Mwilu (Suing as the Administrator of the Estate of Agnes Ndwale Mwilu) v Mwilu (Environment & Land Case E021 of 2020) [2024] KEMC 20 (KLR) (27 September 2024) (Judgment)

Neutral citation: [2024] KEMC 20 (KLR)

REPUBLIC OF KENYA

IN THE MACHAKOS LAW COURTS

ENVIRONMENT & LAND CASE E021 OF 2020

CN ONDIEKI, PM

SEPTEMBER 27, 2024

BETWEEN

JOSPHAT MUTUKU MWILU (SUING AS THE ADMINISTRATOR OF THE ESTATE OF AGNES NDWALE MWILU) ..... PLAINTIFF

AND

BENSON ERIC MUTISYA MWILU ..... DEFENDANT

JUDGMENT

Part i:Introduction

1. Once a person secures registration as the proprietor of a parcel of land, then subject to the encumbrances; easements; wayleaves; airways; restrictions; conditions contained or endorsed in the certificate; overriding interests; and matrimonial rights, the proprietor attains proprietary rights including the right to possession and the right to admit or licence any person thereinto. In this connection, any person who unlawfully, without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on that land without the consent of the proprietor commits trespass.

Part ii: The Plaintiff's Case

2. Vide an Amended Plaint dated 11th December 2023 and filed on even date, the Plaintiff brought this action against the Defendant seeking Judgment for a declaration that the suit property known as Wamunyu/Kambiti/13 was fraudulently transferred to the Defendant; an order of cancellation of registration of the Defendant as the proprietor; an order of rectification against the Machakos County Land Registrar; an order of permanent injunction restraining the Defendant either by himself or his agents or servants from continued trespass, alienation, selling, and or in any other way dealing with the said property; general damages for trespass; and costs of this suit.

3. The Plaintiff and Defendant are step-brothers. The Plaintiff is the son of the late Agnes Ndwale Mwilu and the Defendant is the son of the third wife of the late Mwilu Mumo.

4. The Plaintiff claims that his mother, Agnes Ndwale Mwilu, the initial Plaintiff who died before conclusion of this suit, was the registered proprietor of the parcel of land known as Wamunyu/Kambiti/13 (hereinafter "the suit property") which she used as a grazeland, having been settled there her late husband, Mwilu Mumo. It is averred that the suit property was transferred to the Defendant fraudulently on the strength of a land control board consent which was never issued in the lifetime of the Defendant's father. It is averred that the late Mwilu Mumo had three wives and that the 1st wife, Agnes Ndwale Mwilu (deceased) was settled in Wamunyu, the 2nd wife was settled in Shimba Hills and the 3rd wife, the Defendant's mother, was settled in Kikoneni. The Plaintiff set out the particulars of fraud as follows: presenting transfer documents for registration which were never signed by the said Mwilu Mumo [deceased]; attaching a consent which was never granted; and forging the signature of the deceased.

5. At the hearing of the Plaintiffs' case, the Plaintiff (PW1) adopted his witness statement dated 3rd November 2020 and filed together with the original Plaint as his evidence-in-chief. In his said statement, the Plaintiff largely rehashes the facts as averred in the Plaint. In addition, he states that his late father Mwilu Mumo was the registered proprietor of the suit property and that his late father had allocated his first wife, the late Agnes Ndwale Mwilu, all the parcels of land located in Wamunyu and the Defendant's mother was allocated the land in Kikoneni. He states that in 2015, the Defendant attempted to 'sneak' his late father to the Land Control Board but they declined to give consent to the transfer in the first sitting of the board. He states that the board did not sit again to consider the application in the lifetime of his late father. It is thus stated that the consent which was presented to the land registry to effect the transfer was forged.

6. In buttressing this claim, the Plaintiff exhibited the following documents: (i) a copy of the title deed as the Plaintiff's Exhibit 1; (ii) a copy of the Plaintiff's ID card as the Plaintiff's Exhibit 2; (iii) a letter from the chief as the Plaintiff's Exhibit 3; (iv) a letter dated 4th August 2020 as the Plaintiff's Exhibit 4; (v) a certificate of death as the Plaintiff's Exhibit 5.

7. In cross-examination of the Plaintiff, he stated that the suit property was yet to be transferred by Mwilu Mumo [deceased] to the name of Agnes Ndwale Mwilu [deceased]. He stated that by the time it was transferred to the Defendant, it was still in the name of his father Mwilu Mumo [deceased]. He stated that his late father had five parcels of land. He stated that one of the five was commercial. He stated that he learnt of the transfer in 2020. He stated the has not done a search. He stated that his family is settled in Wamunyu/Kambiti/88 which was given top him by his late father. He stated that he has three other brothers (sons of the late Agnes) whose families are settled in Wamunyu/Kambiti/30 where his late mother also settled. He conceded that there is a time his late father Mwilu Mumo, informed them that he desired to give the Defendant land and that he took them to the land control board which referred them to the chief, after they declined to give consent. He stated that he is the one who lodged a complaint with the chief that his late father wanted to give the Defendant land. He stated that the chief never resolved the impasse and he was thus shocked to learn that land had been transferred. He stated that no succession cause has been filed over the estate of Mwilu Mumo [deceased]. He stated that his father did not transfer the suit property to the Defendant.

