



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC APPEAL NO. 36 OF 2019**

**BENEDETTA MBATHA MUEMA.....APPELLANT**

**AND**

**WITEITHIE GWAKA INVESTMENTS LIMITED.....1<sup>ST</sup> RESPONDENT**

**CHARLES MWAURA.....2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the decision of the Senior Principal Magistrate Hon. A. M. MAINA, delivered on the 9<sup>th</sup> day of April 2019 in Chief Magistrate Court at Thika in Civil Case No. 510 of 2014)*

**JUDGMENT**

The Appellant herein **Benedetta Mbatha Muema**, was the Plaintiff in **Thika CMCC No. 510 of 2014**. The Respondents were the Defendants in the above stated suit. The Plaintiff via a Plaint dated **7<sup>th</sup> July 2014**, sought for the following orders against the Defendants;

- a) A mandatory injunction restraining the Defendants, their agents, servants, family and or other person acting on their behalf from interfering, building, construction, trespassing upon, occupying or in whatever way dealing with the Plaintiff's land, the suit property.*
- b) An order for the rectification of the Land Register to cancel the names of the 2<sup>nd</sup> Defendant and substitute with that of the Plaintiff.*
- c) General Damages.*
- d) Cost of the suit and interest on cost.*
- e) Any other relief that the Court may deem fit and just to grant.*

In her statement of Claim, the Plaintiff (Appellant) averred that on **5<sup>th</sup> November 1987**, one **Veronica Wambui Wakaba** who was the original shareholder with the **1<sup>st</sup> Defendant(1<sup>st</sup> Respondent)** sold her shares to the Plaintiff's (Appellant's) husband one **John Muema Mulle**, who later transferred the shares to the Plaintiff (Appellant) and the Plaintiff was issued with the share **certificate No. 0835**, indicating her plot to be **409** in **Farm No. 1** situate at **Witeithie Estate Thika**. The Plaintiff (Appellant) and her husband have been in possession for the last **27 years**. That the Plaintiff visited the site of her Plot and found the **2<sup>nd</sup> Defendant (2<sup>ND</sup> Respondent)** constructing a permanent house on her plot and upon inquiry she was told that the **2<sup>nd</sup> Defendant** is the registered owner of the plot

The Plaintiff (Appellant) further contended that since she did not transfer the plot to the **2<sup>nd</sup> Defendant**, the acquisition of the land by the **2<sup>nd</sup> Defendant (Respondent)** was by fraud. She particularized fraud as transferring her land by **1<sup>st</sup> Defendant(Respondent)** to the **2<sup>nd</sup> Defendant (Respondent)** without her knowledge or consent, acquiring a title deed to her property without her consent or participation, giving title deed to the **2<sup>nd</sup> Defendant (Respondent)** when she was in possession without due process. She sought for orders to stop the Defendants from further interfering with her land by way of continued occupation, construction, alienation entry or re-entry.

The suit was opposed by the **1<sup>st</sup> Defendant( 1<sup>st</sup> Respondent )** who filed a Defence dated **15<sup>th</sup> August 2014**, and denied all the allegations made in the Plaint and further denied that on **5<sup>th</sup> November 1987**, the said **Veronica Wambui Wakaba** was a shareholder in the said Company original or otherwise. It was its contention that the only proof of membership in the **1<sup>st</sup> Defendant (Respondent)** is a share certificate and that none in the name of **Veronica Wambui Wakaba** has been annexed in the Plaintiff's documents. Further, that there is no proof of the sale of the said shares by the said **Veronica Wambui Wakaba** to the Plaintiff's husband and that there is no share certificate to that effect. That the purported sale agreement between the parties is a sham as the said **Veronica Wambui** had no capacity to transfer shares.

It was further contended that the purported transfer of the shares climaxing to the purposed issuance of the share certificate is fraught with and wafting of skulduggery. That the mode of ownership of properties of the 1<sup>st</sup> Defendant (Respondent) is first through membership vide share certificate, followed up by balloting, and devoid of balloting, a member cannot be allotted property. The 1<sup>st</sup> Defendant denied any monies were ever received on its behalf and urged the Court to dismiss the suit.

The 2<sup>nd</sup> Defendant (2<sup>nd</sup> Respondent) also filed a Statement of Defence dated **10<sup>th</sup> September 2014**, and denied all the allegations made in the Plaint. He averred that he is the duly registered owner of **Parcel No. Juja Kalimoni Block 10/409**, having purchased the suit property on **26<sup>th</sup> March 2012**, from one **Daniel Njue Njoroge**, who was in possession and he took possession and has been in occupation for the past 3 years and has developed the suit property. He contended that the Plaintiff had nothing to sell/offer since the land did not belong to her and it was the Plaintiff's acts that were tainted with fraud. He particularized fraud by the Plaintiff(Appellant); as falsely claiming to be in possession, forging share certificate and purporting to fraudulently obtain land whilst no documents to prove the same.

The 2<sup>nd</sup> Defendant(Respondent) further averred that the suit property was first registered to the 1<sup>st</sup> Defendant on **22<sup>nd</sup> February 2008**, who in turn transferred the same to **Kennedy Kanyi Gatoro** and a title deed issued to that effect. That the said Kennedy sold the same to **Daniel Njue Njoroge** on **23<sup>rd</sup> November 2011**, who in turn sold it to him. He contended that his documents are genuine and therefore superior.

After Close of pleadings, the matter proceeded by way of viva voce evidence wherein the Plaintiff called five witnesses and the Defendants called 3 witnesses.

