



Thuo & another (Suing as the Legal Representatives of the Estate of Susan Waithera Fischer Thuo alias Susan Waithera Thuo - Deceased) v Wambui & 2 others (Environmental and Land Originating Summons 541 of 2010) [2022] KEELC 12838 (KLR) (29 September 2022) (Judgment)

Neutral citation: [2022] KEELC 12838 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 541 OF 2010
SO OKONG'O, J
SEPTEMBER 29, 2022**

BETWEEN

KESSIAH WAIRIMU THUO 1ST APPLICANT

JAMES NJUGUNA KAMAU 2ND APPLICANT

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF SUSAN
WAITHERA FISCHER THUO ALIAS SUSAN WAITHERA THUO - DECEASED**

AND

MARY WANJIRU WAMBUI 1ST RESPONDENT

MATHEW GICHIA WAINAINA 2ND RESPONDENT

KIAMBU COUNTY LAND REGISTRAR 3RD RESPONDENT

JUDGMENT

1. The Applicants brought this suit against the Respondents through Originating Summons dated November 11, 2010. The Originating Summons was amended on November 19, 2010 and further amended on May 7, 2012. The Further Amended Originating Summons dated May 7, 2012 was supported by an affidavit sworn by the 1st Applicant, Kessiah Wairimu Thuo on May 7, 2012 in which she adopted the contents of the affidavit she had sworn on November 19, 2010 in support of the Amended Originating Summons.
2. The Applicants sought for the following orders in their Further Amended Originating Summons;
 - a. A declaration that all that parcel of land known as KABETE/MUTHUMU/T.178 together with all the developments thereon is the property of the estate of Susan Waithera Fischer Thuo Alias Susan Waithera Thuo (Deceased).



- b. A declaration that any purported sale and/or transfer of all that parcel of land known as KABETE/MUTHUMU/T.178 together with all the developments thereon to the 2nd Respondent herein or any other person is illegal null and void ab initio.
 - c. An order directing the Land Registrar, Kiambu County to cancel all or any entry on the land register purporting to transfer all that parcel of land known as KABETE /MUTHUMU/ T.178 to the 2nd Respondent herein and restore the ownership to the deceased's estate or as the Court may deem fit.
 - d. An order directing the Respondents jointly and severally to render a true and just account for all the income that has accrued to the deceased's estate by way of monthly rents with effect from 1st August 2009 until full control of the said parcel of land is restored to the Applicants.
 - e. A permanent injunction restraining the 2nd Respondent either by himself or through his agents or servants from intermeddling with, receiving rent from, transferring, charging or in any other manner dealing with all that parcel of land known as KABETE/MUTHUMU/T.178.
 - f. That the costs of this application be borne by the Respondents.
3. In the grounds that were set on the face of the Originating Summons and the affidavits in support thereof, the Applicants averred that all that parcel of land known as Kabete/Muthumu/T.178 together with the developments thereon comprising of a block of eight residential flats (hereinafter referred to only as "the suit property") was at all material times registered in the name of Susan Waithera Fischer Thuo Alias Susan Waithera Thuo (Deceased) (hereinafter referred to only as "the deceased"). The Applicants averred that the suit property was registered in the name of the deceased on March 10, 1998 and that the same remained registered in her name as at the time of her death on June 28, 2007. The Applicants averred that they were the administrators of the estate of the deceased having been issued with Grant of Letters of Administration by the High Court in respect of her estate on September 13, 2010 in Nairobi High Court Succession Cause No. 487 of 2010. The Applicants averred that they were the only persons authorized in law to administer the estate of the deceased.
 4. The Applicants averred that the deceased left two unemployed sons in their care and that she had a German male partner one, Edgar Lorenz Werner (hereinafter referred to only as "Edgar") who took over the management of the suit property and collected monthly rent from the tenants occupying the same in excess of Kshs. 50,000/= without rendering any account to them.
 5. The Applicants averred that their efforts to collect rent from the suit property were frustrated by Edgar who disappeared with the deceased burial permit and that it took them time to obtain a duplicate permit so as to obtain a death certificate for use in applying for letters of administration.
 6. The Applicants averred that towards the end of 2009, the 1st Applicant got information that Edgar had transferred the suit property to a third party. The Applicants averred that a search that they conducted on the suit property revealed that the suit property was transferred on or about July 3, 2009 to the 1st Respondent.
 7. The Applicants averred that a further search that they conducted on 12th October 2010 revealed that the suit property had been further transferred to the 2nd Respondent on or about November 6, 2009.
 8. The Applicants averred that since the suit property was registered in the name of the deceased as at the time of her death, the same could only be transferred or dealt with by her legal representatives. The Applicants averred that they were the only legal representatives of the deceased to whom a Grant of Letters of Administration had been issued by the court.



