting but not the legal burden of proof. In *Munyu Maina v. Hiram Gathiba Maina* [2013]eKLR, the Court of Appeal stated as follows:

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the



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

In *George Mbiti Kiebia & Another v. Isaya Theuri M'lintari & Another* [2014] eKLR the Court of Appeal stated that:

“Under Section 112 of the *Evidence Act*, 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. How the appellant got registered as proprietor of Land Parcel No. 70 is a fact within the knowledge of the appellant and it was incumbent upon the appellant to dislodge the notion that Land Parcel No. 70 was ancestral clan land and refute that he was not registered as proprietor as a representative of the family of the late M’Kiebia.”

23. How the suit property was transferred from the deceased to the 1st Appellant was a fact within the knowledge of the 1st Appellant. It was only the 1st Appellant who could prove the same. Did the 1st Appellant prove that he acquired the suit property legally and procedurally? Like the lower court, my answer is in the negative. The 1st Appellant who contended that the deceased sold to him the whole of the suit property placed before the lower court an agreement of sale dated 6th June 2003 which she claimed to have entered into with the deceased. As observed by the lower court, the purported agreement that was disputed by the 1st Respondent and one of the alleged witnesses thereto, Ezekiel Oyas Oloo is full of alterations and insertions that are not counter-signed by the parties to the agreement. The terms of the agreement are also contrary to the evidence of the 1st Appellant. In her evidence in chief, the 1st Appellant told the court that they agreed on a purchase price of Kshs. 145,000/- and that she made an initial payment of Kshs. 45,000/- and paid the balance of Kshs.100,000/- later. In the agreement, it is indicated that the full purchase price of Kshs. 145,000/- was paid on the execution of the agreement. The purported agreement was also witnessed by a Land Registrar, Machora S.O. Magare. All the parties are in agreement that this Land Registrar was not in the deceased’s house when the deceased and the 1st Appellant were entering into the agreement for sale.
24. The 1st Appellant did not also place before the lower court a copy of the instrument of transfer of the suit property that was alleged to have been executed in his favour by the deceased. He did not also produce the application for Land Control Board consent and the consent. There was a total lack of documentation relating to the transfer of the suit property from the deceased to the 1st Appellant. The 1st Appellant claimed that she had the documents and that she left the same at the Land Registry.
25. DW1 was a Land Registrar. He produced in evidence all the documents they had in their possession regarding the transfer of the suit property to the Appellants. Whereas all the necessary documentation regarding the transfer of the property from the 1st Appellant to the 2nd Appellant was in place, there was none regarding the transfer of the suit property by the deceased to the 1st Appellant. The Land Registrar did not have in their records the instrument of transfer executed by the deceased in favour of the 1st Appellant on the strength of which the property could have been registered in the name of the 1st Appellant. There was also no consent of the Land Control Board or evidence of assessment and payment of Stamp Duty. On cross-examination by the 1st Respondent’s advocate, the Land Registrar, DW1 told the court that “There was no consent obtained. No transfer documents were registered. There was no valuation done regarding the suit property. There was no evidence of Stamp Duty. There are no records how the 3rd Defendant acquired the land.” The only documents that both the 1st Appellant and the Land Registrar held as evidence of the transfer of the suit property to the 1st Appellant by the deceased were a title deed and a copy of the extract of the register. Land Registration



is a process rather than an event. Making an entry in the land register and issuing a title deed are the end results of that process. They cannot by themselves be evidence that the process was carried out or conducted lawfully.

26. It is my finding that the agreement of sale dated 6th June 2003 that was produced by the 1st Appellant in evidence was not the agreement that was signed by both the 1st Appellant and the deceased in the deceased's house. It is also my finding that the 1st Appellant failed to prove that the transfer of the suit property from the deceased to the 1st Appellant was lawful. In the absence of evidence that the deceased executed a transfer in the 1st Appellant's favour and that consent of the Land Control Board was obtained for the transaction, the only conclusion to be made by the court was that the transfer was irregular, unlawful, null and void. It follows therefore that both the purported sale and transfer of the suit property to the 1st Appellant were unlawful. I find no error in the lower court's finding to that effect.
27. The 1st Appellant had contended that the 1st Respondent did not establish fraud against him. The term fraud is defined in *Black's Law Dictionary 9th Edition* as follows;

“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. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a Court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another”.