### **PLAINTIFF'S CASE**

**PW1 Benedetta Mbatha Muema** testified that her husband **John Muema Mulle** had a share at **Witeithie Gwaka Investment** for plot No. **409**. That she requested him to transfer the property to her for her to secure a loan. She produced a copy of the **share certificate** as **Exhibit 1**, a copy of the **transfer fees receipt** as **Exhibit 2**. That initially there was a man rearing pigs on the ground but they asked him to move out. That her husband was told to wait for the title deed but when they later went to the plot, they realized that there was construction ongoing.

That her husband bought the property from **Veronica** and he had a share certificate. That **Veronica Wakaba** sold the land to her husband and therefore the land was in her husband's name and she transferred it to them. That she went with her husband to transfer the land and the share certificate is dated **26<sup>th</sup> August 2005** though it has been interfered with. That they had been given the documents with the said interference. That the plot is in her name, but it was her husband who was to follow up with the title deed. She acknowledged that the share certificate did not have her husband's name and she did not have any document to show that the land had been transferred to her. That she paid **Kshs.9400/=** as transfer fees, and though she was not present when her husband bought the land from **Veronica**, she saw the documents. However, she has never gone to the plot with a surveyor though her husband took her to the plot.

That she had neither used nor stayed on the plot and she did not know a title deed had been taken in **2008**, but only learnt that the 2<sup>nd</sup> Defendant had constructed on the said plot. She told the Court that she did not do the alterations and denied selling the suit property to **Charles Mwaura**.

**PW2 John Muema Mule** testified that **Veronica** sold to him the suit property in **1987** after they had visited **Witeithie** and seen it. That they went to **Weitethie office** and **Veronica** was asked to avail the ballot paper, but alleged that she had lost them. However, she was advised to get an Affidavit which was prepared in a Law Firm. That the land was transferred to him and he was issued with a share certificate **No. 1397**. That in **2005**, his wife wanted to take a loan and use the land as security. That they went to **Witeithie Investment Company Limited** and paid for the transfer.

That when he bought the suit property, **Veronica's** husband took him to the ground. That when he transferred the suit property to his wife, he surrendered his share certificate to the Company and his wife was issued with a fresh one. That he had not obtained title deed. That there was a man rearing pigs on the plot and he had asked him to move out. That the said plot was **No. 409**.

He acknowledged that he did not see **Veronica's** share certificate though she was an original owner. That he wrote the agreement though the documents did not show the agreement was written on behalf of **Veronica**. That he had bought the land for **Kshs.11,200/=** and he never took a title deed. That though he has had the land for **27 years**, he never utilized it due financial limitations. That he was present when his wife was issued with a share certificate and he thought the alterations from the 1<sup>st</sup> Defendant (Respondent) were normal. Further that the 1<sup>st</sup> Defendant (Respondent) must have given a share certificate to a person who sold the land to the 2<sup>nd</sup> Defendant(Respondent). That he went to **Witeithie Investment Company** and talked to Wachira and the Chairman who proposed he be given another plot at **Ngoigwa**. That **Veronica's Wakaba's** name was in the register and it was cancelled and as he was issued with a share certificate. He further testified that he transferred the land in **2005** and that they used a printed share certificate was used.

**PW3 Mary Wambui King'ombe** testified that **Veronica Wambui** is her mother. It was her testimony that her mother had a plot with **Witeithie Company** and she saw the agreement for sale for the land and when she inquired, her mother told her that she had sold it to **Muema** to pay school fess. She testified that she was then **10 years**.

**PW4 Veronica Wambui** testified that she knew **John Muema** and she used to work with him. That she had a plot at **Witeithie Investment Company** and she sold it to a Mkamba who had walked out. However, the Court later held that the said witness was an incompetent witness and she was therefore stood down.

**PW5 Margaret Nyagambi** testified that **Veronica** is her mother and that in **1987** she was **21 years old**. It was her evidence that her mother had a share with **Witeithie Company**, which she sold to enable her go for a teaching course. She further testified that she was not present when the sale was conducted but that she knew the buyer who used to work with her mother.

## DEFENCE CASE

**DW1 Anthony Kagamba Haho**, the Chairman of the 1<sup>st</sup> Defendant as at **November 2002**, stated that from their Register, **plot No. 358**, did not show any transfer of the plot to **Muema**. That the Plaintiff (Appellant) share certificate **No. 0835** is dated **26<sup>th</sup> August**, but the year is not clear as it had been altered. That he would not accept such a document in his office and from the Company seal, the impression of the stamp was not clear. It was his testimony that they did not stamp their certificate. He denied that the 1<sup>st</sup> signature which was apparently his was signed by him and the 2<sup>nd</sup> signature belonged to a **Robert Kungu**, who had made forgeries in their Company's certificates and had cases pending in Court.

It was his further testimony that the suit deals with **Farm No. 1** and that all owners of the land got into the land before he was the Chairman. That if the Plaintiff was a member, she must have bought her shares from an existing member and if a member sells a share Certificate, the Company holds the original share Certificate and it does not issue any new certificate to a new person. That the Register did not contain the name of **John Mule** and therefore he could not have transferred his share to the Plaintiff (Appellant) who is his wife as it is not recorded anywhere. That the share Certificate is evidence of ownership of shares in the Company.

That **Witethie Company** was founded in **1972**, and in the Register, **entry 358** shows the names of **Wambui Wakaba**. That for **Karanja** the certificate is indicated as **359** which is missing in their records. That from the Register there is a **359**, which shows it was transferred to **1401**, which he could not completely comment on. That **Wambui Wakaba** had not balloted for share Certificate **No.358**, which had some information deleted, though he did not know who deleted the information. That the Original share certificate **No. 0835**, indicates the year **2000**, but the month and date was not indicated. That the Certificate could not qualify one to own a plot and the Company issues certificates to new members.