8. PW2, Alfred Mwendwa Wambua, adopted his witness statement dated 3rd November 2020 and filed together with the original Plaint as his evidence-in-chief. In his said statement, PW2 states that he is a retired member of the LCB Yathui Division, having retired in 2017. He states that in 2005, the Defendant and his late father attended the board meeting seeking consent to transfer the suit property

but the board required that all family members attend the meeting on another date. He states that the Defendant, his father and other family members appeared in October 2005 but the family members declined to give consent on grounds that the Defendant was settled elsewhere. He states that the board thus declined to grant consent and advised them to seek assistance of the area chief to resolve the stalemate and that they never came back to the board again.

9. In cross-examination, PW2 stated that he has no relationship with the late Agnes. He stated that no consent was granted. He stated that he had no minutes of the meeting in Court.

10. In his written Submissions dated 20th August 2024 and filed on 21st August 2024, learned Counsel Mr. Muli instructed by the Firm of Messieurs Evans Muli and & Company Advocates representing the Plaintiff, has urged this Court to find that the Plaintiff has proved fraud under section 26 of the *Land Registration Act*, placing reliance in Justus Tureti Obara vs. Peter Koipetai [2014] eKLR; Munyu Maina vs. Hiram Maina Civil Appeal No. 2309 of 2009; and Uthasyo Mutheke vs. James Mwanthi Muthembwa ELC Appeal No. 4 of 2020.

Part iii: The Defendant's Case

11. In his Statement of Defence dated 30th September 2022 and filed on 4th October 2022, the Defendant denied every material averment in the Plaint. The Defendant avers that his late father, Mwilu Mumo, voluntarily transferred the suit property to him in 2006 after the Yathui Division LCB issued a consent dated 11th May 2005, which was not appealed against.

12. Further, it is averred that since the transfer occurred in 2006, this suit is time-barred.

13. At the hearing of the Defendant's case, DW1, the Defendant adopted his Affidavit sworn on 30th September 2022 together with all its annextures, which was filed on 4th October 2022 as his evidence-in-chief. In his said Affidavit, the Defendant largely rehashes the facts as averred in his Defence. In addition, he concedes that he is the current registered proprietor of the suit property. He states that the late Mwilu Mumo transferred the suit property to him in 2006 and died on 6th July 2011.

14. In buttressing his defence, DW1 exhibited the following documents: (i) a copy of official search dated 19th September 2022 as the Defendant's Exhibit 1; (ii) a copy of the Title Deed for the suit property as the Defendant's Exhibit 2; (iii) a copy of the certificate of death of Mwilu Mumo indicated to have died on 6th July 2011 as the Defendant's Exhibit 3; (iv) a copy of receipt for the LCB consent dated 11th may 2005 as the Defendant's Exhibit 4; (v) a copy of receipt for search dated 11th May 2005 as the Defendant's Exhibit 5; (vi) a cash deposit slip for stamp duty dated 12th April 2006 as the Defendant's Exhibit 6; (vii) a stamp duty declaration form dated 12th April 2006 as the Defendant's Exhibit 7; and (viii) a copy of the Defendant's letter dated 4th August 2020 as the Defendant's Exhibit 8.

15. In cross-examination of the DW1, he stated that the late Agnes was his step-mother and the Plaintiff herein is his step-brother. He stated that he was born and raised in Kikononi, Kwale where his mother lived too. He stated that his mother was buried in Kikononi. He stated that the Kikononi land is occupied by his sister and brother. He conceded that they have never lived in Wamunyu. He stated that parcel number 30 in Wamunyu belonged to Agnes but the suit property was transferred to him by his late father in 2006. He stated that his late father successfully secured a consent from Yathui Division LCB. He stated that all family members attended the board meeting. He stated that it is true, the Plaintiff herein objected to issuance of the consent and when the chairman confirmed that the Plaintiff lives in parcel 88, the consent was granted. He stated that they were not referred to the chief. He stated that he did not have in Court the application for consent and copies of the transfer documents. He

stated that he was gifted for taking care of his father well he stated that all the while, when his father was ailing, he single-handedly settled the bills.

16. In re-examination, DW1 stated that the Kikononi land was transferred to his sister and brother and he did not get a share.

