



**Siringi v Makori & 5 others (Environment and Land Case Civil Suit  
691 of 2016) [2023] KEELC 595 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 595 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 691 OF 2016  
SO OKONG'O, J  
FEBRUARY 9, 2023**

**BETWEEN**

**ELIZAPHAN MAKORI SIRINGI ..... PLAINTIFF**

**AND**

**NORAH MONG'ARE MAKORI ..... 1<sup>ST</sup> DEFENDANT**

**TAMMOIMA J.M.B GICHANA ..... 2<sup>ND</sup> DEFENDANT**

**GIDEON CAIRO MITONDA ..... 3<sup>RD</sup> DEFENDANT**

**KAJIADO NORTH LAND REGISTRAR-NGONG ..... 4<sup>TH</sup> DEFENDANT**

**THE ATTORNEY GENERAL ..... 5<sup>TH</sup> DEFENDANT**

**KENYA COMMERCIAL BANK LIMITED ..... 6<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff brought this suit against the defendants through a plaint dated 23<sup>rd</sup> June 2016. The plaintiff sought the following reliefs;
  - a. A permanent injunction restraining the defendants from dealing with all that parcel of land known as Title no Ngong/Ngong/26365(hereinafter referred to as “the suit property”).
  - b. A mandatory injunction compelling the 4<sup>th</sup> defendant to forthwith rectify the register of the suit property and revert the ownership thereof to the plaintiff after cancelling the illegal registration of the transfers in favour of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
  - c. A declaration that the plaintiff is the absolute legal owner of the suit property.
  - d. General damages.
  - e. Costs of the suit.



- f. Any other relief the court may deem fit to grant.
2. The plaintiff averred that he was at all material times the registered owner of the suit property. The plaintiff averred that the 1<sup>st</sup> defendant was at all material times her wife until 2012 when they separated due to irreconcilable differences. The plaintiff averred that while they lived together as husband and wife, the 1<sup>st</sup> defendant took custody of the original title deed for the suit property.
  3. The plaintiff averred that on or about 16<sup>th</sup> September 2014, the 1<sup>st</sup> defendant fraudulently transferred the suit property to her name alleging that the same had been sold to her by the plaintiff. The plaintiff averred that by virtue of the 1<sup>st</sup> defendant's relationship with the plaintiff, the 1<sup>st</sup> defendant still had in her possession several documents belonging to the plaintiff. The plaintiff averred that the documents used to effect the transfer of the suit property to the 1<sup>st</sup> defendant were forged. The plaintiff averred that the title deed for the suit property was issued to the 1<sup>st</sup> defendant by the 4<sup>th</sup> defendant through collusion in that due process was not followed.
  4. The plaintiff averred that the 1<sup>st</sup> defendant subsequently transferred the suit property to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants who in turn charged the same to the 6<sup>th</sup> defendant. The plaintiff averred that the 6<sup>th</sup> defendant took a charge over a fraudulent title and, as such, had no right to sell the suit property even if there was a default on the part of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to service the loan.
  5. The suit was defended by the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed a joint statement of defence on 21<sup>st</sup> November 2017. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants denied the plaintiff's claim in its entirety. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants averred that they acquired the suit property lawfully in that the 1<sup>st</sup> defendant had an apparent valid title to the suit property. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants denied that they were involved in any act of fraud in their acquisition of the suit property. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants averred that before purchasing the suit property, they conducted a search that showed that the 1<sup>st</sup> defendant was the registered owner of the suit property.
  6. The 4<sup>th</sup> and 5<sup>th</sup> defendants filed a joint statement of defence on 28<sup>th</sup> September 2016. The 4<sup>th</sup> and 5<sup>th</sup> defendants admitted that the plaintiff was initially registered as the owner of the suit property. The 4<sup>th</sup> and 5<sup>th</sup> defendants averred that the plaintiff transferred the suit property to the 1<sup>st</sup> defendant.
  7. The 4<sup>th</sup> and 5<sup>th</sup> defendants averred that they were strangers to the relationship between the plaintiff and the 1<sup>st</sup> defendant and that the 1<sup>st</sup> defendant fraudulently caused the suit property to be transferred to her name before transferring it to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The 4<sup>th</sup> and 5<sup>th</sup> defendants denied that they were involved in any act of fraud in the transfer of the suit property to the 1<sup>st</sup> defendant. The 4<sup>th</sup> and 5<sup>th</sup> defendants averred that the transfer of the suit property to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants was carried out lawfully.
  8. The 6<sup>th</sup> Defendant filed a statement of defence on 17<sup>th</sup> August 2016. The 6<sup>th</sup> defendant averred that it was a stranger to the circumstances under which the 1<sup>st</sup> and the 2<sup>nd</sup> and 3<sup>rd</sup> defendants acquired the suit property. The 6<sup>th</sup> defendant admitted that the suit property was charged to the 6<sup>th</sup> defendant to secure a loan that was advanced by the 6<sup>th</sup> defendant to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.
  9. The 6<sup>th</sup> defendant averred that it was not aware of any act of fraud in the acquisition of the suit property when the same was offered to it as a security by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and denied being involved in the alleged fraud. The 6<sup>th</sup> defendant averred that it was wrongly joined as a party to the suit as the same disclosed no reasonable cause of action against it.



