



**Thiga & another v Mburu & 2 others (Sued on Behalf of Amamen
Self-Help Group) (Environment and Land Appeal E018 of 2024)
[2025] KEELC 4603 (KLR) (Environment and Land) (19 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4603 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA
ENVIRONMENT AND LAND
ENVIRONMENT AND LAND APPEAL E018 OF 2024**

MC OUNDO, J

JUNE 19, 2025

BETWEEN

JOSEPH NJOROGE NGAMATE THIGA 1ST APPELLANT

GRACE WAIRIMU NYOIKE 2ND APPELLANT

AND

DAVID T MBURU 1ST RESPONDENT

SAMMY MWAURA MHUNGI 2ND RESPONDENT

ANTHONY KIMATA MUGWANJA 3RD RESPONDENT

SUED ON BEHALF OF AMAMEN SELF-HELP GROUP

*(Being an Appeal from the decision of the Hon. Abdulqadir Lorot, Chief
Magistrate in Naivasha CM ELC No. 20 of 2018 (Joseph Ngamate
Thiga versus T. Mburu & Others) as delivered on 9th December 2024)*

JUDGMENT

1. Coming up for determination on Appeal is a matter which was heard and determined by Hon. Abdulqadir Lorot H.R, Chief Magistrate wherein upon considering the evidence of both parties, vide his Judgment delivered on 9th December, 2024, the learned Magistrate dismissed the Plaintiff's suit with costs to the Defendants.
2. The Appellants, being dissatisfied with the Judgement and Decree of the trial Magistrate have now filed the present Appeal based on the following grounds in their Memorandum of Appeal:



- i. The honorable Magistrate erred in law and fact in openly and without justification endorsing that despite the fact that a title had been removed illegally from the estate of a deceased person, the beneficiary (1st Respondent) did get a good title that he could pass to the 2nd Respondent.
- ii. The honorable Magistrate erred in law and in fact in failing to admit that the 2nd Appellant was a substantive party in the proceedings before him and treated her as a fringe party that did not merit full attention in her own right and with separate interests different from those of the 1st Appellant on behalf of the estate of their deceased father.
- iii. The honorable Magistrate erred in law and in fact in failing to appreciate that what was at stake was the interest of an estate of a deceased person whereby the Appellants were just administrators and a decision against them was also a decision against the other beneficiaries of the estate of the late George Thiga Ngamate being represented.
- iv. The learned Magistrate erred in law and in fact by strangely but openly appearing to have a preconceived bias in favour of the Respondents, especially the 1st Respondent in that he merely believed everything he said even without any evidence but subjected the Plaintiff to a different standard of proof on account of being an advocate.
- v. The honorable Magistrate's court totally disregarded binding decisions of the High Court provided by the Plaintiff without any attempt at distinguishing them or indicating where the authorities were overturned by superior courts especially on the question of whether estate property can be available for alienation before a grant is confirmed by a court of law and whether a chargor/chargee's right are unassailable on discovery that the title charged could be impeached on account of being improperly obtained.
- vi. The honorable court erred in law and fact in concluding that it was only the Plaintiff who could have applied to join the bank where the suit title was charged while not only could this have been done by the 2nd Respondent who had a contractual arrangement with the bank but the court further failed to identify at what point the Appellants got to know about the particulars of charge transaction which was a matter within the knowledge of the 2nd Respondent all through.
- vii. The honorable Magistrate erred in law and fact in handling the 2nd Respondent with kid gloves by failing to put their laid back defence to scrutiny on the serious issue of representation through a supposed single official of a body not recognized to be a legal person even after the Appellants had pointed out the issue but nothing turned over this angle throughout the judgement.
- viii. The honorable court erred in law and in fact by falling in a manifest error that the 1st Appellant could be punished for being according to the court less than candid even if the end result was a punishment to the rest of the estate members and an endorsement of an illegality, irrespective of its source.
- ix. The honorable court erred in law and in fact in making strange claims that the interested party/2nd Appellant was unrepresented when it was clear that she was represented by the same lawyer as the 1st Appellant but further the court made adverse and unjustified comments as against her which gave the impression that the court was openly biased against her.
- x. The honorable court erred in law and fact in its decision which effectively meant the lower court had power to superintend over matters of distribution of an estate properly before a High Court.