17. DW2, Wycliffe Kyalo, adopted his witness statement dated 15th March 2023 and filed on 17th March 2023 as his evidence-in-chief. In his said statement, DW2 states that he is the one who surveyed the suit property for purposes of beacons and fencing

18. In cross-examination of the DW2, he stated that he is gazette as a surveyor. He stated that he had no beacon certificate in Court.

19. DW3, Maurice Nzikali, adopted his witness statement dated 15th March 2023 and filed on 17th March 2023 as his evidence-in-chief. In his said statement, DW3 states that he is a retired chief in charge of Wamunyu Location. He recalled that in 2004, the late Mwilu Mumo came to his office and informed him that he wanted to transfer his parcel of land to the Defendant as gift for taking good care of him. He stated that he wrote a letter to Yathui Division LCB to facilitate his desire.

20. In cross-examination of the DW3, he stated that he referred the late Mwilu Mumo to the Yathui Division LCB. He stated that he was also a member of the LCB. He stated that he did not return to his office again.

21. DW4, Patrick Mumo Kithuku, adopted his witness statement dated 15th March 2023 and filed on 17th March 2023 as his evidence-in-chief. In his said statement, DW4 states he was a witness to the gift which given to the Defendant by his late uncle, Mwilu Mumo.

22. In cross-examination of the DW4, he stated that he did not witness in writing.

23. In his written Submissions dated 16th July 2024 and filed on 17th July 2024, learned Counsel Mr. Kimani instructed by the Firm of Stephen Macharia Kimani Advocates, representing the Defendant, has urged this Court to find that the Defendant was voluntarily given a gift inter vivos by the late Mwilu Mumo; that the Plaintiff lacks the locus standi to represent the estate of the late Mwilu Mumo; and that this suit is time-barred.

24. Ultimately, this Court is thus urged to dismiss the suit with costs to the Defendant.

Part iv: Questions for Determination

25. Commending themselves for determination - gleaning from the Amended Plaint, the Statement of Defence, and the rival written Submissions – two questions for determination as follows:

    i. Whether the Plaintiff has made a case for an order for rectification of the register by cancellation of the Defendant's name as the registered proprietor of the parcel of land known as Wamunyu/Kambiti/13 (hereinafter "the suit property") and revert to the original registered proprietor Mwilu Mumo [deceased].

    ii. Which party should bear the costs of this suit?

Part v: Analysis of the law; examination of facts; evaluation of evidence and determination

26. I now embark on analysis, interrogation, assessment and evaluation of each of the two questions, in turn.

(i) Whether the Plaintiff has made a case for an order for rectification of the register by cancellation of the Defendant's name as the registered proprietor of the parcel of land known as Wamunyu/Kambiti/13 (hereinafter "the suit property") and revert to the original registered proprietor Mwilu Mumo [deceased]

26. Before this question is settled, this Court desires to set down the wider framework by way of history.

27. Our current land registration system is a 19th Century conception called the Torrens System.[1] The Torrens system stands on three intrepid pillars woven around the curtain, mirror and insurance principles. The first pillar is the mirror principle which posits that the register mirrors accurately and completely the current facts about the proprietor. The second pillar is the curtain principle which posits that a person interested to know the full, frank and true status of a piece of land does not need to go behind the curtain (the register or Certificate of title or lease). The third pillar is the insurance or indemnity principle which posits that if loss is occasioned by fraud or by errors made by the Registrar of Titles, the Government which is the guarantor of tiles is responsible. The three pillars, read conjunctively, constitute the doctrine of indefeasibility of title. The Torrens system of registration, noticeably, places premium on the accuracy of the land register and insists that the register must mirror all currently active registrable interests affecting a particular parcel of land. Motivated by this curtain and mirror principle, this system of registration adopted the registration of Title in a public register as opposed to registration of private Deeds. The paramount object of the Torrens System was therefore to save a person dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title and to satisfy themselves of its validity. This system of registration vouches for sanctity of title. The doctrine of sanctity of title posits that once a bona fide purchaser for value without notice is registered as the proprietor of the subject parcel of land, it is conclusive evidence that the person named therein is the owner and thus indefeasible in rem (against the entire world including the original proprietor) except on grounds of fraud; misrepresentation; obtaining the title unprocedurally; illegality and obtaining the title through a corrupt scheme, all of which the beneficiary of the impugned title must have partaken and further, except on grounds of the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; liabilities, rights and interests as affect the same and are declared by section 28 of the *Land Registration Act* not to require noting on the register. In the foregoing context, this system of registration solemnly promised sanctity of title. It solemnly promised that a title, like money, is not just a piece of paper but a store of value and a solemn promise by the government that the document is authentic and undisputed in origin.