9. The Applicants averred that the purported transfer of the suit property to the 1st Respondent and subsequently to the 2nd Respondent were illegal, null and void and should be cancelled. The Applicants averred further that the Respondents had no right to collect rent from the suit property or to benefit from any income accruing therefrom and as such, they should account to the estate of the deceased for the rent that they have collected from the property.
10. The 2nd Respondent opposed the Originating Summons through a replying affidavit sworn on February 2, 2011. The 2nd Respondent averred that he was the registered owner of the suit property having purchased the same from the 1st Respondent who was its previous registered owner on November 6, 2009 at a consideration of Kshs. 4,200,000/-. The 2nd Respondent averred that he was an innocent purchaser of the suit property and as such was entitled to quiet possession and enjoyment of the property.
11. The 2nd Respondent denied that he had acquired the suit property fraudulently. The 2nd Respondent averred that he was entitled to collect rent from the suit property being the registered owner thereof.
12. The 2nd Respondent averred that the deceased was married to Edgar and that upon the deceased's death, Edgar in his capacity as the legal representative of the deceased, transferred the suit property to the 1st Respondent. The 2nd Respondent averred that the Applicants had never entered the suit property or attempted to collect rent therefrom since the death of the deceased.
13. The 2nd Respondent averred that before purchasing the suit property, she conducted a search that confirmed that the property had no encumbrances and that the 1st Respondent who sold the property to him informed him that she married Edgar after the death of the deceased. The 2nd Respondent averred that the Originating Summons was brought with the intention of depriving him of the suit property.
14. The 3rd Respondent opposed the Originating Summons through a replying affidavit sworn by W.N Muguro, the Land Registrar Kiambu Land Registry on 16th September 2015. The 3rd Respondent stated that the suit property was registered in the name of James Thuo Cabi on July 9, 1959 and on March 3, 1998 the same was transferred to the 1st Applicant and one, David Kimani Karogo. The 3rd Respondent stated that on 10th March 1998, the suit property was transferred to the deceased. The 3rd Respondent averred that on July 3, 2009, the suit property was transferred to the 1st Respondent and subsequently to the 2nd Respondent on November 6, 2009.
15. The 3rd Respondent stated that if indeed the deceased had died on June 28, 2007 and a Grant of Letters of Administration in respect of her estate was not issued until 13th September 2010, it was not possible for the deceased to have transferred the suit property to the 1st Respondent on July 3, 2009 since such a transfer could only be effected by the deceased's legal representative.
16. The 3rd Respondent stated that there was no way the Land Registry could have detected that the documents that were presented to it for registration were intended to defraud the estate of the deceased of the suit property. The 3rd Respondent averred that it was for the 1st Respondent to explain to the court how she acquired the suit property. The 1st Respondent did not file a replying affidavit in response to the Originating Summons.

The evidence tendered by the parties:

17. At the trial, the 1st Applicant who gave evidence as PW1 told the court that the 2nd Applicant and she were the administrators of the estate of the deceased. She produced a copy of the Grant of Letters of