8. That the deceased's property had been sold outside the known process of the law which could have been fraud, forgery or whatever other means yet despite all these facts having been laid before the trial court, it had made a decision on the most spurious reasons possible. An invitation was made to the court to re-look at the analysis of the trial court in its judgement.
9. That even if the 1st Appellant who is an advocate of the High Court of Kenya had participated in the acquisition of the title before the succession proceedings had been initiated and grant issued, the same would not give court legal reasons to clothe the patently illegal arrangement with some legality. It was their submission that the moment the illegality or fraud was discovered, the court ought to have automatically taken some decisive action to do damage control to stop further hatching of illegalities going forward.
10. That the 2nd Appellant, being a beneficiary whose voice was the voice of beneficiaries who had been deprived of their interest in the suit property, had been thrown into the periphery as if she had said nothing worth recording, wherein the lower court ended up punishing an entire membership of the estate in an effort to get to the 1st Appellant.
11. That whereas it had been brought to the attention of the court that matters regarding the estate of George Thiga Ngamate were live and un concluded before the High Court sitting in Naivasha, the trial Magistrate chose to flatly ignore the same and had proceeded to make a finding that had a serious bearing on the pending proceedings in a superior court. Reliance was placed on the decisions in *Wambui v Mwangi & 3 others* (Civil Appeal 465 of 2019) [2021] KECA 144 (KLR) (19 November 2021) (Judgment) and *In re Estate of Barasa Kanenje Manya (Deceased)* (Succession Cause 263 of 2002) [2020] KEHC 1 (KLR) (30 July 2020) (Ruling) to submit that the title herein had stemmed from theft of property in the deceased's estate for which no proper title could ensue.
12. On grounds 2 and 9 of the Memorandum of Appeal, the Appellants' submission had been that the court did not address the 2nd Appellant herein as an Interested Party or indeed any other beneficiary who had been a party to the transfer of estate property to the 1st Respondent, but had simply cast aspersions based outside the formal proceedings. That it was not open for the honourable court to purport to moralize an issue outside the law. It was their submission that in his effort to punish the 1st Appellant, the court had ignored the rights of the 2nd Appellant and the rest of the beneficiaries to the estate.
13. On grounds 4, 6 and 7 of the Memorandum of Appeal, the Appellants submitted that whereas the court had believed all the allegations by the Respondents, it had at the same time strictly scrutinized the Appellants' evidence there by applying two standards. That the court believed the allegations by the 1st Respondent that the 1st Appellant being a lawyer, had drawn an agreement between the 1st and 2nd Respondents for the sale of the suit property despite there having been no production of the said agreement.
14. It was their submission that it whereas the court had insisted that they ought to have joined the bank to the proceedings, it would be foolhardy for one to expect the Appellants who had no privity of contract with the Bank to be the one seeking to join the bank to the proceedings herein yet the 2nd Respondent in its counterclaim had admitted that a third-party bank had been affected by its counterclaim but chose not to involve it.
15. That the trial court had disregarded the authorities availed to it on the issue on whether the court of law could cancel a title notwithstanding the existence of a charge if it was proved that the charged title was fraudulently obtained before the charge had been lodged. Reliance was placed in the decided case of *Kibiro Wagoro Makumi v Francis Nduati Macharia & another* [2018] KEELC 4102 (KLR) to



submit that courts of law had times without number cancelled titles that had been obtained irregularly irrespective of the encumbrances attached to them, including charges.

16. It was thus their submission that the court should not countenance a situation where the estate of the deceased would lose out on the basis of connivance of parties who had concocted a fraud, irrespective of who they were and that there were mechanisms for those who had been aggrieved to seek redress. Reliance was placed in the decided case of *Alice Chemutai Too v Nickson Kipkurui Korir & 2 others* [2015] KEELC 151 (KLR).
17. Their submission was that although issues on the 2nd Respondent's capacity as a Self-Help Group to sue or be sued through the two officials who had filed pleadings and who had eventually testified as it was not a legal person, and the group having not been a registered body and neither had its certificate of registration been produced to justify them in mounting a counterclaim, and further, that there had been no list of members who had authorized the two gentlemen to counterclaim on behalf of the group, the trial court had totally ignored this line of argument without any justification.
18. It was thus their submission that the impugned judgement was a decision that had been made upfront hence the court had merely been gathering possible justification for an already made finding. That there was too much glossing over the shortcomings of the Respondents' case and deliberate scavenging for any fault lines on the case of the Appellants which was not fair. They thus submitted that the instant Appeal was well merited in law and in fact, that the estate property was sacrosanct and should be protected awaiting the distribution of its assets by the High Court, Naivasha currently seized of the estate, and that the court was enjoined to restate the true position of the law. That their appeal be allowed with costs.

1st Respondent's Submissions.

19. In response to the Appellant's Appeal and in opposition thereto, the 1st Respondent vide his written submissions dated 21st March, 2025, submitted on Ground 1 of the Appeal that the 2nd Respondent was a bona fide purchaser for value without notice and within the meaning of the provisions of Section 26 of the *Land Registration Act*. That the 1st Appellant did the registration of the transfer in his capacity as an Advocate wherein he had shared the proceeds of the consideration with his two brothers. This evidence was not controverted. That had there been fraud in the said sale, the Appellants had actively participated in and facilitated the same and the 1st Appellant could not be allowed to now turn around and claim fraud for which he had been the author.
20. That on the other hand, the 1st and 2nd Respondents had exercised due diligence before purchasing the suit property where they had found that the title was free. That they paid the full purchase price and later used the title as collateral to secure a bank facility which bank was not party to the suit. That they were bona fide purchaser for value without notice and were protected under the provisions of Section 26 of the *Land Registration Act*.
21. That the allegation made on ground 2 of the Memorandum of Appeal were false. The trial court did appreciate that the sale herein had been a transfer in the pendency of a succession cause. It was thus his submission that it would be upon the succession court to take into account the fact that the three sons had already benefited from the proceeds of the sale of the suit property at the final distribution of the estate. That in any case, the estate herein was a vast estate with many assets thus deciding the instant matter to the contrary would violate the provisions of section 26 of the *Land Registration Act* and prejudice the interests of the financier bank.
22. In response to ground 3 of the Appeal, he submitted that contrary to the allegations therein, all parties' evidence had been subjected to the same degree of proof on a balance of probability. That in any case,