In *Vijay Morjaria v. Nansingh Madhusingh Darbar & another* [2000]eKLR, the court (Tunoi JA) stated as follows:

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

28. I am satisfied that the 1st Respondent pleaded fraud against the 1st Appellant and the 2nd and 3rd Respondents in the lower court. In my view, failure by the 1st Appellant to show how the suit property was transferred from the deceased to the 1st Appellant was clear evidence that the 1st Appellant acquired the property fraudulently. If the deceased did not execute a transfer in favour of the 1st Appellant, what was registered could only have been a forged document. If the deceased did not apply for the consent of the Land Control Board, the consent on the strength of which the suit property was transferred to the 1st Appellant could only have been acquired through fraud and misrepresentation. There are also chances that such consent if it existed could have been forged. It is my finding therefore that fraud was proved against the 1st Appellant.
29. On whether the title that was passed by the 1st Appellant to the 2nd Appellant could be saved through the doctrine of innocent purchaser without notice, my answer is negative for three reasons. First, the 2nd Appellant was not an innocent purchaser of the suit property, secondly, the 1st Appellant had no valid



interest in the suit property that he could transfer to the 2nd Appellant and thirdly, the suit property was transferred to the 2nd Appellant in breach of the doctrine of *lis pendens*.

30. 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.”

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.

38. We say so because in the recent past and even presently, fraudsters have upped their game and we have come across several cases where Title deeds manufactured in the backstreets have, with collusion of officers in land registries, been transplanted at the Lands Office and intending buyers have been duped to believe that such documents are genuine and on that basis they have “purchased” properties which later turn out to belong to other people when the correct documents mysteriously reappear on the register or the genuine owner show up after seeing strangers on their properties waving other instruments of title. It is the prevalence of these incidents that have necessitated the current overhaul and computerization of the registration systems at the Land Registry in Nairobi.

39. The elephant in the room is whether genuine, legitimate owners of property should be dispossessed of their hard earned property, because a party has “purchased” the property on the basis of an “apparent title” at the land registry



which had been transplanted in place of the genuine title, only for the genuine one to reemerge after the transaction? In our view, 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/she could have believed to be genuinely owned by the person holding himself out as the vendor.”

31. I have not had sight of the agreement of sale between the 1st Appellant and the 2nd Appellant. The terms under which the property was sold to the 2nd Appellant are in the circumstances not clear. I have however seen an application for Land Control Board consent dated 29th April 2015 and the instrument of transfer of land of the same date signed by the 1st and 2nd Appellants. There is no indication in the transfer form as to the consideration that the 2nd Appellant paid for the suit property. No evidence was also placed before the court to demonstrate payment of the agreed consideration. From the said application for the consent of the Land Control Board and instrument of transfer, it appears that the Appellants entered into a sale agreement on or about 29th April 2015. There is no evidence that the 2nd Appellant conducted a search on the title of the suit property before entering into the sale agreement with the 1st Appellant. The search that was produced by the 2nd Appellant in evidence was conducted on 18th June 2014 more than a year before the sale transaction between the Appellants. I am of the view that if the 2nd Appellant had conducted a search, the search would have revealed to him that as at the time he was entering into the said agreement of sale with the 1st Appellant, the 1st Appellant had registered a restriction against the title of the suit property because of a dispute that the 1st Appellant had with the 1st Respondent over the property. The said restriction was removed on 28th May 2015 to pave the way for registration of the transfer of the property to the 2nd Appellant after the 1st Appellant sold the property to the 2nd Appellant. I am also of the view that if the 2nd Appellant had inspected the property on the ground and made the necessary inquiries with the people on the ground, he would have learnt that the ownership of the suit property was in dispute and that there was an ongoing court case over the same. In *Godfrey Gitthinji Kamiri v Attorney General & 4 others* [2019] eKLR the court cited *Chemey Investment Ltd. v A.G & 2 Others* [2018] eKLR where the Court of Appeal stated as follows:

“We have noted that the Ekima Junior Academy never took possession of the suit property. It therefore means that when the appellant purported to purchase the same, the suit property was in the same condition it was when it was initially allocated, namely in use for public purposes. We ask ourselves, which innocent purchaser, without notice, would accept to purchase a property that is being used for public purposes, just next to the provincial headquarters and the law courts, without any form of inquiry”. As this court stated in *Arthi Highway Developers Limited vs West End Butchery Limited & 6 Others* (Supra), only a foolhardy, and we may add, a careless or fraudulent investor would purchase land such as the suit property “with the alacrity of a potato dealer in Wakulima Market”. And further in *Flemish Investments Ltd vs Town council of Mariakani*. CA No. 30 of 2015, in an appeal where the appellant who had fraudulently obtained registration of public property in his name but claimed to be an innocent purchaser for value without notice, this court stated:-

A *bona fide* purchaser exercising due diligence would be expected to inspect the property he is buying, to ascertain its physical location, person, if any, in occupation, developments, buildings and fixtures thereon, among others. If indeed the appellant honestly believed that plot no. 34 and the cattle dip on it were part of the suit property, he would have rehabilitated the cattle dip as his property, or simply demolished it, not to pester the respondent for its relocation.