Further that the signature on the certificate which he had indicated was not his, resembled his signature. That **Robert Mwangi Irungu**, who was a Co-Director between **2002 to 2003** at the Company was voted out and the share certificate was allegedly signed by him, He testified that he was however not Director at the time of the certificate was issued.

Further that they issued new shares to buyers who had bought the shares and they have a time frame for destruction the certificates from old members. That if the Company had a share Certificate from **John Mule**, the Company would not be holding it by now. That if someone lost their documents, the Company would accept a Police Abstract and an Affidavit, though he had never seen any Affidavits of loss of certificates. It was his testimony that when there is loss, the Company confirms from the Register and a duplicate certificate is issued before a person transfers the land.

Further that he could not confirm what the practice was before he became a Chairman. That the secretary was the one who issues certificates and the Chairman only confirms if the member who transfers his certificates was a member. That though the core business of the Company is to buy and sell plots, they have members who do not have plots. It was his testimony that a person ought to buy shares, pays for the survey fees and then ballot.

It was his evidence that he issued a title for **plot No. 409** and that he was the first person to issue for the said plot. That he cannot tell who balloted for **Plot No. 409** and he was not aware of when the balloting was done. Further that all balloting were done between **1975** and he only knows of the last person who was holding the plot and he did not know where the plot was. That in **2008**, the 1<sup>st</sup> title deed was issued for the land to **Kennedy Kanyi Gatoro** and he had to have a share certificate and ballot which appears on page 36 member **No. 1089**, Certificate **No.0827** which he returned before the title deed was issued.

He produced the original register and testified that page 1 of the Original Register was missing. That on **page 10** of the photocopies, **page 283** corresponds with certificate number **358** and it reads the names **Wambui Wakaba**, who was an original member of the Company as per the original register and she had one share which was valued at **Kshs.300**. Further that on **page 10**, the transfer on page **283** shows the share was transferred, but that it is rubbed out on the column of the nominee's name and particulars. He further testified that **Kennedy Kanyi** is listed as **No. 1089** in **Farm No. 2**. That **Kennedy Kanyi** joined the Company on **21<sup>st</sup> June 2003** and that **Wambui Wakaba** joined in **1976**. It was his evidence that in **2003**, the Company was not admitting new members unless one bought shares from an old member and that **Kennedy** seems to have bought his share from **member No. 0827**. That it was not possible for him to tell where **Kanyi** bought his plot from.

That a former Director was suspected to have committed forgeries and he was charged and convicted. That **Robert Mwangi** was alive in **2006** and **2007** and was working from the office. That even if one had a share, that did not mean one had a plot, as a person must ballot and that **Wakaba Wambui** having **300 shares** meant she had a share worth **Kshs.300/=**. That the register did not show she owned a plot as she may not have paid for survey for her to get a ballot. That as per page 36 of the Register, the owner of **plot no. 409** was **Kennedy Kanyi Gatoro** as the plot was transferred to him and that no irregular dealings were done. That once a title deed is issued the Company's mandate ends. That as per **page 36**, **Kennedy Kanyi** owned land in Farm No. 1, in respect of properties **10845, 1084** and **1085**, which may have been transferred from Farm No. 2 to Farm No. 1 and therefore there is no anomaly in their Register. It was his evidence that if **Veronica** was their member, he would urge her to add more money as there is land for her.

## 2<sup>ND</sup> DEFENDANT' S CASE

**DW2 Charles Mwaura Kara** testified that one **Daniel Njue Njoro** had made an advertisement in the Newspaper to which he responded and they entered into an agreement dated **26<sup>th</sup> March 2012**, for a consideration of **Kshs.880,000/=**. He produced the agreement as Exhibit 1. That he was issued with a title deed on **6<sup>th</sup> July 2012**, which he produced as Exhibit 2. Further that upon conducting a search he confirmed that the suit property belonged to **Daniel Njue** who had bought the same from **Kennedy Kanyi** and he had seen a sale agreement between **Kennedy and Njue** dated **3<sup>rd</sup> November 2011**, in which **Njue** bought the suit property for a consideration of **Kshs. 600,000/=**.

That the first initial owner was **Witeithie Gwaka Investment Group** and the land was first owned by **Kennedy Kanyi** and then transferred to **Daniel Njue** on **23<sup>rd</sup> November 2011** and finally to him. He produced **Mr. Njue's** title deed as Exhibit MFI 4 and the green card as Exhibit 5. That when he bought the land, the ground was empty and upon getting necessary approvals, he started construction, but that the same was stopped. He produced the plans approval as **Exhibit 6**. That there was a consent dated **3<sup>rd</sup> November 2011**, between him and **Daniel** and he produced the consent and transfer as Exhibits 8 and 9 respectively.

He told the Court that he was not a member of the Company and on page 36 of the Register, the name of **Kennedy Gatoro** appears as the owner of **plot 409** and the said plot was initially a dumpsite. That he bought the suit property from the registered owner and that he never evicted the Plaintiff. That **Kanyi** owned the plot in Farm 2 and the register states that the said **Kanyi** was from Farm No. 2 and the plots were owned even in 1987. It was his testimony that the title deed is not charged and that it was not uncommon for someone to buy land and sell it the following day.