- being an advocate and officer of court, the 1st Appellant was expected to act with utmost honesty but he had fallen short of that and regrettably did not meet the standard of proof on the evidence on record. That further, the decisions that had been cited by the Appellants had been distinguishable from the instant case.
23. That the Plaintiff in the lower court, the 1st Appellant herein had failed to sue the financier bank yet it had been its duty to do so. That the Appellant did not disclose in their pleadings that the title to the suit property was held as collateral in a bank.
 24. That justice was all about fairness. The Appellant, 1st Respondent and his witness being sons and the beneficiaries of the deceased estate agreed to sell the suit property to get funds to proceed with the succession under the guidance and active participation of the 1st Appellant wherein they had shared the consideration equally and the property was sold to the 3rd Respondent. That thereafter, the property had been used as security for a bank loan yet the bank was never made a party to the instant suit. That the parties before the succession court would have an opportunity to factor in the funds that had been shared as proceeds of the sale of the suit property herein as part of their beneficial interest which they had already benefitted from.
 25. He submitted that to hold otherwise would reward the Appellants' actions in transferring the suit property and further defeat the interest of the financier bank which had not been given a chance to defend its interest by the fault of the Appellant. That subsequently, justice in the present matter was to dismiss the Appeal herein with costs.
 26. The 2nd Respondent's written submissions dated the 29th March 2025 on the other hand was to the effect that the Appeal was opposed, that the Judgement dated 9th December 2024 was legal, meritorious and was well reasoned within the law and for interest of justice the same should be upheld. That none of the 12 grounds of appeal has any legal weight and the same should be dismissed.
 27. That based on the evidence by family members including the 1st Respondent, the trial Magistrate had established both in law, facts and evidence that the Appellants particularly the 1st Appellant had participated in the sale of the subject land wherein he and all his brothers had benefited from the proceeds of sale. That the issue of succession was now overtaken by events as a Bank had now charged the property. That litigation ought to come to an end wherein the Bank's interests should be protected.
 28. That the proceedings in the trial court clearly demonstrate that the trial Magistrate had evaluated the tendered evidence judiciously and in equal balances. That the Appeal as filed was verbose and not based on any fact of law but was a mere repetition of stories where there had been no demonstration of fact or law of any act of bias by the trial Magistrate that led to the Judgement. That the trial court treated the evidence of all parties equally in line with provisions of Article 49, 50 and 51 of the Constitution of Kenya.
 29. Their submissions were that the Appellants appeal was below the threshold and should be dismissed with costs.

Analyses of the evidence.

30. According to the proceedings, the 1st Appellant herein instituted the suit, as a Plaintiff against the 1st and 2nd Respondents herein in Naivasha CMCELC No. 20 of 2018 (Formerly Nakuru ELC Case No. 468 of 2016) vide a Plaint dated 27th October, 2016 wherein he had sought for the following orders;
 - i. That the title known as LR Naivasha/Mwichiringiri Block 4/1149 in the name of the 2nd Defendant be re-transferred back to the estate of the deceased named George Thiga Ngamate



pending the hearing and determination of Nairobi High Court Succession Cause No. 2641 of 2015, or to the administrator of the estate if the succession cause shall have been determined.

- ii. Costs of the suit plus interest at court rate.
31. Subsequent to the filing of the suit, the 1st Defendant filed his Statement of Defence dated 8th December, 2016 wherein he denied the allegations contained in the Plaintiff putting the Plaintiff to strict proof while stating that the grant of Letters of Administration to the Plaintiff had fraudulently been obtained wherein the 1st Defendant had commenced revocation proceedings. That the sale and transfer of LR Naivasha/Mwichiringiri Block 4/1149 (suit property) had been done with the full knowledge and consent of all the beneficiaries of the estate. That indeed, the proceeds of the sale of the suit property had been shared between the Plaintiff, 1st Defendant and Charles Macharia Thiga (DW2) who were sons and beneficiaries of the estate of the deceased. He thus prayed that the Plaintiff's suit against him be dismissed with costs.
 32. In rejoinder, the Plaintiff had reiterated the contents of his Plaintiff thereby denying the allegation of fraud contained therein that they had shared in the proceeds of the sale of the suit property. He sought for the dismissal of the 1st Defendant's Defence with costs.
 33. The 2nd Defendant in its Defence and Counterclaim dated 30th November 2016 denied the allegations contained in the Plaintiff putting the Plaintiff to strict proof while arguing that the Plaintiff's suit had not disclosed substantive or meritorious claim. It challenged the Plaintiff's alleged capacity as an administrator of the deceased's estate stating that LR Naivasha/Mwichiringiri Block 4/1149 was not available for distribution by the Plaintiff in the said capacity as the said land had been duly registered in the name of the 1st Defendant who had been the absolute registered owner at the time of the sale of the same to the 2nd Defendant as per information in the Land Register in Naivasha.
 34. That if at all there had been fraudulent registration of the suit property, then the Plaintiff had conspired with the 1st Defendant to extort funds and monies from the 2nd Defendant, who had been a bona fide purchaser of the said land. It thus stated that the suit property was not available for reinstatement to the Plaintiff as it was not part of the deceased's estate.
 35. In its Counterclaim, the 2nd Defendant sought for the dismissal of the Plaintiff's suit and for orders that:
 - i. The Plaintiff suit was a fraudulent act since the 2nd Defendant is a bona fide purchaser for value.
 - ii. Damages be awarded to the 2nd Defendant against the Plaintiff.
 - iii. Costs and interests of the suit.
 36. The case proceeded for hearing wherein the Plaintiff testified as PW 1 to the effect that he was the last-born son of the deceased George Thiga Ngamate, an administrator of the deceased's estate and an Advocate of the High Court of Kenya. He adopted his witness statements as his evidence in chief and sought to produce the documents filed therein. He confirmed that the 1st Defendant was his brother and the third born in the family, the Interested Party/the 2nd Appellant herein was their sister and also an administrator of the estate of their deceased father while he neither knew the self-help group nor 2nd Defendant and how he was joined in the suit.
 37. That he had sued the 1st Defendant because despite the suit property having belonged to his father, the same had been registered to him before the succession Cause had been concluded. That he sought that the suit land that had subsequently been registered in the name of the 2nd Defendant be reverted to the Deceased's estate.