### **The Evidence Tendered by the Parties:**

10. At the trial, the plaintiff adopted his witness statement dated 23<sup>rd</sup> June 2016 as his evidence in chief. The plaintiff produced as exhibits the documents attached to his list of documents of the same date. The plaintiff testified that after purchasing the suit property, he was transferred from Nairobi to Mombasa and when the title deed for the property came out, the same was handed over to the 1<sup>st</sup> defendant who was in Nairobi. He stated that in addition to the said title deed, the 1<sup>st</sup> defendant also had his personal documents such as Identity Card and KRA PIN Certificate. The plaintiff stated that a disagreement arose between him and the 1<sup>st</sup> defendant that led to their separation. The plaintiff stated that even after the separation, the 1<sup>st</sup> defendant remained in possession of the original title deed of the suit property. The plaintiff stated that he learnt from one of her daughters that the suit property had been sold and transferred. He stated that it was upon perusal of the documents that were set to him by his said daughter that he learnt of the fraudulent transfer of the suit property.
11. The plaintiff stated that he did not sign the instrument of transfer of the suit property to the 1<sup>st</sup> defendant neither did he appear before the advocate that allegedly witnessed the same. The plaintiff stated further that he did not attend the Land Control Board meeting at which the consent to transfer the suit property was given. He stated that at the time the suit property was sold by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, he had already developed the same with a maisonette. The plaintiff stated that when he visited the suit property, he found that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants had already taken possession thereof.
12. The plaintiff told the court that he had put up a residence on the suit property as his retirement home and that he had been forced to stay in a rented house. He stated that the construction of the house on the suit property was almost complete when it was fraudulently sold to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants by the 1<sup>st</sup> defendant.
13. On cross-examination by the 2<sup>nd</sup> and 3<sup>rd</sup> advocates, the plaintiff stated that he married the 1<sup>st</sup> defendant in 1980 and that they separated in December 2012. He stated further that they had not divorced. He stated that the 2<sup>nd</sup> defendant was known to him and that he knew him through a friend before the 2<sup>nd</sup> defendant went to live in the USA. The plaintiff stated further that upon learning of the fraudulent sale of the suit property, he did not report the matter to the police. On cross-examination by the advocate for the 4<sup>th</sup> and 5<sup>th</sup> defendants, the plaintiff stated that upon learning of the sale of the suit property, he reported the matter to the Directorate of Criminal Investigations and recorded a statement. On cross-examination by the advocate for the 6<sup>th</sup> defendant, he stated that the 1<sup>st</sup> defendant forged his signature on the transfer in favour of the 1<sup>st</sup> defendant and that he did not know that the 1<sup>st</sup> defendant could sell the suit property. He stated that when he learnt of the fraud, the 1<sup>st</sup> defendant had already transferred the suit property to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.
14. On re-examination, the plaintiff stated that he learnt that the 1<sup>st</sup> defendant had transferred the suit property to her name and subsequently to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in June 2016. The plaintiff reiterated that he reported the fraud to the police. The plaintiff wondered how the title for the suit property was issued and charged on the same day to the 6<sup>th</sup> defendant.
15. After the close of the plaintiff's case, the 6<sup>th</sup> Defendant's witness, Vivian Koskey (DW1) was the first to give evidence for the defendants. DW1 testified that in 2015, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants approached the 6<sup>th</sup> defendant for a loan facility to purchase the suit property and construct a house on it. She stated that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants applied for a loan of ksh 7,650,000/- and that the property was being purchased from the 1<sup>st</sup> defendant. She stated that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants presented to the 6<sup>th</sup>