- Administration that was issued to them on September 13, 2010 as PEXH. 1. PW1 adopted the contents of her affidavit sworn on November 19, 2010 as part of her evidence in chief.
18. PW1 testified that the deceased was not married but had two sons, Mathew Waweru Thuo (deceased) and James Thuo and that the suit property was registered in her name. PW1 stated that the deceased put up the houses on the suit property around 1998/1999 while she was living in Germany. PW1 stated that the deceased used to send her the money for construction.
 19. PW1 stated that when the deceased came back to Kenya she was accompanied by Edgar and she found when the construction of the houses on the suit property had been completed and the houses had tenants.
 20. PW1 stated that the deceased did not transfer the suit property to the 1st Respondent and that the same belonged to the estate of the deceased. PW1 produced the documents attached to her affidavit sworn on November 19, 2010 namely; copies of, birth certificate for Mathew Waweru Thuo, birth certificate for James Thuo, certificate of death for Mathew Waweru Thuo, extracts of the register for the suit property and certificate of official search dated October 12, 2010 as PEXH2, PEXH3, PEXH4, PEXH5 and PEXH6 respectively.
 21. On cross examination, PW1 reiterated that the deceased was not married to Edgar despite her obituary stating that she was. PW1 stated that Edgar was issued with the deceased's burial permit because he was the one who took her to the hospital and paid for the mortuary charges on account of their friendship. PW1 stated that Edgar had no right to inherit the suit property and that she was not aware how the suit property was transferred to the 1st Respondent.
 22. After the close of the Applicants' case, the 2nd Respondent gave evidence as DW1. DW1 adopted as his evidence in chief his witness statement dated 13th September 2011 filed in court on October 25, 2013. He produced the documents attached to his list of documents dated October 18, 2012 also filed in court on October 25, 2013 as DEXH1.
 23. In the statement, DW1 reiterated the contents of his affidavit in response to the Originating Summons that I highlighted earlier in this judgment. It is not necessary to repeat the same here. DW1 stated that he entered into an agreement of sale dated 6th November 2009 with the 1st Respondent for the purchase of the suit property at Kshs. 4,200,000/= an amount that he paid and had the instrument of transfer executed in his favour by the 1st Respondent on the same day. DW1 stated further that he paid stamp duty for the transfer and had the same registered and the suit property transferred to his name. DW1 stated that when he purchased the property, the same was registered in the name of the 1st Respondent and that he conducted the necessary due diligence before purchasing the suit property that did not reveal any encumbrance. DW1 stated that he was an innocent purchaser of the suit property. On cross examination, DW1 stated that he was not aware how the 1st Respondent acquired the suit property. On examination by the court, DW1 stated that he did not know how the suit property was transferred from the deceased to the 1st Respondent.
 24. The 1st Respondent gave evidence as DW2. DW2 adopted her witness statement dated November 14, 2015 that was filed in court on 24th November 2015 as her evidence in chief and produced documents attached to her list of documents dated 14th November 2015 filed in court on November 24, 2015 as DEXH2.
 25. In her witness statement, DW2 stated that she acquired the suit property by virtue of her marriage to Edgar. DW2 admitted that before she acquired the suit property, the same was registered in the name of the deceased. She stated that she married Edgar after the death of the deceased who was Edgar's wife.



- DW2 stated that Edgar inherited the suit property from the deceased and arranged for the same to be transferred to her on July 3, 2009 after which she was issued with a title deed in respect thereof.
26. DW2 stated that in November 2009, Edgar and she sold the suit property to the 2nd Respondent at Kshs. 4,200,000/-. She stated that Edgar did not live long after that as he died on October 12, 2010 and was buried in Mombasa. DW2 stated that there was no fraud in the transfer of the suit property from the deceased to her and from her to the 2nd Respondent. DW2 denied that the Applicants were the legal representatives of the deceased contending that Edgar was the next of kin and legal representative of the estate of the deceased. DW2 reiterated that she acquired the suit property lawfully.
 27. On cross-examination, DW2 admitted that when she married Edgar, she was aware that the deceased had died. She stated that she did not meet the deceased and that the information about the deceased was given to her by Edgar. DW2 admitted that when the property was transferred to her, the same was in the name of the deceased. She stated that the instrument of transfer of the suit property was brought to her, she signed the same and handed it to Edgar who was to complete the process and have the property registered in her name. DW2 stated that she was not aware whether Edgar had taken out Grant of letters of administration in respect of the estate of the deceased. She stated that it was Edgar who would have said whether he obtained the Grant or not. DW2 stated further that she did not know why Edgar decided to transfer the suit property to her before the same was sold.
 28. The Respondents' last witness was James Kinyati Waweru (DW3). DW3 adopted his witness statement dated September 13, 2011 as his evidence in chief. In the statement, DW3 stated that he was an estate agent. DW3 stated that he was the one who introduced the 2nd Respondent to Edgar and the 1st Respondent. He stated that the 2nd Respondent acquired the suit property transparently and honestly for valuable consideration.
 29. The 3rd Respondent did not tender any evidence at the trial.