For a party who was buying a commercial property rather than a ranch, the presence of a cattle dip on the property should have rang alarm bells”.

32. In the absence of a sale agreement, evidence of payment of the purchase price, and evidence of due diligence having been undertaken, I am not persuaded that the 2nd Appellant was an innocent purchaser of the suit property without notice of any defect in the 1st Appellant’s title. In any event, even if the 2nd Appellant purchased the suit property innocently, I am of the view that he could not acquire a valid title from the 1st Appellant. I have held earlier in the judgment that the title that was held by the 1st Appellant was unlawful, null and void. The title was a nullity. Transfer of such title to the 2nd Appellant could not confer on him any interest in the suit property. In *Macfoy v. United Africa Co. Ltd.*(1961) 3 All E.R 1169, Lord Denning stated as follows at page 1172 concerning an act which 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”.

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(sic) 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.”
33. It is common ground that the suit property was transferred by the 1st Appellant to the 2nd Appellant on 21st July 2015. It is also common ground that as at this date a suit had already been filed against the 1st Appellant and the 2nd and 3rd Respondents (Kisumu ELC No. 350 of 2014) challenging the 1st Appellant’s title to the suit property and the suit was pending hearing and determination before this court. The suit was subsequently transferred to the lower court and given a new case number, Kisumu



CMC ELC No. 130 of 2018. In *Bernadatte Wangare Muriu v. National Social Security Fund Board of Trustees & 2 others* [2012] eKLR, the court cited *Fredrick Joses Kinyua and Peter Kiplangat Koech v G.N. Baird*, Nairobi Hccc No. 4819 of 1989 as consolidated with Nairobi HCCC No. 6587 of 1991 *George Neil Baird and Wanda Baird v Fredrick Joses kinyua and Peter Kiplangat Koech* in which G.S. Pall J. stated as follows:

The doctrine of *lis Pendens* under section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of *lis pendens* is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice. It therefore overrides, section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other...”

In *Margaret Wairimu Warima v. Phylis Wanjiru Thairu & 2 others* [2017]eKLR, the court stated as follows on the doctrine of *lis Pendens*:

“ Apart from the court orders, which we find were operative at all times material to the suit, there is a common law doctrine of *Lis pendens* which is unaffected by statute and has been upheld by this Court. The common sense of it was explained by Lord Justice Turner in the case of *Bellamy vs. Sabine* [1857] 1 De J 566, as follows: “It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendent lite were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendants alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same course of proceedings.”

In *Emmanuel Ngade Nyoka v. Kitheka Mutisya Ngata*, [2017]eKLR, the court stated that:

“ So that by the time he was subdividing, selling and transferring portions of the suit premises to the interested parties he was well aware that litigation regarding the suit premises was still ongoing in the first appellate court. This state of affairs obviously attracts the application of the *lis pendens* doctrine. It is a doctrine of law and thus it matters not when it is raised. The doctrine simply prohibits a party to a suit from transferring the suit premises to a third party while the suit, with regard to the suit premises is pending. The purpose of the doctrine is of course to preserve the suit premises until the finalisation of the ongoing litigation... As already stated the appellant was well aware of the pending appeal when he purported to subdivide, sell and transfer to the interested parties portions of the suit premises. This being the case the interested parties cannot be heard to argue that they were innocent purchasers for value without notice. As correctly observed by the learned Judge purchase of a property pendent lite for valuable consideration affects the purchaser in the same manner as if he had notice and will be accordingly bound by the judgment or decree in the suit. It does not matter that at the time of purchase there was no order stopping the selling or subdivision of the suit premises as the interested parties have argued. Nor was there need to tender evidence to show that the interested parties were never parties to any collusion or fraud in their acquisition of portions aforesaid. What is pertinent is that the appellant well knowing of the pending litigation involving the suit premises nonetheless went ahead to mischievously



subdivide and transfer portions thereof to the interested parties. In the circumstances the learned Judge did not err in invoking the doctrine.”