defendant copies of the sale agreement between them and the 1<sup>st</sup> defendant and the title deed for the suit property. She stated that upon receipt of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants' application, they instructed a valuer to value the suit property and to carry out a search on the title of the property after which they offered to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants a loan of ksh 7,650,000/- on the security of the suit property. She stated that after the offer was accepted, the suit property was transferred to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and a charge was created over the property after the 6<sup>th</sup> defendant's advocates had carried out a search and confirmed that the suit property was owned by the 1<sup>st</sup> defendant and there was no encumbrance on it. She stated that all the necessary legal processes and formalities were undertaken while creating security over the suit property. DW1 stated that the 6<sup>th</sup> Defendant was not aware of any fraud in the acquisition of the suit property. DW1 adopted her witness statement dated 15<sup>th</sup> August 2016 as part of her evidence in chief. She stated that the 6<sup>th</sup> defendant undertook all necessary due diligence before taking the suit property as a security. DW1 produced several documents as exhibits. On cross-examination, DW1 reiterated that the 6<sup>th</sup> defendant conducted due diligence before creating a charge over the suit property. She stated further that the 6<sup>th</sup> defendant disbursed the loan after receiving all the loan security documents.

16. The next to give evidence was the 2<sup>nd</sup> defendant, Tammoima J.M.B Gichana (DW2) who gave evidence on his own behalf and on behalf of the 3<sup>rd</sup> defendant. DW2 adopted his witness statement dated 8<sup>th</sup> November 2017 as part of his evidence in chief and produced the 2<sup>nd</sup> and 3<sup>rd</sup> defendants' bundle of documents dated 15<sup>th</sup> November 2017 as exhibits. He told the court that he was introduced to the 1<sup>st</sup> defendant by a foreman who was working at his brother's house. He stated that the 1<sup>st</sup> defendant showed him the suit property which she told him was owned by her and which she wished to sell.
17. DW2 stated that the 3<sup>rd</sup> defendant and he were interested in purchasing the suit property and that he conducted a search which showed that the 1<sup>st</sup> defendant was the owner of the suit property. He stated that they entered into a sale agreement with the 1<sup>st</sup> defendant who agreed to sell the suit property at ksh 6,000,000/-. He stated that they paid to the 1<sup>st</sup> defendant a sum of ksh 500,000/- and obtained a loan from the 6<sup>th</sup> defendant on the security of the suit property for the balance of the purchase price. He stated that before transferring the suit property to them, the 1<sup>st</sup> defendant swore an affidavit to the effect that she was not married. He stated that after the property was transferred to them, they were issued with a title. He stated that the suit property was thereafter charged to the 6<sup>th</sup> defendant to secure the said loan. He stated that they conducted the necessary due diligence and that they were not aware that the 1<sup>st</sup> defendant had acquired the suit property fraudulently. He denied that they were parties to the alleged fraud.
18. On cross-examination, DW2 stated that when he visited the suit property, he found an incomplete building thereon. He stated that the building had a roof but had no doors and windows. He stated that the unfinished building was occupied by the 1<sup>st</sup> defendant. He stated that the plaintiff was not known to him and that a search that they carried out showed the 1<sup>st</sup> defendant as the owner of the property. He stated that there was no encumbrance on the title of the property. He stated that they had cleared the loan that they obtained from the 6<sup>th</sup> defendant although the titled deed for the property was still in the possession of the 6<sup>th</sup> defendant.
19. The last witness to give evidence was John Matheka, the Land Registrar, Ngong (DW3). He produced as exhibits copies of the documents that were at the Land Registry relating to the transaction between the 1<sup>st</sup> defendant and the 2<sup>nd</sup> and 3<sup>rd</sup> defendants over the suit property. He stated that the transfer of the suit property by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants was undertaken procedurally.



20. On cross-examination, he stated that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants acquired the suit property lawfully before charging it to the 6<sup>th</sup> defendant. He stated that the charge was also lawfully registered.
21. The 1<sup>st</sup> defendant never entered appearance and as such did not defend the suit.