The submissions:

30. The Applicant filed submissions dated January 14, 2022 on January 17, 2022 while the 1st and 2nd Respondents filed their submissions dated January 20, 2022 on January 28, 2022.
31. In summary, the Applicants submitted that the deceased was survived by her mother and two sons and that there was no evidence to show that Edgar applied for or was issued with Grant of Letters of Administration in respect of the estate of the deceased. The Applicants submitted that in the circumstances, Edgar did not have a good title to the suit property that he could pass to a third party. In support of this submission, the Applicants cited Mombasa Civil Appeal No.14 of 2017, [*Nirmal Singh Dhanjal v Joginder Singh Dhanjal & 4 Others*](#).
32. The Applicants submitted further that the 2nd Respondent was not a bona fide purchaser of the suit property for value without notice since the 2nd Respondent seemed to have had a lot of information about the deceased's family.
33. In summary, the 1st and 2nd Respondents submitted that the Applicants did not have locus standi to institute this suit as the deceased was married to Edgar. The 1st and 2nd Respondents submitted that under section 35 of the [*Law of Succession Act*](#), a spouse and children of a deceased are the only persons with *locus standi* to file a suit on behalf of the estate. In support of this submission, the 1st and 2nd Respondents cited Thika ELC No.222 of 2018, [*Daykio Plantations v National Bank of Kenya*](#) in which the term locus standi was defined.



34. The 1st and 2nd Respondents submitted that Edgar inherited the suit property from the deceased and the 1st Respondent acquired it from Edgar by virtue of being the wife of the Edgar. The 1st and 2nd Respondents submitted that the 2nd Respondent who purchased the suit property from the 1st Respondent was a *bona fide* purchaser for value. In support of this submission, the 1st and 2nd Respondents cited *Katende v Haridar & Company Limited* [2008] 2 EA 173. The 1st and 2nd Respondents submitted that the Applicants had failed to prove their claim against the Respondents.

Determination:

35. On July 11, 2018, the parties with a view to narrow down the issues for determination in this suit agreed among others on the fact that the suit property was registered in the name of the deceased on March 10, 1998. In my view, the issues remaining for determination in this suit are the following;
- a. Whether the 1st Respondent acquired the suit property lawfully from the deceased.
 - b. Whether the 2nd Respondent acquired a valid title in respect of the suit property from the 1st Respondent.
 - c. Whether the Applicants are entitled to the orders sought in the Further Amended Originating Summons.
 - d. Who is liable for the costs of the suit?
36. I will consider these issues one after the other. In *Samuel Kamere v Land Registrar Kajiado*, Nairobi Court of Appeal, Civil Appeal No. 28 of 2005, the Court addressing the issue of competing titles stated that:

“It is evident that there are two competing claims over the suit property, and we have said that the plaintiff’s proprietary interest is already established. Since the appellant’s title is under challenge, in order to be considered a *bona fide* purchaser for value, he must prove that he had acquired a valid and legal title, secondly, that he carried out the necessary due diligence to determine the lawful owner from whom he acquired a legitimate title, and thirdly that he paid valuable consideration for the purchase of the suit property.”

37. In *Munyu Maina v Hiram Gathiba Maina*, Civil Appeal No.239 of 2009, the Court of Appeal stated that:

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

38. In *Mwangi James Njehia v Janetta Wanjiku Mwangi & another* [2021] eKLR, the court 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.”