38. The Plaintiff relied on the following filed list and supplementary list of documents in evidence;
- i. Grant of representation dated 24th January 2016.
 - ii. Petition for Letters of administration intestate of the estate of George Thiga Ngamate.
 - iii. Kenya Gazette Notice of 15th January 2016.
 - iv. Extract of Green Card for LR. Naivasha/Mwichiringiri Block 4/1149.
39. In cross examination by the Counsel for the 1st Defendant, he confirmed that he was an Advocate and an administrator of his father's estate alongside three others including the 1st Defendant herein. He denied ever having a meeting where they had agreed to transfer the suit property. That he had seen the 1st Defendant's documents. That there had been an application for fund transfer dated 4th February 2015 which had transferred funds from the 1st Defendant's account into his account. He however denied that the same was not a share of the proceeds of sale but that the 1st Defendant had owed him money. He denied having prepared the paperwork for the sale of the suit property and maintained that he had not been part of the process of the sale herein.
40. His evidence had been that whereas the suit property was his father's, the 2nd Defendant was not known to him. That he was not aware of the transaction between the 1st and 2nd Defendant as the 1st Defendant had not disclosed to him the source of the money. That since he lived with his ailing mother, he had assumed that part of the money which the 1st Defendant had transferred to him had been for the upkeep of his mother. His evidence had been that the said money had been deposited into his account without his knowledge.
41. He confirmed that he was aware that the suit property was in the 'hands' of the 2nd Defendant and that the same had been charged and was collateral to the bank that had offered a loan facility for which he wanted the court to disregard the interest of the 2nd Defendant and the bank that had advanced it the loan.
42. When he was cross-examined by the Counsel for the 2nd Defendant, he confirmed that he was aware that the suit property had been charged to a bank and that he did not sue the said bank because at the time of filing the suit, he had not been aware that the suit property had been charged. That it had been only after they had received the Green Card long after the suit had been filed, that he had known the existence of the charge. He however, could not recall when they had discovered that the suit land had been charged.
43. Whereas he had maintained that the suit property had been sold secretly, on further probe, he admitted that the 1st Defendant had told him that the proceeds that had been deposited in his account had been from the sale of land. That whilst the police had been investigating the matter, he could neither recall reporting the fraud to the police nor did he have any report from the police to show that there had been fraud committed in the transfer of the suit land.
44. He confirmed that their father had died in the year 2008 and that the suit property had been registered in the 1st Defendant's name in the year 2014. He maintained that although he had not been told where the money that was deposited in his account had come from, yet he had withdrawn the same and spent it in taking care of his mother. That whereas the 1st Defendant had disclosed that they had sold the suit property to the 2nd Defendant, the said suit property had been illegally acquired.
45. In re-examination, he confirmed that the documents of transfer dated 4th February 2015 had indicated that the sources of funds were proceeds of sale. That at that time, the suit land had been registered in the