28. The paramount object of the Torrens System was summed up in Privy Council decision in Gibbs vs. Messer (1891) AC 28, at pages 248 and 254, as follows: "The main object of the Act and the legislative scheme for the attainment of that object are equally plain. The object is to save a person dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title and to satisfy themselves of its validity. That end is accomplished by providing that everyone who purchases, in bona fide and for value, from a registered proprietor and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title...everyone who purchases in bona fide and for value, from a registered proprietor, and who enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title." In Regal Constellation Hotel Ltd Re 2004 CanLII 2006 Ontario C.A., at page 13 paragraph

[1] Named after its avant-gardist, Sir Robert Richard Torrens, an Irish national who was a civil servant in the British Colony of South Australia (as a Colonial Treasurer and Registrar-General of Land) and who later became a Member of the House of Assembly of South Australia representing Adelaide City and Third Premier of South Australia.

42, the Court stated that "The philosophy of land titles system embodies three principles, namely, the mirror principle, where the register is a perfect mirror of the state of title; the curtain principle, which holds that a purchaser need not investigate the history of past dealings with the land, or search behind the title as depicted on the register; and the insurance principle, where the state guarantees the accuracy of the register and compensates any person who suffers loss as the result of an inaccuracy."

29. What then constitutes the doctrine of indefeasibility of title? The three pillars above are what constitute indefeasibility of title. See Gibbs vs. Messer (1891) AC 28 or 248.

30. The Torrens system of registration vouches for sanctity of title. The doctrine of sanctity of title posits that once a bona fide purchaser for value without notice is registered as the proprietor of the subject parcel of land, it is conclusive evidence that the person named therein is the owner and thus indefeasible against the entire world including the original owner except on grounds of fraud; corruption; misrepresentation; being obtained unprocedurally; illegality; being obtained through a corrupt scheme; all of which the holder of the title must have partaken and further except on grounds of the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; liabilities, rights and interests as affect the same and are declared by section 28 of the *Land Registration Act* not to require noting on the register. In the foregoing context, this system of registration solemnly promised sanctity of title. It solemnly promised that a title, like money, is not just a piece of paper but a store of value and a solemn promise by the government that the document is authentic and undisputed in origin. As a result of this doctrine, a property owner is fortified in his belief that his home is his castle, where even the King may not enter, to paraphrase William Pitt 1st Earl of Chatham.

31. In Kenya, the tenets of the Torrens System have been codified in both our *Constitution of Kenya, 2010* and the *Land Registration Act*.

32. Article 40 of *the Constitution* guarantees and protects the right to acquire and own property. This right encompasses inter alia the protection against arbitrary deprivation of property from the proprietor and the protection against limitations or restrictions laid in the way of enjoyment of the property. The text reads as follows: "(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property–– (a) of any description; and (b) in any part of Kenya. (2) Parliament shall not enact a law that permits the State or any person— (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4). (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation— (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that— (i) requires prompt payment in full, of just compensation to the person; and (ii) allows any person who has an interest in, or right over, that property a right of access to a Court of law. (4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land. (5) The State shall support, promote and protect the intellectual property rights of the people of Kenya. (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired."

33. The suit property is a freehold tenure. A Kenyan citizen can own, in Kenya, land of any tenure unlike an alien. Article 65 of *the Constitution* provides that a citizen can hold land of any tenure (whether freehold or leasehold). It states thus: "(1) A person who is not a citizen may hold land on the basis of leasehold tenure only, and any such lease, however granted, shall not exceed ninety-nine years. (2) If

a provision of any agreement, deed, conveyance or document of whatever nature purports to confer on a person who is not a citizen an interest in land greater than a ninety-nine-year lease, the provision shall be regarded as conferring on the person a ninety-nine-year leasehold interest, and no more. (3) For purposes of this Article— (a) a body corporate shall be regarded as a citizen only if the body corporate is wholly owned by one or more citizens; and (b) property held in trust shall be regarded as being held by a citizen only if all of the beneficial interest of the trust is held by persons who are citizens. (4) Parliament may enact legislation to make further provision for the operation of this Article."

34. In accord with the Torrens System, in Kenya, registration of a person as the proprietor of land vests in that person absolute ownership of that land and so is the registration of a person as a proprietor of a leasehold interest. Section 24 of the *Land Registration Act* provides for the interest conferred by registration in the following words: "Subject to this Act— (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease."