39. In *Alberta Mae Gacie v Attorney General & 4 Others* [2006] eKLR the court stated as follows:

“Cursed should be the day when any crook in the streets of Nairobi or any town in this jurisdiction, using forgery, deceit or any kind of fraud, would acquire a legal and valid title deceitfully snatched from a legal registered innocent proprietor. Indeed, cursed would be the day when such a crook would have the legal capability or competence to pass to a third party, innocent or otherwise, a land interest that he does not have even if it were for valuable



consideration. For my part, I would want to think that such a time when this court would be called upon to defend such crooks, has not come and shall never come....”

40. In *Iqbal Singh Rai v Mark Lecchini and the Registrar of Titles*, Civil Case No 1054 of 2001, the court stated as follows:

“At the time when the 1st Defendant sought to buy the land in dispute the registered proprietor was the Plaintiff. There is no dispute that he never dealt with the Plaintiff in the transaction that followed. The person with whom he dealt was not the registered proprietor of the land in dispute. The person was a fraud who had no claim whatsoever to the land. The consequence is that the 1st Defendant was a purchaser who did not deal with the registered proprietor of the land. Section 23(1) protects ‘title issued to a purchaser upon the transfer or transmission by the proprietor thereof’. The 1st Defendant did not obtain a transfer from the Plaintiff who was the registered proprietor. He obtained a transfer from a fraudulent person who had no claim to the land. He cannot I find invoke the provisions of section 23(1) to say he obtained an indefeasible title.”

41. In *Daudi Kiptugen v Commissioner of Lands & 4 Others* [2015] eKLR the court stated that:

“...the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title. If this were not the position then all one would need to do is to manufacture a Lease or a Certificate of title at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein.”

42. In the Court of Appeal case of *Arthi Highways Developers Limited v West End Butchery Limited & 6 others* [2015] eKLR, the court stated as follows on the applicability of the doctrine of “bona fide purchaser without notice:

“67. Furthermore, the protection accorded by law in the event of fraud, is to a “bona fide purchaser without notice” and even then, only against equitable interests. We have seen the definition of “bona fide purchaser” from Black’s Law Dictionary and from the Katende case (*supra*). The onus is on the person who wishes to rely on such defence to prove it, and the defence is against the claims of any prior equitable owner. *Snell’s Principles of Equity (supra)* illustrate the issue, thus:-

“An important qualification to the basic rule is the doctrine of the purchaser without notice, which demonstrates a fundamental distinction between legal estates and equitable interests.

The doctrine. A legal right is enforceable against any person who takes the property, whether he has notice of it or not, except where the right is overreached or is void against him for want of registration. If A sells to C land over which B has a legal right of way, C takes the land subject to B’s right, although he was ignorant of the right. But it is different as regards equitable rights. Nothing can be clearer than that a purchaser for valuable consideration who obtains a legal estate at the time of his purchase without notice of a prior equitable right is entitled to priority in equity as well as at law. In such a case equity follows the law, the purchaser’s conscience not being in any way affected by the equitable right. Where there is equal equity the law prevails.”



43. The suit property is registered under the *Registered Land Act*, Chapter 300 Laws of Kenya (now repealed). Sections 27 and 28 of the *Registered Land Act* provides as follows:

“

“27. Subject to this Act -

- (a) a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;
- (b) b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.

28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject -

- (a) a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- (b) b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

44. Section 143(1) and (2) of the *Registered Land Act* provides as follows:

“(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.”

45. In *Peter Kagwara Uiru v Peter Githua Chege & another* [2020] eKLR the court stated that:

“Section 82 of the *Law of Succession Act* Cap 160 Laws of Kenya makes it clear that, it is only the administrator of a deceased estate that has power to deal with the estate of a deceased person.

Section 82 (a) (b) & (c) of the Act provide as follows: -



82. Personal representatives shall, subject only to any limitation imposed by their grants, have the following powers: -

- (a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;
- (b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that—

- (i) any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and
- (ii) no immovable property shall be sold before confirmation of the grant;
- (c) to assent, at any time after confirmation of the grant, to the vesting of a specific legacy in the legatee thereof;

Section 45 (1) of the Act forbids any intermeddling with property of a deceased person and provides as follows: -

(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

17. The father of the 1st defendant as is evident from the exhibited proceedings of the succession cause and more specifically from the copy of the certificate of death died on July 17, 1986. The copy of the certificate of search dated May 6, 2010 in respect of land parcel Bahati/Bahati/Block1/231 shows that Benedito Chege Muthee was as at that date the registered owner and was so registered on 4th October 1984. Consequently, as at September 25, 1992 when the 1st defendant and the plaintiff purported to enter into a sale agreement, the property was in the name of the 1st defendant's father who was then deceased. The 1st defendant did not hold a grant of letters of administration which would have enabled him to deal with the property of the deceased.