- name of the 1st Defendant and not the deceased wherein succession proceedings had not commenced. That he could not recall at whose behest the 2nd Defendant had been joined to the proceedings.
46. Grace Wairimu Nyoike testified as PW2 and confirmed that she was a sibling to the 1st Defendant, the 10th born daughter to the deceased, George Thiga Ngamate and also an administrator to his estate. She adopted her witness statements as her evidence in chief and sought to produce the filed documents in evidence.
47. She then proceeded to testify that the 1st Defendant had taken one of the deceased's assets and fraudulently transferred it to himself wherein he had later sold it.
48. That subsequently they had obtained the green card with a suit parcel of land which had indicated that the 1st Defendant had sold it in the absence of a succession cause. That they now sought to reclaim the land so that it could be included in the deceased's estate. She explained that the succession cause was before the Naivasha High Court. That she did not know the 2nd Defendant and neither had she received any proceeds of the sale. She denied having been aware that the suit property was up for sale.
49. On cross-examination by the Counsel for the 1st Defendant, she confirmed that she was one of the administrators of the deceased's estate which constituted many other parcels of land. She also stated that documents to the deceased's estate including titles were in the custody of one of the administrators whom she did not know and it was not true that the same were in the custody of the Plaintiff herein. She explained that when their mother passed away, the 1st Defendant and one Charles Macharia (DW2) had attempted to grab the documents which were not in the custody of the Plaintiff.
50. On cross-examination by the Counsel for the 2nd Defendant, she confirmed that she was the daughter of George Thiga Ngamate (Deceased) and an administrator of his estate. She also confirmed that the succession cause was Naivasha High Court No. 7 of 2017. She further confirmed that the Summons for Confirmation of Grant had been an annexure to a supporting affidavit to an Application dated 23rd February 2023. In a schedule for the description of property, LR Naivasha/Mwichiringiri Block 4/1149 had been included as part of the deceased estate.
51. That although they had known that the suit property was in their father's name, they did not know how the 1st Defendant had sold it, which had been the basis for filing of the suit. That she could not recall when she had seen the green card.
52. Her evidence was that they had reported the matter at the Naivasha police station wherein they had been given an OB number although she had not filed the said OB. She confirmed that the 1st Defendant had sent their mother some money for treatment through the Plaintiff. That she was not aware that the suit land had been charged to the bank.

The Plaintiff had thus closed his case

53. David Thiga Mburu, the 1st Defendant herein adopted his witness statement as his evidence in chief and sought to produce the filed documents in evidence before testifying as DW1 to the effect that he was the first born among the three sons of the late George Thiga Ngamate, That the Plaintiff was the last born.
54. His evidence was that their father had distributed his properties before his death wherein they had a meeting to discuss the same. That in the said meeting where their mother had been present, the three sons of the deceased had agreed to sell one of the properties to assist them in conducting succession since no one had volunteered to pay the costs of the succession Cause. That the Plaintiff being a lawyer



- had informed them that they could sell the parcel of land at Mirera. That at that time, they had not instituted the succession Cause.
55. That the Plaintiff was their brother whom they had educated since he was young. That they agreed to sell the said parcel of land at Mirera as had been proposed by the Plaintiff who had indicated that he knew how the said parcel of land would be registered in their names to enable them sell the same. That the Plaintiff was the custodian of all the titles pertaining to the deceased's parcels of land(estate)
56. He testified that the Plaintiff had promised to follow up until the transfer and process the title. That his father had acknowledged that he was the eldest son hence he had left him in charge thus it had been agreed that he be listed as the owner of the suit property. That he had been unwell at the time thus he had not signed some transfer documents that had been brought to him by the Plaintiff.
57. That they had looked for a broker after which they had sold the suit property at a purchase price of Kshs. 2,800,000/= which money had been wired into his account. That he, the Plaintiff and Charles (DW2) had shared the said money equally wherein each one of them had received a sum of Kshs 753,000/=. That he had met the Plaintiff at Limuru after which they had proceeded to Equity Bank Limuru Branch where he had transferred the said money to the Plaintiff and that the transfer form read that the money had been from sale of land.
58. He explained that his mother had a bank account held at Kimende and that each of them had a responsibility of taking care of her. That whereas the Plaintiff had wanted to be a sole administrator, they had presented an objection hence they had been joined as co-administrators. He admitted that they had a dispute on distribution since the Plaintiff wanted the suit property herein to revert to the estate which was impossible since they had all agreed to sell the same. That he was one of the administrators and there had been many disagreements over the succession since the Plaintiff wanted to swindle others. He explained that before filing a succession cause they used to meet at his (1st Defendant) house.
59. That indeed many of his father and mother's shares were missing and that the Plaintiff had sold the shares in Carbacide Investments shares, Eveready and Barclays Bank at Kshs. 900,000/= and shared the money with them equally. He urged that since the purchaser herein had bought the suit property in good faith, the Plaintiff's case should be dismissed.
60. In his evidence, the 1st Defendant relied on the following filed list of documents;
- i. Grant of letters of administration.
 - ii. Court file in Limuru Criminal Case No. 123 of 2017, *R v David Mburu Thiga & Charles Macharia Thiga*.
 - iii. Court file Criminal Case No. 7 of 2017, *R v Charles Macharia Thiga & David Thiga Mburu*.
 - iv. Application for funds transfer dated 4th February 2015.
 - v. Equity Bank Statement for March 2015 for A/C No. 0200xxxxxx893
 - vi. Sale Agreement dated 19th January 2016.
 - vii. 1st Defendant's Statement of account at Equity Bank for the period 31st January 2015 to 25th March 2015.
61. When he was cross-examined by the Counsel for the Plaintiff, DW1 confirmed that their father died in the year 2008. That whereas he had not left a written will to indicate how he had wanted his estate to be distributed, he had spoken to them before his death. He confirmed that the Succession Cause that was



