



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC APPEAL NO. 38 OF 2018**

**PETER NJUGUNA KARIUKI.....APPELLANT**

**VERSUS**

**JAMES NJOGU KAGUNDA.....RESPONDENT**

**(Being an appeal from the judgement and decree delivered by *Hon. G. OMODHO*, in *Chief Magistrate Court Civil Suit No. 1008 of 2009 on the 13<sup>th</sup> December, 2018*)**

**JUDGEMENT**

The Appellant herein Peter Njuguna Kariuki was the Plaintiff in Thika CMCC No. 1008 of 2009. The Respondent James Njogu Kagunda was the Defendant.

By a Plaint dated **18<sup>th</sup> November 2009**, the Plaintiff (Appellant) **brought this suit against the Defendant (Respondent) and sought for orders that;**

- a. The Defendant/Respondent do hand over the title deed of Land Parcel RUIRU WEST BLOCK 1/GITHUNGURI/386 to the Land Registrar Thika District for cancellation.**
- b. Cost of this suit.**
- c. Interest on (b) at court rates.**

In his statement of claim, the Plaintiff (Appellant) averred that he was the registered allottee of the suit property having purchased it from **John Riitho Mwaura**. That upon payment of the relevant clearance fees, he was issued with Certificate Number **232**, Ballot Number **386** and Clearance certificate. That on **30<sup>th</sup> October 2009**, with the intention of registering the title, he was informed that somebody else had fraudulently obtained title deed in his name relating to the suit land. He particularized fraud by the Defendant(Respondent) as; registering the suit property with the Knowledge that the Plaintiff ( Appellant) was the owner, colluding with the land office to be so registered; accepting to be registered in the suit land when the Plaintiff (Appellant) was cleared by **Githunguri Constituency Ranching Company Ltd** as the owner of the same, accepting title to the same and disregarding the same was cleared to the Plaintiff (Appellant). That as a result of the fraud, there is a fraudulent title deed and the Plaintiff (Appellant) was apprehensive that the Defendant (Respondent) is likely to carry out prejudicial acts.

The suit was contested and the Defendant (Respondent) filed an Amended Statement of Defence and Counter Claim dated **5<sup>th</sup> May 2016**, and denied all the allegations made in the Plaint. He averred that he was the registered owner of the suit property and there was no fraud involved in the transfer. That the Plaintiff (Appellant) fraudulently obtained the sale agreement, ballot paper No. 386 and the Clearance Certificate.

In his Counter Claim, he stated that he bought the suit land from one Wilfred Kaggia on 1<sup>st</sup> October 2007, for Kshs. 360,000/= who originally bought it from John Riitho Mwaura on 29<sup>th</sup> March 2004. That John Mwaura was the owner of Plot No. 386, denoted by share certificate No. 341 through Githunguri Constituency Ranching Company Limited. That the registration of the suit property was done in the year 2004, to Wilfred Kaggia Mwangi, then to the Defendant in the year 2008. That the Plaintiff's/ (Appellant's) claim lies with the said John Riitho Mwaura, who sold the land twice having sold the same to Wilfred Kaggia Mwangi in 2004 and a title deed was issued. That the Plaintiff (Appellant) fraudulently entered or encroached on the suit land and put up illegal structures.

**In his Counter Claim he sought for orders that:-**

a. an order of eviction to issue against the Defendant his servants, or agents and to be permanently restrained from trespassing, interfering or encroaching on the plaintiff's parcel of land number RUIRU WEST BLOCK 1/ GITHUNGURI /386.

The matter proceeded by way of Viva voce evidence wherein the Plaintiff (Appellant) testified for himself and closed his case and the Defendant(Respondent) called two witnesses.

#### **PLAINTIFF'S (APPELLANT'S CASE)**

**PW1 Peter Njuguna Kariuki** produced the witness statement of the late **John Riitho** filed on **21<sup>st</sup> October 2011** . He testified that he entered into a Sale Agreement dated **27<sup>th</sup> March 2009**, at the Law Firm of **PW Murage** Advocate for **Kshs. 300,000/=** and he produced the Sale Agreement as exhibit 1. That he got a Certificate of shares from **Githunguri Constituency Ranching Company Limited**, which he produced as exhibit 2, Clearance Certificate Exhibit 3 and a letter dated **25<sup>th</sup> September 2009** as Exhibit 4. That he went to the Lands Registry and found that the land was registered to **James Kagunda** and there was a previous agreement dated **2018** and documents attached. Further that **Riitho** had been paid **Kshs. 50,000/=**. That as per the green card entry No. 2, **14<sup>th</sup> April 2004**, **Kaggia** was to pay by July and that the title is not properly obtained. Further that there is an agreement dated **1<sup>st</sup> October 2007**, at which time the full purchase price had not been paid. That they got the title on **22<sup>nd</sup> January 2008**, having bought the land on **1<sup>st</sup> October 2007**. He testified that he got the suit property legally from **John Riitho**.