18. The 1st defendant had no capacity to enter into any sale agreement affecting the property of his deceased father. The purported agreement was therefore null and void ab initio. The act by the 1st defendant constituted intermeddling with the property of a deceased person in terms of section 45(I) of the *Law of Succession Act*.”

46. There is no dispute that the suit property was registered in the name of the deceased as at the time of her death on June 28, 2008. There is also no dispute that the suit property devolved upon her estate following her death and that only a duly appointed legal representative of her estate could deal with the suit property. The 1st Respondent admitted that she acquired the suit property after the death of the



deceased. The Applicants proved that they were the legal representatives of the estate of the deceased having been appointed as such by the High Court through a Grant of Letters of Administration issued on September 13, 2010 by the High Court at Nairobi in Succession Cause No. 487 of 2010.

47. It is not disputed that the 1st Respondent did not acquire the suit property from the Applicants. The burden was on the 1st Respondent to prove that she acquired the suit property legally. The 1st Respondent contended that she acquired the suit property from Edgar who had inherited the same from the deceased. The 1st Respondent did not place any evidence before the court showing that Edgar inherited the suit property from the deceased. The extracts of the register of the suit property that were placed before the court did not show that Edgar owned the suit property at any time. In any event, Edgar could only inherit the suit property through succession proceedings in which he would have been either a petitioner for a grant of letters of administration in respect of the estate of the deceased and/or a beneficiary. No evidence was placed before the court showing that Edgar applied for a grant of letters of administration of the estate of the deceased or that he was named as a beneficiary in any such application.
48. The 1st Respondent did not explain how the suit property moved from the name of the deceased to her name. The 1st Respondent did not produce the instrument of transfer through which the suit property was transferred from the deceased to her. The 1st Respondent told the court that a transfer was brought to her which she executed and handed to Edgar who was to arrange for registration and issuance of a title in her name. In the absence of any explanation on how the 1st Respondent acquired the suit property and on the face of the evidence that Edgar who purportedly transferred the suit property to the 1st Respondent was neither the registered owner of the suit property nor a legal representative of the estate of the deceased, it is my finding and I so hold that the 1st Respondent acquired the suit property illegally and fraudulently.
49. Since the 1st Respondent acquired her title to the suit property illegally and fraudulently as I have held above, the purported title was null and void. 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”.
50. It follows from the foregoing that the void title could not confer any valid interest in the suit property upon the 1st Respondent. Since the 1st Respondent did not have a valid interest in the suit property, she had no interest in the property that she could convey to the 2nd Respondent. It follows therefore that the 2nd Respondent could not acquire a better title in the suit property than that which the 1st Respondent held. Since the title held by the 1st Respondent was null and void, that is what the 2nd Respondent acquired. The 2nd Respondent did not therefore acquire any valid interest in the suit property. The 2nd Respondent's title was tainted with fraud and illegality committed by the 1st Respondent and as such the same is similarly null and void.
51. The defence of an innocent purchaser for value without notice cannot come to the aid of the 2nd Respondent. As the Court of Appeal had stated in the case of *Arthi Highways Developers Limited v West End Butchery Limited & 6 others* (*supra*), the defence is only available against equitable interests. The deceased held a legal interest in the suit property. The deceased's legal interest is enforceable against the 2nd Respondent whether the 2nd Respondent had notice of the same or not. The 2nd Respondent



acquired his purported interest in the suit property subject to the deceased's legal interest that was in existence as at the time of the purported acquisition by the 2nd Respondent of his interest in the suit property. In any event, a fraudulent and illegal interest in land however innocently acquired cannot prevail against a valid legal interest in the same land.