#### **The Submissions:**

22. The plaintiff filed submissions dated 12<sup>th</sup> November 2021. The plaintiff submitted that he had established that the 1<sup>st</sup> defendant was his wife and that due to that relationship, she had in her possession the title deed for the suit property. The plaintiff submitted that he neither transferred the suit property to the 1<sup>st</sup> defendant nor did he attend a meeting of the Land Control Board at which the consent was granted for the alleged transaction. The plaintiff submitted that failure on the part of the 4<sup>th</sup> defendant to produce a copy of the application for the said consent was evidence of the 4<sup>th</sup> defendant's participation in the fraudulent transfer of the suit property to the 1<sup>st</sup> defendant.
23. The plaintiff submitted further that the documents produced by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in support of their title to the suit property had several discrepancies and that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants did not carry out due diligence before purchasing the suit property. The plaintiff submitted that the 6<sup>th</sup> defendant accepted the suit property as a security without valuing it or visiting the site thereof. The plaintiff submitted that the whole transaction offends section 36(1) of the *Land Act*, 2012. The plaintiff cited two authorities in support of his submissions.
24. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed submissions dated 31<sup>st</sup> January 2022 in which they framed four issues for determination by the court. The first issue was whether the 2<sup>nd</sup> and 3<sup>rd</sup> defendants acquired a valid title in respect of the suit property. On this issue, the 2<sup>nd</sup> and 3<sup>rd</sup> defendant submitted that they conducted the necessary due diligence on the title of the suit property before purchasing the same from the 1<sup>st</sup> defendant. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants submitted that it was after they were convinced that the 1<sup>st</sup> defendant was the absolute owner of the suit property that they entered into a sale agreement with her and paid the full purchase price. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants relied on section 26 of the Land Registration Act and submitted that they acquired title to the suit property lawfully.
25. The second issue was whether there was fraud in the acquisition of the suit property and whether the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were parties to the same. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants submitted that the plaintiff did not tender any evidence showing that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were involved in any irregularity, suspicious activity or fraud in their acquisition of the suit property. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants submitted that fraud must be pleaded, particularized and strictly proved. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants submitted that the plaintiff failed to do this and as such his claim based on fraud cannot be sustained. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants submitted that in the absence of proof of fraud, there was no basis for the rectification of the register of the suit property by the cancellation of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants' title to the suit property.
26. On whether the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were innocent purchasers of the suit property for value without notice, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants referred to the definition of innocent purchaser for value in Black's Law Dictionary 9<sup>th</sup> Edition and the Ugandan case of *Katende v Haridar & Company Limited* [2008]2 EA 173 and submitted that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were innocent purchasers of the suit property for value without notice of any defect in the 1<sup>st</sup> defendant's title.
27. On the issue of costs, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants submitted that being innocent purchasers of the suit property for value who were wrongfully dragged into this suit by the plaintiff, they were entitled to the costs of the suit.