35. Further and in accord with the Torrens System, the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of Court, shall not be liable to be defeated except on grounds of fraud; corruption; misrepresentation; being obtained unprocedurally; illegality; being obtained through a corrupt scheme; all of which the holder of the title must have partaken and further except on grounds of leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register. This doctrine of indefeasibility is enacted under section 25 of the *Land Registration Act* read with section 24 thereof and is modelled along the grains of section 91 of the Real Property Act, 1858 which read as follows: "91. It shall not be lawful for any person to institute or prosecute any action of ejectment for the recovery of land under the operation of this Act, against the registered proprietor, save and except only in the case of a mortgagee against his mortgagor, an encumbrancee against his encumbrancer, or a lessor against his lessee, in default, under the terms, conditions, or covenants of a bill of mortgage, bill of encumbrance, bill of trust, or lease, as the case may be, executed and registered in accordance with the provisions of this Act, or in the case of any person duly authorised by any Court having jurisdiction in cases of bankruptcy or insolvency, against a bankrupt or insolvent, or in case the registered proprietor has obtained such land by fraud or misrepresentation." Section 25 of the *Land Registration Act* provides for rights of a proprietor in the following words: "(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject— (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register. (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee."

36. In Kenya, the only noticeable departure from the Torrens system is that whereas in original prescription of the Torrens system, both the Certificate of Title and register were conclusive evidence of title, in Kenya only the register is conclusive evidence of title while a Certificate of Title or Lease is prima facie proof that the person's name therein is the proprietor of the subject parcel of land. Section 33 of the Real Property Act, 1858 read as follows: "33. Every certificate of title or entry in the register book shall

be conclusive, and vest the estate and interests in the land therein mentioned in such manner and to such effect as shall be expressed in such certificate or entry valid to all intents, save and except as is hereinafter provided in the case of fraud or error." In Kenya, this has since been modified to leave the register only as the conclusive evidence of title, rendering a Certificate of Title or Lease issued by the Registrar upon registration a mere prima facie evidence that the person named therein is the proprietor of the subject parcel of land. Section 26(1) of the *Land Registration Act* provides that "(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme." This departure of the evidentiary character of a Certificate of Title or Lease from being conclusive evidence in the original Torrens prescription to presenting prima facie evidence in the *Land Registration Act* regime, is apparently motivated by the local realities chiefly the forgery menace in Kenya infamously known as the 'River Road Titles.' In Kenya, therefore, conclusive evidence of proprietorship lies not in the Certificate of Title or lease but the register, so that the register is the title and the title is the register. Under the Torrens system, a certificate of title or lease is therefore not mandatory. Since under the Torrens System the register is the ultimate title and the ultimate title is the register. A Certificate Title or Lease is thus mere prima facie proof of proprietorship and thus founds a rebuttable presumption that the person named therein has been registered as the proprietor of the subject parcel of land. Part of the reasoning behind this position is that no interest in an instrument pass until it is registered. In this sense, a Certificate of Title or Lease is elective and not mandatory. The merit of this thinking is that if a Certificate of Title or Lease is lost for instance, it does not affect ownership. It only calls for a replacement. Likewise, if a certificate of title or lease forged, it does not affect the status of register itself in any way at all as title is separate entity. Being the child of the register, a certificate of title or lease is only defeasible on grounds of except on grounds of fraud; corruption; misrepresentation; being obtained unprocedurally; illegality; being obtained through a corrupt scheme; all of which the holder of the title must have partaken. Section 26 of the *Land Registration Act* provides thus: "(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original." Section 30 of the *Land Registration Act* provides that "(1) The Registrar may, if requested by a proprietor of land whose name appears in the register or a lease where no certificate of title or certificate of lease has been issued, issue to him or her a certificate of title or a certificate of lease, as the case may be, in the prescribed form showing, if so required by the proprietor, all subsisting entries in the register affecting that land or lease. (2) Notwithstanding subsection (1)— (a) only one certificate of title or certificate of lease shall be issued in respect of each parcel or lease; and (b) no certificate of title or certificate of lease shall be issued unless the lease is for a certain period exceeding twenty-one years. (3) A certificate of title or certificate of lease shall be prima facie evidence of the matters shown in the certificate, and the land or lease shall be subject to all entries in the register. (4) If there is more than one proprietor, unless they are tenants in common, the proprietors shall agree among themselves on which of them shall receive the certificate

of title or the certificate of lease, and if they fail to agree, the certificate of title or the certificate of lease shall be filed in the registry. (5) The date of issue of a certificate of title or certificate of lease shall be noted in the register." Further, a certificate of title or lease shall be prima facie evidence of the matters shown in the certificate. Section 30 of the *Land Registration Act* provides for the import and purport of issuance of a Certificate of title and Certificate of lease. It provides thus: "(1) The Registrar may, if requested by a proprietor of land whose name appears in the register or a lease where no certificate of title or certificate of lease has been issued, issue to him or her a certificate of title or a certificate of lease, as the case may be, in the prescribed form showing, if so required by the proprietor, all subsisting entries in the register affecting that land or lease. (2) Notwithstanding subsection (1)— (a) only one certificate of title or certificate of lease shall be issued in respect of each parcel or lease; and (b) no certificate of title or certificate of lease shall be issued unless the lease is for a certain period exceeding twenty-one years. (3) A certificate of title or certificate of lease shall be prima facie evidence of the matters shown in the certificate, and the land or lease shall be subject to all entries in the register. (4) If there is more than one proprietor, unless they are tenants in common, the proprietors shall agree among themselves on which of them shall receive the certificate of title or the certificate of lease, and if they fail to agree, the certificate of title or the certificate of lease shall be filed in the registry. (5) The date of issue of a certificate of title or certificate of lease shall be noted in the register."