52. 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 abinitio. The position in law as we have already highlighted above is that anything founded on nullity is also null and void and of no consequence. The title allegedly vested in the 3rd respondent and subsequently passed on to the appellant having stemmed from court proceedings that were subsequently declared null and void also stood vitiated by the same nullity and of no consequence. The Judge cannot therefore be faulted for stating the correct position in law in the manner done.

71. Seventh, section 80 of the Act is explicit that any title founded on irregularity, unprocedurally or a corrupt scheme stands vitiated. The title purportedly acquired by the 3rd respondent and subsequently passed on to the appellant having been demonstrably shown to have been tainted with fraud, deceit and nullity fits the description of title that has been acquired not only irregularly and unprocedurally but also through a corrupt scheme. The corrupt scheme herein arises from the facts informing the vitiated High Court proceedings which we find no need to rehash but adopt as already highlighted above.

72. In light of all the above, we reiterate that the Judge's reasoning as to why appellant's title to the suit property was vitiated was well founded both in fact and in law and is therefore unassailable.”

53. Due to the foregoing, it is my finding that the 2nd Respondent did not acquire a valid title in respect of the suit property from the 1st Respondent.
54. On whether the Applicants are entitled to the reliefs sought, I am satisfied that the Applicants have proved their claim against the Respondents on a balance of probabilities. They are therefore entitled to the reliefs sought in the Further Amended Originating Summons dated May 7, 2012 save for the order of accounts. I am not satisfied that under the circumstances through which the 2nd Respondent acquired and took possession of the suit property, he was in any fiduciary relationship with the Applicants that imposed on him a duty to render accounts.
55. On the issue of costs, I am of the view that the 1st Respondent should bear the same. It was the 1st Respondent who acquired the suit property illegally and fraudulently from the deceased before she sold the same to the 2nd Respondent. In view of the findings that have been made by the court, the 2nd Respondent stands to lose the suit property. I will therefore spare him the burden of the costs of the suit payable to the Applicants.
56. I wish to state before concluding that I did not find any merit in the 1st and 2nd Respondents' argument that the Applicants had no *locus standi* to institute this suit. The Applicants produced in evidence a Grant of Letters of Administration in respect of the estate of the deceased that was issued to them by the High Court. That Grant was not challenged by the 1st and 2nd Respondents. The Grant in my view gave the Applicants the *locus standi* to maintain this suit on behalf of the estate of the deceased.



Conclusion:

57. In conclusion, I hereby enter judgment for the Applicants against the Respondents as follows;
- a. I declare that all that parcel of land known as KABETE/MUTHUMU/T.178 together with all the developments thereon is the property of the estate of Susan Waithera Fischer Thuo Alias Susan Waithera Thuo (Deceased).
 - b. I declare that the purported sale and transfer of all that parcel of land known as KABETE/MUTHUMU/T.178 together with all the developments thereon to the 1st Respondent and subsequently to the 2nd Respondent were illegal null and void *ab initio*.
 - c. The 3rd Respondent shall forthwith rectify the register of all that parcel of land known as KABETE/MUTHUMU/T.178 by cancelling entries numbers 6, 7, 8 and 9 on the said register through which the property was transferred to the 1st and 2nd Respondents and titles issued in their favour.
 - d. The 3rd Respondent shall forthwith restore the ownership of all that parcel of land known as KABETE /MUTHUMU/T.178 to the name of the deceased SUSAN WAITHIRA THUO.
 - e. A permanent injunction is issued restraining the 2nd Respondent either by himself or through his agents or servants from intermeddling with, receiving rent from, transferring, charging or in any other manner dealing with all that parcel of land known as KABETE/MUTHUMU/T.178.
 - f. The Applicants shall have the costs of the suit to be paid by the 1st Respondent.

DELIVERED AND DATED AT NAIROBI THIS 29TH DAY OF SEPTEMBER 2022

S. OKONG'O

JUDGE

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

Ms. Nyamweya h/b for Mr. Mwangi Gathuri for the Applicants

Mr. Mwangi for the 1st and 2nd Respondents

N/A for the 3rd Respondent

Ms. Valentine-Court Assistant