- filed in the year 2015 had not been concluded. That whilst he could not recall the exact time when he had become the registered owner of the suit property, yet it had been around the year 2015. That after the Plaintiff had assured them that he knew what he would do, they had agreed that the suit property be transferred to his name after which he and Charles had contacted a broker to get them a buyer.
62. That they did not take minutes since they were talking as brothers. That whereas the Plaintiff had prepared all the documents leading to the transfer of the suit property to the 1st Defendant's name, he did not give him any papers.
 63. He confirmed that the transfer of funds had listed the reasons as land sale agreement thus the money had been the proceeds of the said sale. He confirmed that he and Charles had been charged in Limuru. That whereas the Plaintiff had barred them from entering the land, they had tilled the land on the orders of the court. That they had planted potatoes therein but on the day of harvesting, the Plaintiff had claimed that they had been harvesting his crops and took them to court for creating disturbance which charges had been dismissed.
 64. That by the time the Grant (Pf exh 1) had been issued by the High Court at Nairobi on 24th January 2016, the suit property had already been sold. That whereas he did not know how and why the 2nd Defendant had been sued, it was a bona fide purchaser. He maintained that all the title documents were in the custody of the Plaintiff. That whereas he had no proof and had not filed a counterclaim, the Plaintiff had sold the shares in Carbacide, Barclays e.tc.
 65. When he was cross-examined by the Counsel for the 2nd Defendant he confirmed that Anthony Kimata and his colleagues had paid a sum of Kshs. 2,800,000/= wherein they had shared the proceeds. He confirmed that the suit property had been in his name. That it was the Plaintiff who had processed the title and that they had all agreed that the suit property be registered in his name as the elder brother. That as an advocate, the Plaintiff knew how to transfer the land.
 66. In re-examination, he confirmed that the Succession Cause had been filed by the Plaintiff in Milimani Law Courts, Nairobi. That the Plaintiff had made copies of all the title documents. That whereas the original titles had been guarded in his father's cupboard, the same were now in the custody of the Plaintiff since he needed them for purposes of changing the details of ownership. That the Plaintiff had brought to him the title deed to the suit property. He confirmed that he had signed the transfer documents that the Plaintiff had brought. He also confirmed that the complainant in the Limuru case was the Plaintiff who had said that they had entered into his land and harvested his crops. That they had had a series of court cases with the Plaintiff.
 67. DW2, Charles Macharia Thiga, testified that they were 13 children in total with the 1st Defendant being his eldest brother and the Plaintiff being the 13th born child. That their father was George Thiga Ngamate (deceased).
 68. That whereas the Plaintiff lay claim that the 1st Defendant had sold the parcel of land subject of succession, yet it had been the Plaintiff who had suggested that they look for money to file a Succession Cause.
 69. That the deceased's three sons had met and agreed to pick and sale one of the estate's parcels of land. The Plaintiff being a lawyer, had suggested that the suit property be transferred to the 1st Defendant so that they could get a better deal. That subsequently, the Plaintiff having initiated the suggestion, obtained the title and they had peacefully proceeded with the sale.
 70. That it had been the Plaintiff who had brought them the papers which they had signed. That afterwards, they had contacted brokers who got them the buyers hence they had sold the suit property



at a purchase price of about Kshs. 3,000,000/= after which the proceeds had been shared equally among the three brothers with each getting a sum of Kshs. 753,000/=.

71. That whereas the case herein must have been the 7th case involving the family, the Plaintiff had never won any case against them. That the Plaintiff had sold the deceased's shares. He adopted his witness statement dated 16th September 2024 as his evidence in chief and then urged the court to dismiss the instant suit because the three brothers had agreed to sell the suit property and the Plaintiff was the one who had changed the title.
72. On cross-examination by the Counsel for the Plaintiff, he confirmed that his statement dated 16th September 2024 had been very brief. That the said statement had been in his name Charles Macharia Thiga and that the name at the bottom, being David Thiga Mburu was a typing error.
73. That whilst they had met and sat with his brothers, they had not taken minutes. He confirmed that the transfer of the suit property had been done before the succession case had been concluded since they had their expert, the Plaintiff herein. He also confirmed that the suit property had been registered in the name of the 1st Defendant who was their elder brother. He further confirmed that the succession cause was still ongoing.
74. That the Plaintiff was a cantankerous litigant although they had not presented all the cases. That although the Plaintiff had brought all the documents for them to sign, he had not brought the said documents to court. That whereas the 1st Defendant had been old and ill, having undergone a surgical procedure, they had trusted the Plaintiff. He confirmed that he had received the monies from the 1st Defendant who had paid him his share of the proceeds.
75. That whilst their father had not made a written will, he had spoken to them orally and asked them to store the information in their memory. He confirmed that the Plaintiff had sold shares of Carbacid and that he could get the evidence from the capital market authority that the Plaintiff had indeed changed the shares to his name. That whereas they had not sued the Plaintiff for the same, they could because they reserved the right to do so.
76. His response on cross-examination by the Counsel for the 2nd Defendant was that the purchase price of the suit property had been Kshs. 3,000,000/= or thereabout.
77. In re-examination, he confirmed that the witness statement that he had filed was his since it bore his signature and that the name David Thiga Mburu in the said statement had been a typing error.
The 1st Defendant had thus closed his case.
78. The 2nd Defendant's case opened with the testimony of one Anthony Kimata Mugwanja a co-defendant on behalf of the 2nd Defendant who testified as DW3. He adopted a witness statement dated 30th November 2016 that he had signed jointly with Sammy Mwaura Muthungi as his evidence in chief and sought to produce the documents filed in evidence. He then proceeded to testify that the 1st Defendant had sold the suit property to them wherein they had paid a sum of Kshs. 3,150,000/= or thereabout into his bank account. That they had done due diligence by conducting a search wherein they had found out that the suit property had been properly registered.
79. That the transfer of the suit property had been done by a lawyer. That however, he never met the Plaintiff during the conveyance process. He confirmed that the suit property was registered in the 2nd Defendant's name and that he was the chairman of the said 2nd Defendant. That they had been considered for a bank loan wherein they had charged the title to the suit property hence the suit property was in the name of the bank as Chargee.