He denied ever working at **Githunguri Constituency Ranching Company Limited**. That he is a shareholder and he bought the land on **27<sup>th</sup> March 2009** from **John Riitho** who gave him ballot **No. 386** and share Certificate **No. 282**. That **Riitho's** share Certificate was **No. 341** and his was **282**. That he was not present when **Riitho** bought the land. That a charge was done on **14<sup>th</sup> April 2004**, and there is bankers cheque of **Kshs. 250,000/=**. Further that the property had 4 rooms where **Kaggia** lived. It was his testimony that at the institution of the suit, he was in possession of the suit property and he constructed when the suit was ongoing.

On re-examination, he testified that when he bought the land, **John's** share was **No. 341**, but on agreement for sale it was indicated as **282** and the ballot was **386**. That the Defendant had paid **Kshs. 50,000/=** but never cleared and **John Riitho** brought him the documents.

#### **DEFENDANT'S(RESPONDENT'S)CASE**

**DW1 James Njogu Kagunda** testified that he bought the land from **Wilfred Kaggia Mwangi** vide a sale agreement dated **1<sup>st</sup> October 2007**, for **Kshs. 360,000/=**. That he conducted a search that confirmed that **Kaggia** was the owner, but it was charged to Family Bank for **Kshs.250,000/=** which was paid and the title was released. That they went to the **Land Control, Board**, and processed the title and got a title deed in his name. Further that the suit property had two incomplete rooms, but he never took possession but left a caretaker who informed him that someone was dropping building materials on the site. He produced the sale agreement as Exhibit 1, title deed Exhibit 2, Green Card Exhibit 3, Cheque of **Kshs. 250,000/=** as Exhibit 4, receipt for LCB dated **18<sup>th</sup> October 2007** as Exhibit 5, receipt for search as Exhibit 6 and the Official Search as Exhibit 7. That he was not in occupation of the land because of a Court order.

Further that he bought land from **Kaggia** and he was never shown a title deed but it was at the bank and upon payment he got it. That he never got clearance from **Githunguri Constituency Ranching Company Limited** as it had no role in the transfer.

**DW2 Wilfred Kaggia Mwangi** testified that he bought the suit property on **29<sup>th</sup> March 2004** for **Kshs. 350,000/=** and he had no title deed . That it had a share Certificate **No. 341** and allotment. Ballot **No. 386**. That he paid **Kshs.50,000/=** and paid the balance through Family Bank. That they were with **Ruth Nzula Riitho**, who signed the agreement by thumb printing after which he proceeded to **Githunguri Constituency Ranching Company Limited** with **Riitho** and handed over original documents to **Githunguri Ranching Company Limited**. That he was given title on **14<sup>th</sup> April 2004**, and he processed a loan at Family Bank. That he finished paying **Riitho**. He produced the Sale agreement as **Exhibit 8** and Application for loan as **Exhibit 9**, banks letter as **Exhibit 10**. That they gave their original documents to **Githunguri Constituency Ranching Company Limited** and they processed the title.

That when they did the agreement, it acknowledged payment of **Kshs.50,000/=** and another **Kshs. 50,000/=** was to be paid on **29<sup>th</sup> April 2004**, and another in **July 2004**. That he did not have any documents to prove payments of the balances. That he paid **Kshs.250,000/=** to Family Bank when the Defendant deposited the balance of the purchase price. That he did not have a copy of the title deed as he already sold the land. That it is impossible to charge land without any title.