28. The 4<sup>th</sup> and 5<sup>th</sup> defendants filed submissions dated 24<sup>th</sup> June 2022. The 4<sup>th</sup> and 5<sup>th</sup> defendants submitted that the plaintiff had not discharged the burden of proving his case on a balance of probabilities. The 4<sup>th</sup> and 5<sup>th</sup> defendants relied on sections 109 and 112 of the *Evidence Act*, Chapter 80 Laws of Kenya, *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000]eKLR and *Kinyanjui Kamau v George Kamau* [2015]eKLR in support of this submission. The 4<sup>th</sup> and 5<sup>th</sup> defendants submitted that from the evidence of the Land Registrar(DW3), no fault was proved against the 4<sup>th</sup> and 5<sup>th</sup> defendants in the transaction in question. The 4<sup>th</sup> and 5<sup>th</sup> defendants urged the court to dismiss the plaintiff's suit with costs.
29. The 6<sup>th</sup> defendant filed submissions dated 27<sup>th</sup> June 2022. The 6<sup>th</sup> defendant framed three issues for determination by the court. The first issue was whether the plaintiff had proved allegations of fraud and forgery that could vitiate the defendants' title. The second issue was whether the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were innocent purchasers of the suit property for value without notice of any defect in the title and if so, whether the 6<sup>th</sup> defendant's security interest in the suit property should be protected. The last issue was whether the plaintiff was entitled to the reliefs sought in the plaint.
30. On the first issue, the 6<sup>th</sup> defendant submitted that the plaintiff neither particularized nor proved the allegations of fraud pleaded against the defendants as required by the law and as such the claim was fatally defective. The 6<sup>th</sup> defendant cited Order 2 Rule 4 of the *Civil Procedure Rules* and *Vijay Morjaria v Nansingh Madhusingh Darbar & another (supra)* in support of this submission. The 6<sup>th</sup> defendant submitted that the burden of proof remained the same for the plaintiff even though the 1<sup>st</sup> defendant did not defend the suit. In support of this submission, the 6<sup>th</sup> defendant cited sections 107 and 109 of the *Evidence Act*, Chapter 80 Laws of Kenya and *Karugi & another v Kabiya & 3 others* [1987]KLR 347. The 6<sup>th</sup> defendant submitted that the plaintiff had failed to discharge the burden of proof. The 6<sup>th</sup> defendant submitted that the plaintiff who alleged that his signature was forged by the 1<sup>st</sup> defendant did not prove such forgery in that he did not tender expert evidence in that regard.
31. On whether the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were innocent purchasers for value without notice of any defect in the 1<sup>st</sup> defendant's title, the 6<sup>th</sup> defendant reiterated the submissions by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants on the issue. The 6<sup>th</sup> defendants submitted that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were the absolute and indefeasible owners of the suit property. The 6<sup>th</sup> defendant submitted that it followed due process in creating a charge over the suit property and that it had a bona fide, lawful and legitimate interest in the suit property. The 6<sup>th</sup> defendant submitted that fraud if any in the acquisition of the suit property could not be raised against it. The 6<sup>th</sup> defendant submitted that its charge could not be impeached on the flimsy grounds that the plaintiff had put forward.
32. On whether the plaintiff was entitled to the reliefs sought, the 6<sup>th</sup> defendant submitted that the plaintiff was not entitled to an order for the rectification of the register where the interest of an innocent third party is involved. In support of this submission, the 6<sup>th</sup> defendant relied on section 80(2) of the *Land Registration Act* 2012. On the issue of damages, the 6<sup>th</sup> defendant submitted that there was no basis upon which the plaintiff could claim damages against the 6<sup>th</sup> defendant with which he had no contract. The 6<sup>th</sup> defendant submitted that damages if any were due to the plaintiff could only be claimed from the 1<sup>st</sup> defendant. The 6<sup>th</sup> defendant urged the court to dismiss the plaintiff's suit with costs to the 6<sup>th</sup> defendant.

### **Analysis and Determination:**

33. The parties did not file a statement of agreed issues. In their submissions, each party framed its own issues. In my view, the issues arising for determination in this suit are the following;



- a. Whether the 1<sup>st</sup> defendant acquired the suit property lawfully from the plaintiff.
- b. Whether the 2<sup>nd</sup> and 3<sup>rd</sup> defendants acquired a valid title in respect of the suit property from the 1<sup>st</sup> defendant.
- c. Whether the charge registered against the title of the suit property is valid?
- d. Whether the plaintiff is entitled to the reliefs sought.
- e. Who is liable for the costs of the suit?

I will consider these issues one after the other.

37. In *Munyu Maina v Hiram Gathiba Maina*, Civil Appeal no239 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 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.”
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 *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.”
41. In *Wambui v Mwangi & 3 others*, (Civil Appeal 465 of 2019) [2021] KECA 144 (KLR) the Court of Appeal stated as follows:
- “70. Sixth, the title was also tainted with nullity in that the court process on the basis of which the title to the suit property was anchored was subsequently declared null and void ab initio. The position in law as we have already highlighted above is that anything founded on nullity is also null and void and of no consequence. The title allegedly vested in the 3rd respondent and subsequently passed on to the appellant having stemmed from court proceedings that were subsequently declared null and void also stood vitiated by the same nullity



and of no consequence. The Judge cannot therefore be faulted for stating the correct position in law in the manner done.

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

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

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 was 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) 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) 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. At the time the suit property was registered in the name of the 1<sup>st</sup> defendant who transferred the same to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants who charged it to the 6<sup>th</sup> defendant, the [Registered Land Act](#) had been repealed and replaced by the [Land Registration Act](#) 2012. The title deeds that were issued to the 1<sup>st</sup> defendant and the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were issued under the repealed [Registered Land Act](#) and the [Land Registration Act](#) 2012. Section 24, 25, 26 and 80 of the [Land Registration Act](#), 2012 provides as follows:

“24. Subject to this Act—

- (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; and
- (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 or expressed agreements, liabilities or incidents of the lease.

25. The rights of a proprietor, whether acquired on first registration or 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—
- (1)
- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
  - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.
26. The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
- (1)
- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
  - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
80. Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
- (1)
- (2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the 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 any act, neglect or default.”