**DW3 Daniel Njue Njoroge** adopted his witness statement dated **6<sup>th</sup> October 2014**, and testified that the suit property was his and he sold it to **Charles Kahara** and that he had bought the land from **Kennedy Kanyi** in the year **2011** for **Kshs. 600,000/=**. That they attended the Land Control Board and got consent to transfer on **3<sup>rd</sup> November 2011**, and he got his title deed on **5<sup>th</sup> December 2011**. He produced his title deed as Exhibit 4 and the sale agreement as **Exhibit 3**. He further produced a letter of allotment as Exhibit 8 and the transfer as Exhibit 9. That he was a member of the **1<sup>st</sup> Defendant**, but in another land and that he sold the suit property in the year he bought it as he had financial constraints. That the land was vacant when he bought it.

It was his testimony that the said **Kanyi** did not show him his share certificate and he obtained a green card and learnt that **Kanyi** had become an owner in **2008**. That between **1987** and **2000**, he could not tell who the owner was. That he learnt of **Kanyi's** death when the case came up. He further testified that when he bought the land, it was vacant and he did not put any boundary to show that he was the owner. That when the **2<sup>nd</sup> Defendant** started constructing on the suit property, he learnt that it had another owner. That he never entered into any transaction over the suit property with the **1<sup>st</sup> Defendant**.

The parties filed written submissions and thereafter the trial Magistrate delivered her determination on **9<sup>th</sup> April 2019**, and dismissed the plaintiff's (Appellant's) suit and held that ;

***“The Plaintiff's prayers against the 2<sup>nd</sup> Defendant are well set out in the Plaint . Having found that the 2<sup>nd</sup> Defendant is the absolute and indefeasible owner of the suit land then prayer (a) of the Plaint fails and cannot be issued against him. The same prayer cannot be issued against the 1<sup>st</sup> Defendant because it is not in possession of the land neither did it transfer the land to the 2<sup>nd</sup> Defendant.***

***It therefore follows that prayer (b) cannot be issued, following the above mentioned findings. The Plaintiff did not testify of any general damages and he who alleges must prove, prayer (c)of the Plaint consequently fails. Having considered all the above mentioned , I find that the Plaintiff has failed to prove her claim against the 2<sup>nd</sup> Defendant and I proceed to dismiss the same with costs to the Defendant.”***

The Appellant was aggrieved by the said decision of the trial magistrate and by a Memorandum of Appeal dated **8<sup>th</sup> May 2019**, sought for orders that;

- a) The Appeal be allowed.***
- b) The Judgment in favour of the Respondents be set aside.***
- c) The Order made by the Learned Magistrate in the Subordinate Court as to interest and costs be set aside.***
- d) The Applicant be awarded the costs of this Appeal and in the subordinate Court.***

The Appeal is based in the grounds that;

- 1. That the learned Magistrate erred in Law and in fact by finding the Appellant's case numerations and dismissing the same with costs.***
- 2. The Learned Magistrate erred in finding that the Plaintiff through PW2 had established that she had bought shares from PW4 and further went on to dismiss the Plaintiff's case.***
- 3. The Learned Magistrate erred in Law and in fact by finding for the Respondents when there was clear indication that the Appellant was a shareholder of the 1<sup>st</sup> respondent and that the 1<sup>st</sup> respondent register had been altered for which the 1<sup>st</sup> Respondent did not tender an explanation before the Court.***
- 4. The learned Magistrate erred in Law and in fact in dismissing the plaintiff's claim as against the 1<sup>st</sup> Defendant despite finding that the Plaintiff has a case against the 1<sup>st</sup> Defendant.***
- 5. That the Learned Magistrate erred in law by failing to have due regard and to take into account the various issues raised in the pleadings, witness statement and evidence produced by the Appellant.***

**6. The Learned Magistrate erred in fact by failing to take into account and to consider the evidence adduced on behalf of the Appellant.**

**7. The Learned Magistrate failed to appreciate the submissions of the Learned Counsel for the Appellant by finding in favour of the Respondent herein.**

**8. The Learned Magistrate erred in Law and in fact by finding that the Plaintiff has failed to prove her claim against the 2<sup>nd</sup> Defendant and proceeded to award costs to both the 1<sup>st</sup> and 2<sup>nd</sup> Defendants rather than the 2<sup>nd</sup> Defendant only.**

**9. The Learned Magistrate erred in law and in fact by finding that the Plaintiff had a claim against the 1<sup>st</sup> defendant yet failed to exercise her discretion in allowing the Plaintiff's prayer for any other relief the Court deemed fit.**

**10. That in all the circumstances of the case, the learned Judge failed to do justice before her based on the pleadings and the findings of the learned magistrate are insupportable in law or on the basis of the evidence adduced.**

The Appeal was canvassed by way of written submissions. . The Appellant through the **Law Firm of Kiarie, Joshua & Co Advocates** filed her written submissions on **6<sup>th</sup> July 2020**, and submitted that it is evident that the trial Court failed to consider the Plaintiff's (Appellant's) evidence on record and misapplied this as against the law. It was further submitted that the trial Magistrate misapplied **Section 26 of the Land Registration Act** as she found that the 1<sup>st</sup> Respondent's Register was clearly altered which alteration the 1<sup>st</sup> Respondent was at pains to explain.

It was further submitted that the 1<sup>st</sup> Respondent deliberately presented before Court an incomplete and altered Register and it was not for the Appellant to table these documents. It was their submission that the trial Court dismissed the Appellant's case when there was evidence to impeach the 2<sup>nd</sup> Respondent's title. Further that the Court failed to pronounce itself on the issue of the Appellant's claim against the 1<sup>st</sup> Respondent, yet it had found that the Appellant had a claim against the 1<sup>st</sup> Respondent. The Appellant relied on the case of **Odds jobs... Vs...Mubia (1970) C.A 476 cited with approval in Richard Nchapi Leiyagu...Vs...IEBC & 2 Others (2014)** where the Court held that;

***"A court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left out to the Court for decision"***

Further that the Court is bound by the parties pleadings, but justice must not be denied by a mere technicality. Further that the trial Court awarded costs to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, despite finding that the Appellant had a case as against the 1<sup>st</sup> Respondent. The Court was urged to allow the Appeal.