37. For the holding that a register is the title and certificate of title is a mere prima facie proof that the person named therein is the proprietor, see an Australian decision in Breskvar vs. Wall (1971) 126 CLR, at pages 4 and 14, Barwick CJ held that "The Torrens system of registered title of which the Act is a form is not a system of registration of title but a system of title by registration. That which the certificate of title describes is not the title which the registered proprietor formerly had, or which but for registration would have had. The title it certifies is not historical or derivate. It is the title which registration itself has vested in the proprietor. Consequently, a registration which results from a void instrument is effective according to the terms of the registration. It matters not what the cause or reason for which the instrument is void... He noted, as an important benefit of the new system, "cutting off the retrospective or derivative character of the title upon each transfer or transmission, so as that each freeholder is in the same position as a grantee direct from the Crown'. "This is an assertion that the title of each registered proprietor comes from the fact of registration, that is made the source of the title, rather than a retrospective approbation of it as derivative right..."

38. What are the interests which override a title even without being reflected in the register? Unless the contrary is expressed in the register, all registered land shall be subject to overriding interests without being noted on the register which interests are trusts including customary trusts; rights of way, rights of water and profits subsisting at the time of first registration under this Act; natural rights of light, air, water and support; rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law; charges for unpaid rates and other funds; rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription; electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law and any other rights provided under any written law. Section 28 of the *Land Registration Act* provides for overriding interests. It states that "Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register— (a) deleted by *Act No. 28 of 2016*, s. 11(a); (b) trusts including customary trusts; (c) rights of way, rights of water and profits subsisting at the time of first registration under this Act; (d) natural rights of light, air, water and support; (e) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law; (f) deleted by *Act No. 28 of 2016*, s. 11(b); (g) charges for unpaid rates and other funds which, without reference to

registration under this Act, are expressly declared by any written law to be a charge upon land; (h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription; (i) electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law; and (j) any other rights provided under any written law, Provided that the Registrar may direct the registration of any of the liabilities, rights and interests hereinbefore defined in such manner as the Registrar deems necessary." None of the rights falling under this category was adduced by the Defendants.

39. The principle of insurance or indemnity is enacted under section 53 of the *Land Registration Act* which is modelled along the lines of section 92 of the Real Property Act, 1858. Section 92 of the Real Property, 1858 provided as follows: "92. Any person who shall, by the decree of any Court having jurisdiction in such case, be declared to be the lawful heir to any land under the operation of this Act, or any person who shall by any such decree be declared to have been deprived of an estate or interest in such land, through the entry in the register book of any memorandum of sale or other instrument affecting such land, made, or procured to be made by fraud, error, misrepresentation, oversight, or deceit, may bring and prosecute an action at law in the Supreme Court for the recovery of damages against the person who may, by fraud or other means as aforesaid, have become registered as proprietor of such land; and the Court or Jury before whom such action is tried shall, if such person obtains a verdict in his favour, find damages against the person so registered as proprietor through fraud, or error, or other means aforesaid, for such sum of money as the Court or Jury may think fit, not exceeding the value of such land at the time when such person did so wrongfully, or in error become registered as proprietor of the same, together with interest on the amount of such value, computed at Six Pounds in the One Hundred Pounds per annum, from the date when such person so became wrongfully, or in error, registered as proprietor." Section 53 of the *Land Registration Act* reads as follows: "(1) If a person acquires or receives land in respect of which the Court could make an order for restoration or for the payment of reasonable compensation, the Court shall not make that order against that person if that person proves that the land was— (a) acquired or received in good faith and without knowledge of the fact that it has been the subject of a disposition to which this part applies; or (b) acquired or received through a person who acquired or received it in the circumstances set out in paragraph (a). (2) Reference to knowledge in this section shall include actual, constructive and imputed knowledge."