46. The foregoing provisions of the [Registered Land Act](#) and the [Land Registration Act 2012](#) provide that the registration of a person as a proprietor of land or lease confers upon that person the absolute ownership of the land and in the case of a lease, the leasehold interest. Both statutes also provide that a register of land may be rectified by the cancellation of any entry thereon where such registration has been obtained by fraud, mistake, illegality, misrepresentation, corruption or any other impropriety subject to the rights of an innocent purchaser for value without notice provided for in section 143(2) of the [Registered Land Act](#) and section 80(2) of the [Land Registration Act 2012](#).



47. There is no dispute that the suit property was at all material times registered in the name of the plaintiff who acquired the same on 1<sup>st</sup> July 2011 at a consideration of ksh 2,900,000/-. There is also no dispute that the 1<sup>st</sup> defendant was at all material times the wife of the plaintiff. The 1<sup>st</sup> defendant could only acquire the suit property from the plaintiff through transfer by the plaintiff or transmission upon the plaintiff's death after obtaining a grant in respect of his estate. The plaintiff is alleged to have transferred the suit property to the 1<sup>st</sup> defendant on 5<sup>th</sup> September 2014 at a consideration of ksh 1,000,000/-. The transfer was registered on 16<sup>th</sup> September 2014 and the 1<sup>st</sup> defendant issued with a title deed on the same date. The plaintiff has denied transferring the suit property to the 1<sup>st</sup> defendant. The plaintiff has contended that the 1<sup>st</sup> defendant fraudulently transferred the suit property to her name by forging his signature. The plaintiff has contended that the 1<sup>st</sup> defendant took advantage of the fact that she had in her possession the original title deed for the suit property and the plaintiff's personal details and documents.
48. I have observed from the correspondence exchanged between the plaintiff and the 1<sup>st</sup> defendant's advocates that was produced in evidence that, as at April 2013, the relationship between the plaintiff and the 1<sup>st</sup> defendant was extremely strained such that they were considering formal separation and divorce. See PEXH.3. I have noted in the letter dated 11<sup>th</sup> January 2013 that was addressed to the 1<sup>st</sup> defendant by the plaintiff's then advocates, K.N.Nyamweya & Co. Advocates that one of the complaints that the plaintiff had against the 1<sup>st</sup> defendant was that the 1<sup>st</sup> defendant had refused to hand over to the plaintiff the title deed for the suit property. In the letter dated 24<sup>th</sup> April 2013 from the 1<sup>st</sup> defendant's advocates, Aminga Mang'erere & Co. Advocates to the plaintiff, the 1<sup>st</sup> defendant referred to the suit property as "an incomplete family residence". In the same letter, the 1<sup>st</sup> defendant stated that she had been married to the plaintiff for several years and that their marriage that was initially customary was registered on 7<sup>th</sup> December 2002. In the letter, the 1<sup>st</sup> defendant stated that their strained relationship started over a minor disagreement in July 2011 that had persisted to the date of the letter.
49. The 1<sup>st</sup> defendant was served personally with Summons to Enter Appearance but did not defend the suit. The allegation that the 1<sup>st</sup> defendant fraudulently transferred the suit property to herself was not controverted. The particulars of fraud pleaded against the 1<sup>st</sup> defendant were also not denied by the 1<sup>st</sup> defendant. From the totality of the evidence before the court, I am persuaded that the plaintiff has established that the 1<sup>st</sup> defendant transferred the suit property to her name fraudulently. As I have mentioned, the relationship between the plaintiff and the 1<sup>st</sup> defendant was strained. The plaintiff was working and living in Mombasa while the 1<sup>st</sup> defendant was living in Nairobi. As at April 2013, the two could only communicate through lawyers. In the circumstances, I am unable to see how the plaintiff could have transferred the suit property to the 1<sup>st</sup> defendant. It is even baffling why he would transfer the same to the 1<sup>st</sup> defendant who was his wife at a consideration of ksh 1,000,000/-. The general practice is that where a spouse wishes to transfer land to the other spouse, the consideration would be indicated as love and affection and the stamp duty would be waived. I wonder why the 1<sup>st</sup> defendant would want to pay stamp duty on a property that was transferred to her by her husband.
50. I am convinced that the 1<sup>st</sup> defendant was scheming to sell the suit property after the same was registered in her name and that the consideration of ksh 1,000,000/- was intended to make the fraudulent transaction appear as a genuine purchase/sale. I have noted that the property was sold to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants soon after the same was transferred to the name of the 1<sup>st</sup> defendant. The sale agreement between the 1<sup>st</sup> defendant and the 2<sup>nd</sup> and 3<sup>rd</sup> defendants is dated 2014. DW1 told the court that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants applied for a loan to purchase the suit property and to complete the construction of a building thereon. She did not produce in evidence a copy of the said application. She stated