80. That whereas they still had a balance with the bank, they had paid a substantial amount. He confirmed that at the time that they had done their due diligence, the suit property had been registered in the name of the 1st Defendant.
81. The 2nd Defendant relied on the documents in its List of Documents dated 27th April, 2017 to wit:
- i. Equity Statement of Account.
 - ii. Application for Funds Transfer dated 24th February, 2015.
82. In cross-examination by the Counsel for the Plaintiff, he confirmed that he was the 2nd Defendant's elected executive Chairman and that they were 18 members. He confirmed that they had a counterclaim. That whereas he had not filed their resolution, he had signed on behalf of the 2nd Defendant which was a registered group.
83. That whilst he did not know Grace Nyoike, he knew the 1st Defendant and Charles Macharia. He confirmed that the suit property had already been subdivided and sold to members and that they had sent a surveyor to the ground. He confirmed that there was a caveat on the suit property which had been generated by the Chargee. That they could not proceed with the sub-division because the original title was held by the bank.
84. That they had carried out due diligence hence it had been a clear transaction unless there had been a conspiracy. That they did not have any information about the family hence they could have conspired to benefit from them.
85. When he was cross-examined by the Counsel for the 1st Defendant, he confirmed that the 2nd Defendant was registered with the Ministry of Social development and it had 18 members. That one of the objectives of the 2nd Defendant was social support, wealth creation and acquisition of property. That they had intended to settle the members at the individual portions which they had done hence the members were following up on the instant case. That since the 1st Defendant had produced bank transfers showing that he had shared the proceeds of the sale with his brothers, he believed him.
86. In re-examination, he testified that he had no suspicion against the 1st Defendant since he was a genuine seller and they were innocent purchasers for value. That the 2nd Defendant and the bank had done their due diligence. That the 1st Defendant had shown him all the transactions hence there had been no iota of doubt as to his genuineness.
- The 2nd Defendant had thus closed his case.

Determination.

87. I have considered the record of Appeal, the holding by the trial Magistrate, the written submissions by learned Counsel and the applicable law. Conscious of my duty as the first Appellate Court in this matter, I have to reconsider the decision Appealed against, assess it and make my own conclusions as was stated by the Court of Appeal in *Paramount Bank Limited v First National Bank Limited & 2 Others* (Civil Appeal 468 of 2018) [2023] KECA 1424 (KLR) where the court held as follows;

“A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. A first Appellate Court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. While considering the scope of section 78 of the



Civil Procedure Act, a first Appellate Court can appreciate the entire evidence and come to a different conclusion.”

88. Having summarized what transpired during the hearing at the trial Court, as herein above, and having looked at the recorded statements herein which were more or less similar to the evidence adduced in court, I find the issue arising herein for determination as follows: -
- i. Whether the trial learned trial Magistrate erred in his findings.
89. It is not in contention that the Appellants herein who had been Plaintiffs in the trial court were siblings to the 1st Respondent and DW2 one Charles Macharia Thiga. It is also not in contention that LR Naivasha/Mwichiringiri Block 4/1149 was initially registered to their father George Thiga Ngamate who passed away in the year 2008.
90. That subsequent to the late George Thiga Ngamate passing away it is not contested that before an Administrator to his estate could be appointed, the suit parcel of land herein was transferred and registered to the 1st Respondent in the year 2014, wherein the same was subsequently sold to the 2nd Respondent vide a Sale Agreement dated 19th January 2016. That the 2nd Respondent subsequently took a bank loan and charged the title to the suit property hence the suit property was in the name of the bank as Chargee.
91. The 1st Appellant then filed suit *vide* Plaint dated 27th October, 2016, lamenting that the 1st Respondent had fraudulently intermeddled with the deceased's property and subsequently illegally conveyed the same to the 2nd Respondent. The Appellant then sought for orders;
- ‘That the title known as LR Naivasha/Mwichiringiri Block 4/1149 in the name of the 2nd Defendant be re-transferred back to the estate of the deceased named George Thiga Ngamate pending the hearing and determination of Nairobi High Court Succession Cause No. 2641 of 2015, or to the administrator of the estate if the succession cause shall have been determined.
- Costs of the suit plus interest at court rate.’
92. The court is aware that it is trite under the provisions of Section 45, *Law of Succession Act*, Cap 160 that any dealing with a deceased person's property without letters of Administration or Grant of Probate is illegal and constitutes "intermeddling." with the said estate which would then make the initial sale by the 1st Respondent void ab initio at the very least, voidable.
93. The court is further aware that it is trite that the legal capacity, to transfer or encumber the deceased's land vests in the personal representative/administrator or executor upon obtaining a grant, and therefore the lack of it renders any transaction in the deceased's estate void, because until then, the deceased's children are merely beneficiaries with an expectancy, not owners with the power to dispose of the assets.
94. Lastly up to this point, the court would have found that the transaction herein that had led to the disposal of the deceased's property, in the absence of his legal representative or administrator was null and void ab initio.
95. However, although the Appellant herein feigned ignorance and denied having knowledge of the sale agreement between the 1st and 2nd Defendants of the suit parcel of land and/or where the money that had been deposited in his account by the 1st Respondent had come from, however from the evidence gathered at the hearing, it clearly emerged that the Appellant had been the instigator in the plot to sell part of the deceased estate.