The 1<sup>st</sup> Respondent filed its written submission through the **Law Firm of Mwihia & Mutai Company Advocates** on **26<sup>th</sup> August 2020** and submitted that the Appellant had not taken out a **Decree** hence the Appeal is fatally defective. That failure to enjoin the District Land Registrar as party to the suit made the suit incompetent and fatally defective as the Appellant had sought for the rectification of the land Registrar. Further that PW4 was found to be an incompetent witness and therefore lacked capacity to testify. Further that it was not enough for the Appellant to merely cite fraud, devoid of proving the same as fraud must be specifically pleaded and proved. The 1<sup>st</sup> Respondent relied on the case of **Kinyanjui Kamau...Vs... George Kamau Njoroge C.A 132 OF 2005 at Nairobi.**

Further that the sale agreement between the vendor and the Appellant's husband was **void ab initio**, if at the time of sale PW4 lacked capacity by not being able to demonstrate that PW4 was a shareholder of the 1<sup>st</sup> Respondent. By showing the share certificate as if it was lost, it was incumbent upon PW4 to take out a share certificate. It was further submitted that PW2 did not produce a share certificate in his name as that the Appellant's whose claim to the suit property was entirely premised on the sanctity of PW4's and PW2'S title.

The 2<sup>nd</sup> Respondent through the **Law Firm of Kanyi Kiruchi & Company Advocates**, filed his written submissions on **16<sup>th</sup> July 2020**, and submitted that no share certificate was produced to show that **Veronica** was a shareholder of the 1<sup>st</sup> Respondent and further that the learned trial magistrate was right in holding that there is no evidence that **Veronica Wambui Wakaba**, had balloted and allocated a parcel of land with the 1<sup>st</sup> Respondent as DW1 had affirmed to Court that there were members with share certificates but who did not own land.

It was further submitted that the trial magistrate appreciated the provisions of **section 3(3) of the Law of Contract** in finding that the sale agreement was null and void as it failed to comply with the said provisions as the said sale agreement is unsigned, does not bear the names of the persons who purported to witness the said agreement. Further that the Court did not **err** in finding that parties are bound by their pleadings and that a Court cannot grant what was not prayed for. The 2<sup>nd</sup> Respondent relied on the case of **Caltex Oil ( Kenya) Limited ... Vs... Rono Limited (2016) eklr** where the Court held that;

***"This appeal raises two important issues. The first relates to the jurisdiction of this Court as to whether the court has powers to grant an order not specifically pleaded in the pleadings, pleadings are a shield and a sword for both sides. They have the potential of informing each party what they expect in the trial before the court. If a party wishes the court to determine or grant a prayer it must be specifically pleaded and proved. The pleadings are a precursor for a party to lead evidence in satisfaction of the prayers he seeks to be granted in his favour. Where no such prayer is pleaded in a specific and somewhat particularized manner, the party is not entitled to benefit and the court has no jurisdiction to whimsically grant those orders."***

That since only the 2<sup>nd</sup> Respondent has a title the only way to determine ownership is to investigate the root of the title and that the 2<sup>nd</sup>

Respondent has been able to demonstrate to the Court how he acquired the suit property. It was further submitted that the Appeal lacks merit as the appellant has failed to establish that **Veronica Wambui Wakaba**, owed the suit property with the 1<sup>st</sup> Respondent as the documents purported to be emanating from the 1<sup>st</sup> Respondent has been denied.

The Court has now carefully read and considered the Pleadings by the parties in the subordinate court, the **Memorandum of Appeal** and the written submissions by the parties in this Appeal.

The Appellant has alleged that the suit property belongs to her having been transferred to her by her husband who had bought the said property from **Veronica Wambui Wakaba**. It is the Appellant's contention that her husband transferred the suit property to her and she was issued with a share certificate and clearance certificate. PW2, who is the Appellant's husband testified that he bought the suit property from **Veronica Wambui Wakaba** and during the time of transfer, the said **Veronica Wambui Wakaba** swore an Affidavit that she had lost her share and clearance certificates. That on the strength of the said Affidavit, the suit property was transferred to him. That the said **Veronica Wambui Wakaba's** husband took him to the suit property. Though PW4 who was the said **Veronica Wambui Wakaba**, was declared an incompetent witness, her daughters testified and in their testimonies, they acknowledged that their mother told them that she had sold the suit property to PW2 who was her workmate and that they both identified PW2.

However it is the 1<sup>st</sup> Respondent's case that the suit property was never balloted by the said **Veronica Wambui Wakaba**, and that the owner of the suit property as per their Register was one **Kennedy Kanyi Gatoro** in whose favour the title deed was issued. It was the 1<sup>st</sup> Respondent's case that there are instances wherein a party is shareholder and if that party had not balloted for a property, then there is no way one could be the owner of such a property. The 1<sup>st</sup> Respondent's witness acknowledged that there was interference with their Register. Further that the said **Kennedy Kanyi Gatoro** became a member of the said Company in **2003**, and must have bought his shares from someone else as the suit property was part of properties that had been balloted for in the 1980's. He also acknowledged that he could not tell from whom the said **Kennedy Kanyi Gatoro** had bought the shares from.