After the *viva voce* evidence, the parties filed their written submissions and on **13<sup>th</sup> December 2018**, the trial Court entered Judgment in favour of the Defendant (Respondent) and stated as follows;

**“In this case by the chronology of events and having had a chance to peruse the said title of the Defendant, the Plaintiff bought the parcel of land after the defendant had processed his title and all transactions were closed. The evidence availed by the Defendant about the sale transaction seems to me a case for double sale of the same parcel of land by the late Riitho. The Defendant has demonstrated good history of the suit land through the green card and I am convinced on the balance of probability that the Defendant title was not obtained through any fraud. I would have no good reason to doubt his exhibits as corroborated by DW2 testimony. Having considered the Plaintiff's case, I am afraid it would not stand for lack of proper justification against the Defendant so I dismiss the plaintiff's case. In the circumstances, I proceed to enter Judgment in favour of the defendant as follows.....”**

The Appellant was aggrieved by the above determination of the Court and Decree thereon and he has sought to challenge the said Judgment through the **Memorandum of Appeal dated 14<sup>th</sup> December 2018**, and filed on **even date** The Appellant sought for orders that the appeal

be allowed, and the Judgement and Decree delivered on the **13<sup>th</sup> December, 2018** by **Hon. G.Omodho (SRM)** be set aside and be substituted with;

**a. An order directing the Respondent to hand over the title deed of parcel no. RUIRU WEST BLOCK 1/ GITHUNGURI/386 to the Thika District for cancellation.**

**b. Costs of this Appeal.**

The grounds upon which the Appellant sought for the Appeal to be allowed are;

**a. The Learned Trial Magistrate erred in law and fact by failing to apprehend the facts of the case and the applicable law hence making a wrong decision.**

**b. The Learned Trial Magistrate erred in law and fact by admitting and granting a counter claim that was filed without leave of court thereby making a wrong decision.**

**c. The Learned Trial Magistrate erred in law and fact by failing to find that the defendant's title was tainted by fraud having been obtained through a corrupt scheme and therefore a candidate for cancellation under Section 26 of the Land Registration Act thereby making a wrong decision.**

**d. The Learned Trial Magistrate erred in law and fact by dismissing the appellant's case against the weight of evidence thereby making a wrong decision.**

**e. The Learned Trial Magistrate erred in law and fact by failing to analyze the evidence and rival submissions of parties and failing to give reasons for believing one party as against the other and made a wrong judgement.**

**f. The Learned Trial Magistrate erred in law and fact by demonstrating open bias in favor of the Defendant and against the Plaintiff, harassing the plaintiff in the course of proceedings thus did not create a conducive environment for a fair hearing.**

**g. The Learned Trial Magistrate erred in law and fact by dismissing the Plaintiff's case thus making a wrong decision.**

In response to the appeal, the Defendant **James Njogu Kagunda** swore a Replying Affidavit on **25<sup>th</sup> June 2019** and averred that he is the registered owner of the suit property . That the land was initially owned by **Githunguri Constituency Ranching Company Limited** for the benefits of its members and that it was initially owned by **John Riitho Mwaura** who held ballot **No. 386** and share Certificate **341**. That the said Mr. Riitho entered into a sale agreement with **Wilfred Kaggia Mwangi**, who was given all the requisite documents and he charged his title to Family Bank to secure a title of **Kshs. 150,000/=** . That the said **Kaggia** then sold the suit property to him and the same was transferred to him .

That the Appellant's case is tainted with contradictions and manufactured documents. That when the Appellant was buying the suit property it was already registered in the names of **Wilfred Kaggia Mwangi**, a charge registered to it and land sold to him. That **Mr. Riitho's** share Certificate was **341** as depicted by the Appellants documents. That **Riitho's** statement also had its anomalies as it stated that he as selling **share certificate 282**. That as per the clearance certificate, the same having been signed by a **Karianja** who was a Secretary of the Board between **2003 and 2009** and acted ultra vires and signed as Chairman to the Board hence not authentic as he is facing mirage of criminal charges ranging from forging Company documents.

The Court directed that the Appeal be canvassed by way of written submissions and the Appellant through the **Law Firm of L. Maina Irungu & Co. Advocates**, filed his written submissions on the **24<sup>th</sup> February 2020**, and urged the court to abandon clause 2 of the Memorandum of Appeal which states that. ***The learned trial magistrate erred in law and fact by admitting and granting a counter claim that was filed without leave of court thereby making a wrong decision.***

It was submitted that the Appellant's interest to the land is valid and the title held by the Respondent is not genuine. It was further submitted that when the Respondent was served with a Record of Appeal, the Respondent sought to file a Reply and introduced new evidence which had not been tendered before the trial Court. That the Appellant ought to be given a chance to test the new evidence through cross examination and or offering evidence in rebuttal. The Appellant relied on the case of **Kenya Anti Corruption Commission...Vs... Willesden Investments Limited & Others (Civil Appeal No. 325 of 2013)**.