96. In deed it had emerged that the Appellant herein, who was a practicing Advocate and was the custodian of all the titles pertaining to the deceased's parcels of land (estate), had advised his elderly brothers to sell the suit property, because he knew how the said parcel of land would be registered in their names, so that they could raise funds to file the succession matter.
97. That indeed it had been the said Appellant who had appeared with the title where the suit land had been registered to the 1st Respondent and some transfer documents for which the 1st Respondent had signed, and the land had subsequently been sold to the 2nd Respondent for about Kshs. 2,800,000/= . The money had been wired into the 1st Respondent's account and he shared it equally between his brothers including the Appellant herein wherein each one of them had received a sum of Kshs 753,000/= . Df exh 8 (2nd Respondents' document No.1.) That indeed the 1st Respondent together with the Appellant had deposited the money into his (Appellant's) account in Equity Bank Limuru Branch. That the transfer form read that the money had been from "sale of land" as per Df exh 9 (2nd Respondents' document No.2)
98. This being a court of justice I have looked at the principles of equity and the legal maxim "*Ex Turpi Causa Non Oritur Actio*" (from a dishonorable cause, no action arises), which essentially means that a Plaintiff cannot pursue a cause of action if it arises in connection with their own illegal or immoral act.
99. Generally, an instigator of a fraudulent sale agreement cannot file suit against the purchaser to recover the sold land based on the doctrine of "Clean Hands" that is *Ex Turpi Causa Non Oritur Actio* which is a fundamental equitable principle where a party seeking relief from a court, particularly in equity (like an order for recovery of land), must come to the court with "clean hands." This means they must not have engaged in misconduct or fraud concerning the very matter for which they are seeking relief.
100. The *Privy Council in Mistry Amar Singh v Serwano Wofunira Kulubya*, [1963] EA 408 on appeal from a judgment and order of the East African Court of Appeal at page 414 of the report. In his speech Lord Morris of Borthy- Guest quoted with approval the following passage from the judgment in *Scott v Brown, Doering, McNab & Co* (3), [1892] 2 QB 724 Lindley LJ at p.728 : stated as follows:
- “ This old and well known legal maxim is founded in good sense, and expresses a clear and well recognised legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the attention of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him. Any rights which he may have irrespective of his illegal contract will, of course, be recognised and enforced. If a plaintiff cannot maintain his cause of action without shewing, as part of such cause of action, that he has been guilty of illegality, then the courts will not assist him in his cause of action.”
101. In this matter I find that the 1st Appellant herein was the instigator of the process of selling his deceased's father's estate before obtaining the letters of administration wherein he had deliberately participated in and/ or orchestrated the fraud. He cannot therefore benefit from his own wrongdoing. There is no evidence that the 2nd Respondent had participated in the fraud and was only but an innocent purchaser as the evidence herein above captioned had revealed.
102. Indeed, allowing the Appeal, would be allowing the Appellant to recover property he had fraudulently orchestrated to its sell which would also be against public policy as it would encourage fraudulent



behavior, undermine the integrity of land transactions, and make a mockery of the legal system. The law aims to deter fraud, not to provide a mechanism for recovery of ill-gotten gains or to extricate such persons as the Appellant from disadvantageous transactions they themselves initiated through deceit.

103. The legal system is designed to deter fraudulent conduct, not to provide a mechanism for fraudsters to reverse their actions when they become inconvenient. The court will therefore not assist a party in extricating themselves from the consequences of their own fraudulent actions, validate and/or provide relief to the perpetrator.
104. The trial Magistrate who had the benefit of observing the parties during the trial, in his judgement, found the Appellant's demeanor to be very shifty and unbelievable especially on the knowledge of the money that had been wired in his account. He had also found that the Appellant had initiated the process alongside his brothers to transfer the suit property to his brother's name wherein he had subsequently ripped from the benefit of the proceeds of the sale and the transfer of the suit property.
105. I find no reason to fault the Trial Magistrate. This Appeal has no merit and is dismissed with costs.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 19TH DAY OF JUNE 2025.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