The 2<sup>nd</sup> Respondent on the other hand reiterated that the suit property belonged to him and that he bought the suit property from **Daniel Njue Njoroge**, who had bought the suit property from **Kennedy Kanyi Gatoro** who was the registered owner of the suit property. He produced in evidence a sale agreement showing the said sale of land.

The trial Court in its Judgment found that the Appellant had not proved her case. The trial Court further found that the sale agreement between PW2 and DW4 did not meet the requirements as set out under **Section 3 (3) of the Contract Act**. The Court also found that the 2<sup>nd</sup> Respondent was an **absolute** and **indefeasible** owner of the suit property and that the Appellant had failed to prove there was fraud. The Court also found **Veronica Wakaba** was a member of the 1<sup>st</sup> Respondent and was a shareholder vide certificate **No. 358**. That from the Register, it was not clear who she transferred her shares to as there is a clear alteration of the records in the register. The Court further found that the Appellant had a case against the 1<sup>st</sup> Respondent.

It is not in doubt that when a person's title to a property has been challenged, it is incumbent upon the person to prove the root of the title. Further the 1<sup>st</sup> Respondent submitted that the Appellant did not take out a Decree hence the Appeal is fatally defective.

The above analysis summarizes the pleadings and evidence before the trial court. Further it captures the grounds of Appeal and submissions by the parties herein. Therefore, this court is called upon to make a determination of this Appeal filed by the Appellant as provided by **Section 78 of the Civil Procedure Act**, wherein the court is called upon to analyze the whole evidence, evaluate, assess, weigh, investigate and scrutinize it and give its own independent conclusion.

However, the court will be alive to the fact that it neither saw nor heard the witnesses. Therefore, it must give allowance for that and the findings of the trial Court must be given due deference, unless it falls foul of proper evaluation of the evidence on record and that the trial Magistrate acted on a wrong principle in arriving at the findings. See the case of **Selle –vs- Associated Mobi Boat Co (1968) EA 123:-**

*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).*

Further the court will only interfere with the decision of the trial court only where it is shown that the trial court misapprehended the applicable law and failed to take into account the relevant facts or took into account an irrelevant fact or that on the facts and law as are known, the decision is plainly wrong. See case of **Ocean Freight Shipping Company Ltd –vs- Oakdale Commodities Ltd, Civil Appeal No. 198 of 1995):-**where the Court held that;

*“.....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”*

After considering the Grounds of Appeal, the proceedings at the lower Court and the written submissions, the Court finds the issues for

determination are:-

1. *Whether the Appeal is fatally defective for failure to attach a Decree.*
2. *Whether the Appellant proved the root of her title as against that of the 2<sup>nd</sup> Respondent*
3. *Whether the trial Court arrived at a wrong decision*
4. *Whether the Appeal is merited*
5. *Who should bear the costs of the suit*

**1. Whether the Appeal is fatally defective for failure to attach a Decree.**

The 1<sup>st</sup> Respondent has submitted that the Appeal is fatally defective for failure by the Appellant to attach a **Decree** on the **Record of Appeal**, which renders the Appeal incurable defective. It is however, the Court's considered view that the Appellant having attached a Judgment to the said Record of Appeal, the failure to attach the Decree is a technicality, which in the Court's view ought not to invalidate the Appeal.

Further the Appeal had already been admitted and since the lower Court's Record is before the Court, no prejudice will be occasioned to the Respondents. See the case of **South Nyanza Sugar Co. Ltd v. Daniel Obara Nyandoro (2010) eKLR**, where the Court held that;

*"In my view, it will amount to miscarriage of justice for this court to strike out the appeal for the reason as advanced by Mr. Ogweni when the appeal had already been admitted and directions taken in the presence of counsel for both parties. In any event, the lower court record is before this court and no prejudice will be occasioned to the Respondent by reference to the same. In addition, it will be against the spirit of overriding objectives of the Civil Procedure Act as stated under Section 1A and 1B for this court to summarily reject the appeal for want of decree."*

Further the Court of Appeal in the case of **Emmanuel Ngade Nyoka ...Vs...Kitheka Mutisya Ngata [2017] eKLR** held that;

*"According to the Judge, the record of appeal before him had a certified copy of the judgment of the trial court. Consequently, he reasoned, the record of appeal was competent notwithstanding the fact that a formal decree had not been included in the record."*

*We entirely agree with the reasoning of the learned Judge on this aspect. In any event, this was a mere technicality that could not have sat well with the current constitutional dispensation that calls upon courts to go for substantive justice as opposed to technicalities. Further holding otherwise would have run counter to the overriding objective as captured in sections 1A and 1B of the Civil Procedure Act. Finally, one would ask what prejudice did the appellant suffer with the omission of the certified copy of the decree in the record of appeal. We do not discern any."*

The Court therefore finds and holds that the Appeal herein is not fatally defective for failure to attach a Decree.

**2. Whether the Appellant proved the root of her title as against that of the 2<sup>nd</sup> Respondent**

In her Judgment, the trial Court held that the title held by the 2<sup>nd</sup> Respondent is **absolute** and **indefeasible** by the fact that the Appellant failed to prove that the same was acquired by fraud. However, a title can also be impeached if the same was acquired illegally, unprocedurally or through a corrupt scheme. See the case of **Elijah Makeri Nyangwara ...Vs... Stephen Mungai Njuguna & Another(2013)eKLR** where the Court held that;

*"...it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions. "I stand by the above words and I am unable to put it better than I did in the said dictum."*

It is not in doubt that the title of the 2<sup>nd</sup> Respondent was questioned. It then became incumbent upon the 2<sup>nd</sup> Respondent to prove the root of his title as well as the Appellant. See the case of **Munyu Maina..Vs..Hiram Gathiha Maina, Civil Appeal No.239 of 2009**, where the Court of Appeal held 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."*

It was the Appellant's contention that her husband who had bought the suit property from **Veronica Wambui Wakaba** transferred the suit property to her. The trial Court held that the said **Veronica Wambui Wakaba** was a shareholder of the 1<sup>st</sup> Respondent vide certificate **No.**

358 and that from the 1<sup>st</sup> Respondent's Register it was not clear who she transferred her shares to.