It was further submitted that the major flaw in the trial Court Judgment started with phrasing of the issue for determination as it does not capture the real issue in dispute. It was the Appellant's submission that the issue in dispute was whether the agreement between **John Riitho** and DW2 had been fully performed and completed or whether it had been breached by DW2. Further whether the full purchase price had been paid and the relevant documents executed. That having not grasped the real issue in dispute, the trial Court could not and did not properly analyze the evidence.

It was further submitted that there was an issue of Advocate/ Client confidentiality and the trial seemed to not have been fair. The Court was urged to allow the Appeal and set aside the decision of the lower Court.

The Respondent through the **Law Firm of Kanyi Kiruchi Co. Advocates**, filed their written submissions on the **29<sup>th</sup> June 2020**, and submitted that the Appellant did not take out letters of Administration for the Estate of **Mr. Riitho**, so as to claim on behalf of his Estate. That the Appellant's documents are not authentic to warrant the cancellation of the Respondent's title. It was further submitted that the

Appellant has failed to prove that his documents are genuine and his Appeal has no grounds to stand, as the Court is bound to analyze all evidence as adduced by the parties. It was the Respondent's submissions that the Appellant should be condemned to pay costs and ordered to vacate the suit premises. The Court was urged to dismiss the Appeal.

The Court has now carefully considered the instant Appeal and the Supplementary Record of Appeal filed on **29<sup>th</sup> July 2019**, and the annexures thereto. The Court has also considered the Respondent's Replying Affidavit to the Appeal filed on **25<sup>th</sup> June 2019**, opposing the said appeal. In general, the **written submissions, cited authorities** and the relevant provisions of law and the adduced evidence plus the decision of the Lower Court have been factored in.

As this is a first appeal, it is the Court's duty to analyze and re-assess the evidence on record and reach its own independent decision in the matter as provided by **Section 78 of the Civil Procedure Act**. See the case of **Selle v Associated Motor Boat Co. [1968] EA 123 where the Court held that;**

**“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan(1955), 22 E. A. C. A. 270).**

The Court acknowledges that it will only interfere with the decision of the trial Court where it is shown that the trial Magistrate misapprehended the applicable law and failed to take into account a relevant factor or took into account an irrelevant factor or that on the facts and law as known, the decision is plainly wrong. See the case of **Ocean Freight Shipping Co. Ltd....Vs.. Oakdale Commodities Ltd(1997)eKLR, Civil App.No.198 of 1995**, where the Court held that:-

**“This is of course not an appeal to us from the decision of the single Judge. The discretion given by Rule 4 is exercised on behalf of the court by a single Judge and for a full bench to interfere with the exercise of the discretion, it must be shown that the discretion was exercised contrary to law, i.e. that the single Judge misapprehended the applicable law, or that he failed to take into account a relevant factor, or took into account an irrelevant one or that on the facts and the law as they are known, the decision is plainly wrong.”**

It has been submitted by the Appellant that the Respondent has introduced new evidence at the Appeal stage, which evidence was not adduced at trial. The Appellant also further went ahead to introduce new evidence in rebuttal to the evidence produced by the Respondent. The Court notes that the Appeal stage, an Appellate court is called upon to determine whether the trial Court exercised its discretion properly in arriving at a decision based on the evidence before it. It is thus not in doubt that before a party can adduce new evidence, leave of Court must first be sought. See the case of **Otieno, Ragot & Company Advocates ....Vs... National Bank of Kenya Limited [2020] eKLR** where the Court of Appeal held that;

**“Therefore, for a party to adduce additional evidence on appeal, leave ought to be granted by the said court.**

**In the present appeal, the respondent did not seek leave to adduce additional evidence. It filed an application for review on which it purported to introduce new evidence. No additional evidence could be produced before the learned Judge unless they formed part of the record before the taxing officer as correctly submitted by the appellant. Admission of documents in taxation proceedings is a preserve of the taxing officer under Rule 13A of the Advocates Remuneration Order and on reference, the Judge only deals with what was on record before the taxing officer.”**

In the instant case, none of the parties sought the leave of Court to introduce additional evidence at this appeal stage and it is thus the Court's considered view that since it did not have an opportunity to determine whether or not the additional evidence introduced by both parties was relevant, and as no leave was sought and granted before the introduction of the same, the additional evidence introduced are null and void. This is so as the court sitting as an appellate Court cannot be called upon to make a determination on whether or not the trial Court misapprehended the law or took into account irrelevant factors with introduction of materials that were not before the trial Court.