40. In the original scheme of the Torrens system, the doctrine of indefeasibility is fortified by the doctrine of innocent purchaser for value who is then deemed to hold a good title, provided the register reflected the seller as the owner and the purchaser did not participate in the impugned fraud. See David Peterson Kiengo & 2 Others vs. Kariuki Thuo (2012) eKLR, per Prof. J.M. Ngugi, J.; Joseph N.K. Arap Ng'ok vs. Moijo Ole Keiwua & 4 others (1997) eKLR, per Tunoi, Shah and Pall, JJA (as they then were); Charles Karathe Kiarie & 2 Others vs. Administrators of the Estate of John Wallace Mathare (deceased) & 5 Others (2013) eKLR, per Onyango Otieno, JA (as he then was), Gatembu and Mohammed, JJA.; Hannah Wangui Ithebu & Other vs. Joel Nguigi Magu (2005) eKLR, per Visram, J. (as he then was).

41. This doctrine of indefeasibility extends to charges, mortgages and property acquired through auctions as result on the exercise of the power to sell under the said charges and mortgages too. Unless there is proof that a chargee participated in the impugned illegality, an innocent chargee without notice of fraud or illegality gets a good indefeasible security. See Dinshaw Byramjee & Sons Ltd vs. A.G. of Kenya (1966) E.A. 198; and Frazer vs. Walker (1967) 649 ALL E.R,

42. And what is the position of a forged title in the Torrens system? A forged title is not good in favour of the forger but in favour of the bona fide purchaser for value. In Gibbs vs. Messer (1891) AC 28, at page 257, the Court stated that "... Although a forged transfer which is void at common law, will, where

duly entered on the register, becomes the root of a valid title, in a bona fide purchaser." Also, in Assets Company Ltd vs. Mere Roihi and Others (1905) A.C. 176, at page 18 para 1, the Privy Council had this to say: "... A registered bona fide purchaser from a registered owner whose title might be impeached for fraud has better title than his vendor, even if title of the latter could be impeached ..."

43. Even when original grant void, subsequent bona fide purchaser's title is valid and indefeasible. In Thomson vs. Edie et al (2006) BCSC (CanLII) Supreme Court B.C. Canada, at page 22 para 61, it was found as a matter of fact that there was an irregularity in issue of the grant but by this time, the property had been sold to a bona fide purchaser. The Court held that "However, the Eadies are entitled to rely on the same protection of indefeasibility of title as if the grant had been valid. That is the intention and the effect of the LTA."

44. Also, in Asset Co. Ltd. vs. Mere Roihi and others (1905) AC 176, it was found as a matter of fact that in issuing grant to Native lands, there were several irregularities and subsequently the parcels of land issued under this irregular grant were sold successively to the bona fide buyers for which transfers were effected, buyers registered as new proprietors and certificates of title issued. The titles were challenged and the Privy Council held at page 2 that "... in the absence of fraud by the Company or its agents, registration is conclusive, and confers good title on the Company, and that in the proceedings in the Native Court even if proved, cannot affect the title of the Company, although such defects may possibly entitle the Natives to Compensation for any injury caused to them by improper registration..."

45. In the same Assets Company Ltd vs. Mere Roihi and Others (1905) A.C. 176, the Privy Council held at page 18 that "... A registered bona fide purchaser from a registered owner whose title might be impeached for fraud has better title than his vendor, even if title of the latter could be impeached ..."

46. Even where there is alleged fraud or illegality, the Registrar of Lands cannot directly act on the allegations unless proved in a Court of law. In this sense, a Registrar of Lands does not have power to cancel a title unless through an order of the Court. See Isaac Gathungu Wanjohi & Another vs. Attorney General & 6 Others (2012) eKLR; and Kuria Greens Limited vs. Registrar of Titles & Another (2011) eKLR.

47. Across the border in Uganda which also adopted the Torrens system of registration, in C.R. Patel vs. Commissioner Land Registration & 2 Other (Judgement Jan 2013), HCCC No. 87 of 2009, Uganda High Court at Kampala (Land Division), where the Registration of Titles Act of Uganda is substantially the same as the *Land Registration Act*, a fraudster did what Njendu did in Kenya and managed to get a duplicate or provisional certificate of title without going through the process of Gazettement, forged a transfer, got registered and sold to an innocent purchaser for value without notice. It was held that despite irregularities and illegalities in issue of provisional certificate and registering forged transfer, since buyer was a bona fide buyer and was not concerned about the past illegalities, his title was indefeasible and valid in rem. It was also stated that under Torrens system in fact register is the title and not certificate. Once duplicate or provisional certificate is issued, it replaces the old one.

48. Also, for the holding that a bona fide purchaser for value without notice from a registered proprietor shall acquire an indefeasible right, notwithstanding the infirmity of his author's title and that the purchaser has no obligation to go beyond the register to investigate the vendor's title, see Shimoni Resort vs. Registrar of Titles & 5 others (2016) eKLR (per Okongó, J); Njilux Motors Ltd vs. KP&L & Another Civil Appeal Number 206 of 1998; Russel & Co. Ltd vs. Commercial Bank of Africa Ltd (1986) KLR 633; Wreck Motors Enterprises vs. Commissioner of Lands Nairobi, Civil Appeal Number 71 of 1997 (Unreported); and *Permanent Markets Society & 11 Others vs. Salima Enterprises & 2 Others Civil Appeal Number 185 of 1997*.