This court having analyzed the evidence produced before the trial Court notes that the Appellant produced in evidence an **Affidavit** sworn by the said **Veronica Wambui Wakaba**, on 5<sup>th</sup> November 1987, which has not been rebutted nor controverted. In the said Affidavit, she deposed that she is also referred to as **Wambui Wakaba**. Further she deposes that she was a member of the 1<sup>st</sup> Respondent and holder of share Certificate no. **358 Farm No/ 1 plot No. 409**, which she stated that she lost them and has been unable to locate the same.

Though the 1<sup>st</sup> Respondent vide their witnesses had indicated that the said **Wambui Wakaba**, was not a shareholder, it is not in doubt that they have not Appealed against the finding of the trial Court that she indeed was a shareholder. The 1<sup>st</sup> Respondent has also stated that the suit property belonged to **Kennedy Kanyi Gatoro**. However, it is not in doubt that the said **Kennedy Kanyi** became a shareholder in the said Company in **2003**. The 1<sup>st</sup> Respondent's witness testified that in **2003**, the said **Kennedy** could only have become a member if he had bought the shares from someone else. There is no evidence that the said **Kennedy Kanyi Gatoro** ever bought the shares from anybody else. Further there is no evidence of how he acquired ownership of property that was balloted in the **60's**.

The Court has gone through the Register that was produced in evidence by the 1<sup>st</sup> Respondent. It is clear that the said **Kanyi Gatoro** was issued with Certificate No. **0827**. From the said Register, the owner of Certificate No. **827** is one **Anna Wanjiku P. Kubai**, who from the Register never balloted nor transferred her shares to anyone. Therefore, it is the Court's considered view that the root of ownership of **Kennedy Kanyi Gatoro** is not justifiable as having allegedly balloted for **Plot No. 409**. The share Certificate issued in **2003**, and it is not clear where he got the shares from as the Company was not issuing shares in **2003**. See the case of **Daudi Kiptugen ...Vs... Commissioner of Lands & 4 Others [2015] eKLR** where the Court held 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.”*

On the other hand, **Veronica Wambui Wakaba** who was the owner of share certificate **358**, indicated that she balloted for **plot 409**, and transferred it to PW2.

Having carefully gone through the Register, the Court notes that it was indeed indicated that the said **Wambui Wakaba** had transferred her shares to someone. However, the indication on who it was transferred to and which plot number she balloted for, has clearly been interfered with.

The 1<sup>st</sup> Respondent is the custodian of the said **Register** and it would not be in the interest of Justice to seek to have the Appellant prove that there was an alteration, while clearly from the said Register, there were interferences which could only be done by the 1<sup>st</sup> Respondent's officers', actions which the Appellant has no control over. There is no evidence that **Plot No. 409** was ever balloted by any other person other than allegedly by **Kennedy Gatoro**, who the Court has already held did not show how he acquired the said property.

Therefore it is the Court's considered view that the evidence clearly points to the fact that the said **Wambui Wakaba** was the owner of **Plot No. 409** as per her Affidavit which has not been rebutted. From the analysis of the evidence by this Court, it does not find any reason why the above evidence should be doubted or not found truthful.

The trial Court further held that it could not ascertain who the said **Wambui Wakaba** transferred her shares to. The Appellant together with her husband did testify that the said **Wambui Wakaba** transferred her shares to them and that they were issued with the share certificate. This evidence was corroborated by the evidence of **Wambui wakaba's** daughters who confirmed that their mother told them of the transfer.

The 1<sup>st</sup> Respondent acknowledged that a **Robert**, who was a Director in the said Company had been forging documents in the said Company and duping people and those were the documents that may have been issued to the Appellant. As already noted by the Court, these were actions done by the officers of the 1<sup>st</sup> Respondent and the Appellant cannot be held accountable for the said actions. This is more so given that the Appellant and her husband's root of title stems from the lawful owner and the original allottee.

The trial Court further held that the sale agreement between PW2 and PW4 did not meet the threshold as required by **Section 3 (3) of the Contract Act**. It is this Court's considered view that the validity or otherwise of the Contract of sale between PW2 and PW4 was never in contention and whether it was valid or not, was not an issue for determination in the said suit as neither party to the contract had contested the same. Further the Respondents were not parties to the same and do not have any **locus standi** to challenge it.

Therefore, the Court finds and holds that the Appellant did establish that **Wambui Wakaba** was the owner of **plot no. 409**, and she transferred the said plot to her husband who later transferred it to her. Consequently, the Court further finds and holds that the Appellant had established the root of her title.

On the other hand, the 2<sup>nd</sup> Respondent though he established that he was a bonafide purchaser for value without **Notice**, his root of title was tainted with illegalities and procedural failure as the person whom he had bought from the suit property could not clearly establish the root of his title. Consequently, this Court finds and holds that the Appellant's root of her title had been established and is found to be valid.