It is not in doubt that both the Appellant and the Respondent claim to have bought the suit property from **John Riitho Mwaura**. It has been acknowledged by both parties that the said **John Riitho** was the owner. It is further not in doubt that the said **John Riitho Mwaura** got the said suit property from **Githunguri Constituency Ranching Company Limited**. The Appellant claims to have entered into a Sale agreement with the said **John Riitho** in **2007**, while the Respondent alleges that he bought the suit property from **Wilfred Kaggia** who had bought the suit property from the said **John Riitho**.

During the trial, the Appellant produced in evidence the witness statement of **John Riitho**, who stated that he had sold the suit property from him. The Defendant also produced in evidence through DW2 a Sale agreement that showed that the **Wilfred Kaggia** bought the suit property from **John Riitho**. The Appellant contended that though **Wilfred Kaggia** had bought the suit property from **John Riitho**, he did not finish paying for the balance of the purchase price and thus the same necessitated the said **John Riitho** to sell the same.

In her judgment the trial Court opined that the issue for determination, is who did **John Riitho** sell the suit property to and further held that the case seemed to be a case of the vendor selling the suit property twice. It is not in doubt that when a party's title to property is called into question, the party needs to prove the root of his title. It is therefore the Court's considered view that the issues for determination are;

## **1. Who has proved the root of their title**

## 2. Should the Respondent's title be cancelled

## 3. Is the Appeal merited.

### 1. Who has proved the root of their title

The Appellant has laid claim to the suit property so has the Respondent. Respondent contends that he bought the said property from **Wilfred Kaggia**, who had bought the suit property from **John Riitho**. In his statement, the said **John Riitho(Deceased)** stated that he had sold the suit property to the Appellant. Both parties root of title have been called into question as the Appellant has alleged there was fraud while the Respondent has also alleged there was fraud. It thus follows that each has to prove their root of title See the case of **Munyu Maina...Vs.. Hiram Gathiha Maina [2013] eKLR**, held as follows:

**“We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register”**

Further in the case of **Hubert L. Martin & 2 Others ...Vs... Margaret J. Kamar & 5 Others[2016] eKLR**, the Court held that;

**‘A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.’**

The Respondent's root of title stems from that of **Wilfred Kaggia**. It is the Court's considered view that the root of **Kaggia's** title must be investigated. The said **Wilfred Kaggia** avers that he bought the suit property from **John Riitho** and had the same transferred to him, To support his claim, he produced in evidence a Sale Agreement dated **29<sup>th</sup> March 2004**. The Court has gone through the said Sale agreement, and **Clause 4** provides that the handover of the original Certificate and to effect transfer in favour of the purchaser at the Company's offices was upon receipt of full payment of the balance. Further under **clause 5**, possession was to be taken upon full payment.

In the said sale agreement, the said **John Riitho** acknowledged having received only **Kshs. 50,000/=**. The Respondent has not produced in evidence any document to show that he paid the full purchase price. Further the said **Wilfred Kaggia** did not produce evidence that **clause 4** of the sale agreement was adhered to in that he was handed over the original documents to enable him transfer the suit property in his name. The Court has seen the letter dated **25<sup>th</sup> September 2009**, from **Githunguri Constituency Ranching Company Limited**, in which it indicates that **Peter Njuguna** was the owner having been transferred to by **John Riitho**. The letter further states that the Company did not give any clearance to any other party.

It is not in doubt that for the said **Wilfred Kaggia** to have the title registered in his name, he needed to get Clearance from the Company. He further needed to have the said **John Riitho** transfer the said property to him by giving him all the necessary documentations. No evidence was produced in trial to show how the transfer was effected to the said **Wilfred Kaggia**, as he did not possess the requisite documentation to effect the transfer. It is not enough to just waive the sale agreement and the title, the process through which the title was transferred and if the terms of the agreement were complied with is key to the root of a proprietor's title. The Court therefore finds and holds that the Respondent failed to prove his root of title as the person he bought from did not have a proper title having failed to show how the suit property was transferred to him.