however that upon receipt of the application, the bank arranged for the suit property to be valued and a search to be conducted on its title. The valuation report was also not produced in evidence. DW1 however produced as DEXH. 3 a copy of an official search that was conducted by their valuer on their instructions. The search is dated 14<sup>th</sup> October 2014. The 1<sup>st</sup> defendant was registered as the owner of the suit property on 16<sup>th</sup> September 2014. Less than a month from the date that the 1<sup>st</sup> defendant transferred the property to her name on 16<sup>th</sup> September 2014, she had already sold the property to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants who had also applied to the 6<sup>th</sup> defendant by 14<sup>th</sup> October 2014 for a loan to purchase the same. There is no doubt from the foregoing that the 1<sup>st</sup> defendant transferred the suit property to her name with a buyer in mind. But even if it was to be assumed that the plaintiff sold the property to the 1<sup>st</sup> defendant, why would the plaintiff sell a property he purchased on 16<sup>th</sup> June 2011 at ksh 2,900,000/- to the 1<sup>st</sup> defendant on 5<sup>th</sup> September 2014 at ksh 1,000,000/-?

51. A part from the instrument of transfer that was produced in evidence by the plaintiff, there is no other information on how the 1<sup>st</sup> defendant acquired the suit property from the plaintiff. There is no evidence that all the necessary consents were obtained including spousal consent and consent of the Land Control Board.
52. Due to the foregoing, I find that the purported transfer of the suit property to the 1<sup>st</sup> defendant was fraudulent, illegal, null and void. The 1<sup>st</sup> defendant did not therefore acquire any valid interest in the suit property. A fraudulent transfer could not confer a proprietary interest on the 1<sup>st</sup> defendant in respect of the suit property. The registration of the 1<sup>st</sup> defendant as the owner of the suit property was therefore a nullity.
53. Since the 1<sup>st</sup> defendant acquired her title to the suit property illegally and fraudulently as I have held, the purported title was null and void. In *Macfoy v United Africa Co. Ltd.*(1961) 3 All ER 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”.
54. It follows from the foregoing that the void title could not confer a valid proprietary interest in the suit property upon the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant did not therefore have a proprietary interest in the suit property that she could convey to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants could not acquire a better title in the suit property than that which the 1<sup>st</sup> defendant held. Since the title held by the 1<sup>st</sup> defendant was null and void, that is what the 2<sup>nd</sup> and 3<sup>rd</sup> defendants acquired. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants did not therefore acquire any valid interest in the suit property. The 2<sup>nd</sup> and 3<sup>rd</sup> defendant’s title was tainted with fraud and illegality committed by the 1<sup>st</sup> defendant and as such the same is similarly null and void.
55. The defence of an innocent purchaser for value without notice cannot save the 2<sup>nd</sup> and 3<sup>rd</sup> defendants’ title. As the Court of Appeal stated in *Arthi Highways Developers Limited v West End Butchery Limited & 6 others*(*supra*), the defence of innocent purchaser without notice is only available against equitable competing interests. The plaintiff held a legal interest in the suit property. The plaintiff’s legal interest is enforceable against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants whether the 2<sup>nd</sup> and 3<sup>rd</sup> defendants had notice of the same or not. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants acquired their purported interest in the suit property from the fraudster subject to the plaintiff’s legal interest that was in existence as at the time of the purported