### **3. Whether the trial Court arrived at a wrong decision**

The trial Court held that the Appellant did not prove that there was fraud. From the Register it is clear that alterations were made to the said

Register in order to conceal the proper information that had been entered. In **Blacks Law Dictionary 9<sup>th</sup> Edition, Fraud has been defined as:-**

***“A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment...”***

***In the same text, fraudulent act has been defined as:-***

***“Conduct involving bad faith, dishonesty, a lack of integrity or moral turpitude.”***

It is thus clear that the actions of the 1<sup>st</sup> Respondent and its officers were conducts of **bad faith** and they did **conceal** the material facts. The Court therefore finds and holds that indeed the Appellant proved that there was fraud.

The trial Court further held that as per **section 26 of the Land Registration Act**, the 2<sup>nd</sup> Respondent's title was **absolute** and **indefeasible** and therefore could not be impeached. However, this Court having held that the root of the 2<sup>nd</sup> Respondent was tainted with fraud on the part of the 1<sup>st</sup> Respondent and procedural deficiencies, it is this Court's considered view that the said title held by 2<sup>nd</sup> Respondent is not **absolute** and can be impeached.

Further though the trial Court held that the Appellant had a claim against the 1<sup>st</sup> Respondent, the court further held that the parties are bound by their pleadings and the Court could not grant what was not prayed for. **Section 3A of the Civil Procedure Act** provides

***“Saving of inherent powers of court. Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”***

It is therefore not in doubt that the Court can exercise its inherent powers to make any findings that would be necessary for the ends of Justice. The prayers by the Appellant seeking for the Court to make any orders it deems fit may have covered the inherent powers of the Court for the saving of Judicial time.

Therefore, this Court finds and holds that the trial Court did arrive at a wrong decision by misapprehending the law and facts.

#### **4. Whether the Appeal is merited**

From the above analysis, it is the Court's considered view that the Appeal herein is merited as the Appellant proved the root of her title and that the title by the 2<sup>nd</sup> Respondent is impeachable.

However, the Court in the same spirit of exercising its inherent power, notes that the 2<sup>nd</sup> Respondent is an innocent purchaser for value having bought the suit property from **Daniel Njue**, who had bought the property from **Kennedy Kanyi Gatoro**.

The definition of a bonafide purchaser, has been defined by the Court in the case of **Lawrence Mukiri ...Vs... Attorney General & 4 Others [2013] eKLR** as

***“... a bona fide purchaser for value is 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, he must prove the following:***

- a. He holds a certificate of Title.***
- b. He purchased the Property in good faith;***
- c. He had no knowledge of the fraud;***
- d. The vendors had apparent valid title;***
- e. He purchased without notice of any fraud;”***

In the instant case, the Court finds that the 2<sup>nd</sup> Respondent was a bonafide purchaser for value. Further the Court notes that the witnesses testified that the 2<sup>nd</sup> Respondent had developed the land, and the Appellant had not developed the land. However, the 1<sup>st</sup> Respondent did indicate that there was land that could be given to the Appellant.

Therefore, it is the Court considered view that the interest of Justice dictates that the 2<sup>nd</sup> Respondent's title to the suit property should not be cancelled. However, the Appellant should be given a property that is equivalent to the value of the instant suit property so that the rights of 2<sup>nd</sup> Respondent as a bonafide purchaser, not be disregarded.

Consequently, this Court finds and holds that the Appeal is merited, but in the interest of Justice, the Court exercises its inherent powers by ensuring that the right of the 2<sup>nd</sup> Respondent who was the bonafide purchaser for value are not disregarded. See the case of **Beth Kaari & another ...Vs... M'nyeri M'rimunya [2013] eKLR** where the Court of Appeal in quoting itself in the case of **Douglas Mbugua Mungai**

Vs.Harrison Munyi, Civil Application No. Nai 167 OF 2010, observed that:

***“We are as a matter of statute law required to take a broad view of justice and take into account all the necessary circumstances, factors, and principles and be satisfied at the end of the exercise that we have acted justly” As was stated in Stephen Boro Gitiha vs. Family Finance Building Society & 3 Others, Civil Application No. Nai. 263 of 2009.***

***“The overriding objective overshadows all technicalities, precedents, rules and actions ... and whatever is in conflict with it must give way.”***

**5. Who should bear the costs of the suit**

It is trite that costs follow the event. In this case, the Appellant being the successful party is therefore entitled to the costs of the instant Appeal and the costs at the lower Court as against the 1<sup>st</sup> Respondent.

Having now carefully considered the available evidence, having evaluated it and coming to its own independent decision, this court finds and holds that the trial Magistrate did **err** and misapprehended the facts and evidence on record and thus arrived at a wrong finding.

Consequently, the court finds that the Appeal is merited and it is allowed in the following terms;

- 1. That the Judgment of the lower Court dated 9th April 2019 be and is hereby set aside.***
- 2. This Court Upholds the title of the 2<sup>nd</sup> Respondent for being a bonafide purchaser for value without Notice.***
- 3. The Court further orders the 1<sup>st</sup> Respondent to compensate the Appellant herein with land of equal value to the suit Property.***
- 4. The 1<sup>st</sup> Respondent to pay costs of the Appeal and the suit at the lower Court.***
- 5. The 1<sup>st</sup> Respondent should compensate the appellant with the said land within a period of 90 days from the date hereof.***

It is so ordered.

***Dated, signed and Delivered at Thika this 14th day of December, 2020.***

**L. GACHERU**

**JUDGE**

**14/12/2020**

**Court Assistant - Lucy**

**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 **Judgment** 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**

**No appearance for the Appellant**

**No appearance for the 1<sup>st</sup> Respondent Though notices had been send out.**

**No appearance for the 2<sup>nd</sup> Respondent**

**L. GACHERU**

**JUDGE**

**14/12/2020**