On the other hand the Appellant produced in evidence a sale agreement dated **27<sup>th</sup> March 2009** in which he bought the suit property from **John Riitho**. The Court has seen the letter dated **25<sup>th</sup> September 2009**, in which the Company acknowledged that suit property was transferred to the Appellant by **John Riitho**. In his statement, the said **John Riitho** acknowledged having sold the same to the Appellant. While it is unfortunate that the said **John Riitho** is no longer available to shed more light as to how the transaction between him and the said **Wilfred Kaggia** never came into fruition, the evidence adduced indicates that he indeed transferred the suit property to the Appellant. While there is evidence that there was a transaction between him and the said **Wilfred Kaggia**, there is no evidence that the transfer was ever effected to **Kaggia** and therefore the Court finds and holds that the Appellant has been able to prove the root of his title as he produced documents that show the root of his title and the same has been backed by the Company.

### 2. Should the Respondent's title be cancelled

The Court has already held that the Respondent has failed to prove the root of his title. Registration is not absolute as a person must prove that the said Registration was one that was in accordance with the law and the laid down procedures. **Section 26(1)** of the **Land Registration Act** which was imported from **Section 28 of the Registered Land Act** (Repealed) provides;

**“The Certificate of Title issued by the Registrar upon registration, 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 the proprietor shall not be subject to challenge, except –**

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

In this instant, the Court has already held and found that the root of **Wilfred Kaggia's** title has not been proved and therefore his title was acquired illegally. The said **Wilfred Kaggia** could therefore not be able to pass that which he did not have. See the case of *Esther Ndegi Njiru & another ... Vs.. Leornard Gatei [2014] eKLR* where the Court held that;

**“As regards the issue whether the registration of the plaintiffs as the owners of the suit property is absolute and indefeasible and not liable to be challenged. I would answer in the negative. Having held and found that the 2<sup>nd</sup> Defendant fraudulently processed and acquired the title to the suit property in his name my view is that he did not acquire a good title to the property and no interest in the property could pass to him. The 2<sup>nd</sup> Defendant therefore not having any good title or interest in the suit property could not pass a good title to the plaintiffs. The plaintiffs have submitted that the title held by James Kinuthia Waiharo being a first registration was protected under the law and could not be defeated and in that regard make reference to section 28 and section 143 (1) of the repealed Registered Land Act Cap 300 Laws of Kenya. I have earlier on in this judgment stated that the repealed Acts ceased to have any application from the date of commencement of the Land Registration Act NO. 3 of 2012.**

**Section 143** Registered Land Act (*repealed*) for this proposition which provided thus:-

**143.(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”**

The equivalent to **section 143(1)** of the repealed Act is **Section 80(1) of the Land Registration Act** which provides:-

**80.(1) 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”.**

**The Court having held that the Respondent did not possess a good title as Wilfred Kaggia, could not have passed a good title, therefore finds and holds that the title held by the Respondent ought to be cancelled.**

### ***3. Is the Appeal merited.***

The Appellant has sought for the setting aside of the trial Court's Judgment. In her Judgment the trial Court held that the Respondent had proved that there was enough evidence to uphold his title as the case was that of a double sale. However, this Court has found and held that the Respondent was not able to prove the root of his title. Therefore the Court finds that the Learned Magistrate misapprehended the Law and facts and arrived at a wrong Conclusion. The Appellant having sought for the cancellation of the Respondent's title and the Court having allowed the same by finding that the same should be cancelled finds and holds that the Appeal herein is merited.

The Appellant has also sought for Cost of the Appeal. **Section 27 of the Civil Procedure Act** gives the Court discretion to grant costs, but also recognizes that cost must follow the event. While it may be that the Respondent is an innocent purchaser, there is no doubt that the Appellant has incurred costs and therefore is entitled to the same.

Having now carefully re-evaluated and re-assessed the available evidence before the trial court and the **Memorandum of Appeal**, together with the written submissions, the Court finds that the trial Magistrate did err and arrived at a wrong decision.

For the above reasons, the Appellant's Appeal is found merited and consequently the said Appeal is allowed entirely and the Judgment and Decree of the trial court are hereby set aside.

The Appellant's having proved his case, the Court enters Judgment in his favour as prayed in his Plaintiff dated **18<sup>th</sup> November 2019**, in terms of prayers (a), (b) and (c) of the said Plaintiff. The Appellant is also entitled to costs of this Appeal.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT THIKA THIS 8<sup>TH</sup> DAY OF APRIL 2021**

**L. GACHERU**

**JUDGE**

**8/4/2021**

**Court Assistant - Phyllis**

**ORDER**

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

**With Consent of and virtual appearance via video conference – Microsoft Teams Platform**

**Mr. Njoroge holding brief for Mr. Maina Irungu for the Appellant**

**No appearance for the Respondent**

**L. GACHERU**

**JUDGE**

**8/4/2021**