- acquisition by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants of their interest in the suit property. As this court has stated in several cases, a fraudulent and illegal interest in land however innocently acquired cannot prevail against a valid legal interest in the same land.
56. Due to the foregoing, it is my finding that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants did not acquire a valid title in respect of the suit property from the 1<sup>st</sup> defendant.
  57. On the issue of the validity of the charge in favour of the 6<sup>th</sup> defendant, my view is that the same was created over an invalid title. A charge over an invalid title cannot create a valid interest in land. The title held by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants was invalid the same having been tainted with the 1<sup>st</sup> defendant's fraudulent activities. An invalid title is a nullity. A charge cannot be created over a null and void title. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants' had no proprietary interest in the suit property to which the charge could attach. It is my finding therefore that the charge created over the suit property in favour of the 6<sup>th</sup> defendant by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants was similarly invalid.
  58. On whether the plaintiff is entitled to the reliefs sought, I am satisfied that the plaintiff has proved his claim against the defendants on a balance of probabilities. He is therefore entitled to the reliefs sought in the plaint save for general damages. The 2<sup>nd</sup>, 3<sup>rd</sup> and 6<sup>th</sup> defendants had argued that since no fraud was proved against them, under sections 143(2) of the *Registered Land Act* (now repealed) and section 80(2) of the *Land Registration Act* 2012 the plaintiff was not entitled to an order for the rectification of the register of the suit property.
  59. I am in agreement with the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and the 6<sup>th</sup> defendant that the plaintiff did not prove that they were parties to the 1<sup>st</sup> defendant's fraudulent acquisition of the suit property or that they had notice of the fraud or contributed to it. However, my view is that the 1<sup>st</sup> defendant was a fraudster. She acquired the suit property fraudulently. Her acts of fraud render the title that she acquired in respect of the suit property null and void. Since the purported title that was held by the 1<sup>st</sup> defendant was the root of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants' purported proprietary interest in the suit property and the 6<sup>th</sup> defendant's chargee's interest, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants' and the 6<sup>th</sup> defendant's said interests have to crumble as they have no base left to stand on. A holder of a void title or charge cannot be termed "a proprietor" of land within the meaning of sections 143(2) of the *Registered Land Act* (now repealed) and section 80(2) of the *Land Registration Act* 2012 since a void title does not confer a valid proprietary interest. A case has therefore been made out for the rectification of the register of the suit property by the cancellation of the illegal transfers and charge. It is worth repeating at this point the words of the Court of Appeal in *Mwangi James Njehia v Janetta Wanjiku Mwangi & another* (*supra*): "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."
  60. There is no doubt that 2<sup>nd</sup> and 3<sup>rd</sup> defendants were duped by the 1<sup>st</sup> defendant. I am surprised that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants did not find it necessary to bring a claim against the 1<sup>st</sup> defendant on her undertaking that she will indemnify the 2<sup>nd</sup> and 3<sup>rd</sup> defendants against any loss that they may suffer if it turned out that her claims that she was the owner of the suit property and that she was not married were not true. Failure to rectify the register of the suit property would mean that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants would retain the suit property sold to them by a fraudster thereby divesting the property from the legitimate owner thereof. The Court of Appeal has stated that this should never happen.
  61. On the issue of costs, I am of the view that the 1<sup>st</sup> defendant should bear the same. It was the 1<sup>st</sup> defendant who acquired the suit property illegally and fraudulently from the plaintiff before she sold the same to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants who charged it to the 6<sup>th</sup> defendant.



**Conclusion:**

62. In conclusion, I hereby enter judgment for the plaintiff against the defendants as follows;
- a. A permanent injunction is issued restraining the defendants by themselves, their servants and/ or agents from having any dealing with all that parcel of land known as Title no Ngong/ Ngong/26365 save for entering thereon for the purposes of vacating the same and handing over possession thereof to the plaintiff.
  - b. The 4<sup>th</sup> and 5<sup>th</sup> defendants shall forthwith rectify the register of all that parcel of land known as Title no Ngong/ Ngong/26365 (suit property) by cancelling entries numbers 11, 12, 13 and 14 in the proprietorship section of the register of the said property and entry number 1 in the encumbrance section of the said register through which the suit property was transferred to the 1<sup>st</sup> defendant and, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and titles issued in their favour and thereafter charged to the 6<sup>th</sup> defendant.
  - c. The 4<sup>th</sup> and 5<sup>th</sup> defendants shall forthwith restore the proprietorship of all that parcel of land known as Title no Ngong/ Ngong/26365 to the name of the plaintiff.
  - d. The plaintiff shall have the costs of the suit to be paid by the 1<sup>st</sup> defendant.

**DELIVERED AND DATED AT KISUMU ON THIS 9<sup>TH</sup> DAY OF FEBRUARY 2023.**

**S. OKONG'O**

**JUDGE**

**JUDGEMENT DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO  
CONFERENCING PLATFORM IN THE PRESENCE OF:**

N/A for the Plaintiff

Mr. Ayisi for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants

N/A for the 4<sup>th</sup> and 5<sup>th</sup> Defendants

Ms. Wamucii for the 6<sup>th</sup> Defendant

Ms. J.Omondi-Court Assistant