In *Kawaljeet Singh Rekhi v. Peter Wainaina Kamau & 2 others* MBSA Civil Appeal No. 21 of 2016 [2016] eKLR, the court stated that:

“...Mulla and Gour in their treatises on the Indian Transfer of Property Act explain the doctrine further that:

“... Every man is presumed to be attentive to what passes in the courts of justice of the state or sovereignty where he resides. Therefore, purchase made of property actually in litigation, pendent lite, for a valuable consideration, and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had such notice, and he will accordingly be bound by the judgment or decree on the suit”.

The doctrine therefore bars dealing with landed property under litigation to the detriment of the parties to the pending litigation. A transfer, if undertaken in those circumstances will really amount to nothing, and this is the case here.”

34. It is clear from the foregoing that the 2nd Appellant’s title cannot be saved by the doctrine of innocent purchaser for value without notice. The sale was against the doctrine of lis pendens and the 1st Appellant also had no valid title in the property that he could transfer to the 2nd Appellant. Since the 1st Appellant’s title was a nullity so was the title purportedly passed to the 2nd Appellant. The findings by the lower court were therefore well founded.
35. On the issue of whether or not the 1st Appellant obtained the consent of the Land Control Board in respect of the transaction between the 1st Appellant and the deceased, the burden of proving the existence of such consent was on the 1st Appellant. The 1st Appellant produced no such consent in evidence. Even the application for the same was not produced. The Land Registrar (DW1) did not find such consent in the Land Registry records in relation to the transaction in question. The 1st Appellant did not tell the court when they appeared before the Land Control Board with the deceased who was over 80 years old, who accompanied the deceased and the date when the consent was issued. Even if it is assumed that the Letter of Consent was misplaced by the 1st Appellant and the Land Registry, still the 1st Appellant could obtain the records from the relevant Land Control Board. No such records were produced in evidence. I am in agreement with the lower court that the 1st Appellant failed to prove that consent of the Land Control Board was obtained in respect of the transaction between him and the deceased. In the absence of such consent, the purported sale transaction was a nullity pursuant to the provisions of the *Land Control Act*, Chapter 302 Laws of Kenya. The lower court cannot be faulted for making such a finding.
36. On the issue of whether the orders issued by the lower court were valid, the following is my view: I have made a finding earlier in the judgment that the purported sale transaction between the 1st Appellant and the deceased and the subsequent sale transaction between the 1st Appellant and the 2nd Appellant were fraudulent, null and void. A declaration to that effect and an order for the restoration of the suit property to the name of the deceased by the lower court were therefore properly made. With regard to the eviction order, the lower court having nullified the titles that the Appellants had acquired in respect of the suit property, the Appellants had no lawful cause for continuing to occupy the suit property. They were trespassers on the property and an order for their eviction was properly made by the lower



court. With regard to mesne profits, in *Attorney General v. Halal Meat Products Limited* [2016] eKLR the Court of Appeal stated as follows on mesne profits:

“It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another. See McGregor on Damages, 18th Ed. para 34-42.”

In the case of *Rajan Shah T/A Rajan S. Shah & Partners v. Bipin P. Shah* [2016] eKLR the court stated as follows:

“The term ‘mesne profits’ relates to the damages or compensation recoverable from a person who has been in wrongful possession of immovable property. The Mesne profits are nothing but a compensation that a person in the unlawful possession of others property has to pay for such wrongful occupation to the owner of the property. It is settled principle of law that wrongful possession is the very essence of a claim for mesne profits and the very foundation of the unlawful possessor’s liability therefore. As a rule, therefore, liability to pay mesne profits goes with actual possession of the land. That is to say, generally, the person in wrongful possession and enjoyment of the immovable property is liable for mesne profits.”

37. The lower court having made a finding that the Appellants had no valid titles to the suit property and as such had occupied the suit property illegally thereby depriving the estate of the deceased of the use thereof, the court was entitled to assess reasonable mesne profits that could compensate the estate for the loss that it had suffered. The awarded one-time payment of Kshs. 100,000/- was reasonable and fair in the circumstances. With regard to costs, costs of and incidental to a suit follows the event and the same is at the discretion of the court. The 1st Respondent having succeeded in her claim against the Appellants and the Appellants having not given any reason why the 1st Respondent could be denied her costs of the suit; the costs were properly awarded by the lower court to the 1st Respondent.

Conclusion

38. In the final analysis and for the foregoing reasons, I find no merit in the Appellants’ appeal. The appeal is dismissed with costs to the 1st Respondent.

DELIVERED AND DATED AT KISUMU ON THIS 19TH DAY OF OCTOBER 2023

S. OKONG’O

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