49. However, there was a departure from this doctrine of indefeasibility of title in Iqbal Singh Rai vs. Mark Lecchini & another (2013) eKLR, where a fraudster stole the identity of the owner, forged his signature and sold the plot to a bona fide buyer. The buyer unaware of the forgery, registered the transfer. Both original owner and buyer asserted that he had indefeasibility of title by virtue of s.23(1) of RTA upon registration of transfer. It was held that "A fraudster cannot transfer a valid title to another party even if that other party becomes the registered proprietor. The fraudulent transfer would be declared null and void and the second title would be cancelled."

50. Against whom can the rightful owner sustain a cause? The rightful owner has a right to recover the parcel of land from the fraudster but after it passes hands to a bona fide purchaser, the right is defeated and thus left with the right to pursue damages. In the Australian case in Breskvar vs. Wall (1971) 126 CLR (High Court Aus), the Court held as follows: "...the Appellants were not deprived of their land when it was registered in the name of a rogue because by appropriate legal action they could have recovered the land from him. However, the Appellants irrevocably lost their land once the rogue sold to an innocent person who acquired a title superior to theirs."

51. How is this position of indefeasibility of title reconciled with the common law doctrine videlicet non dat qui non habet. This common law doctrine simply translated that no one gives what he does not have. Differently put, nemo plus iuris ad alium transferre potest quam ipse habet, which loosely translates that one cannot transfer to another more rights than they have, so that a purchaser from a fraudster acquires no good title. In a New Zealand leading decision in indefeasibility of title in Boyd vs. Mayor of Wellington (1924) NZLR 1174, the Plaintiff (Mr. Boyd) owned a parcel of land in Wellington until 1917 when the local council acquired it compulsorily to build part of the Wellington Tramway System. After the council was registered as the new proprietor of the property, it came to the Plaintiff's attention that because there was an existing building on the property, the council had no legal right to acquire the property without the owner's consent. The Plaintiff took legal action against the council to return the land back to his ownership. The Court ruled in favour of the council on grounds inter alia that the transfer was not obtained by way of fraud and the Wellington City Council had obtained an indefeasible title to the property. Salmond, J. elucidated the interface between nemo dat and indefeasibility of title and had the following to say about the person deemed an innocent purchaser for value without notice: "This case raises once more the important question of the scope and nature of the rule as to indefeasibility of title under the Land Transfer Act. I regret that I am unable to take the same view of this matter as is taken by a majority of the members of the Court. I think, on the contrary, that an instrument which is null and void before registration remains equally null and void inter partes notwithstanding and creates no indefeasible title until and unless the rights of some third person purchasing in good faith and for value on the faith of the registered instrument have supervened. Until then it is the right and duty of which now arises for consideration is whether the District Land Registrar to rectify the Register registration by cancelling a registration which was wrongly procured and therefore ought not have to been continued."

52. In Kenya, however, on 21st April 2023, the equitable doctrine of innocent purchaser for value appears to have considerably diminished in the recent decision of the Supreme Court of Kenya (hereinafter "the SCORK") in Dina Management Limited vs. County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment). In this case, while discussing the doctrine of indefeasibility of title, SCORK - without saying it expressly – appears to have to have dropped the rationale underpinning the equitable doctrine of innocent purchaser for value and reverted to the common law position discussed supra namely non dat qui non habet - that no one gives what he does not have and nemo plus iuris ad alium transferre potest quam ipse habet – that one cannot transfer to another more rights than he has. It follows that once the root of the title is under

challenge, a purchaser from a fraudster - even without knowledge or participation - acquires no good title. At paragraph 111, PM Mwilu, DCJ & V-P, SC Wanjala, NS Ndungu, I Lenaola & W Ouko, SCJJ reasoned that "Article 40 of *the Constitution* entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired. Having found that the 1st registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under Article 40 of *the Constitution*. The root of the title having been challenged, as we already noted above the appellant could not benefit from the doctrine of bona fide purchaser." This decision has far-reaching implications on purchasers of land, since it bears a reverberating departure from the curtain, mirror and insurance principles of the Torrens System. The decision has shaken the very foundation of the equitable doctrine of innocent purchaser for value in the following respects. First, it seems to suggest that there will be no sanctity of title if the process followed prior to the issuance of the title did not comply with the law with the lethal effect that even an innocent purchaser cannot rely on the principle of indefeasibility of title if the root of the title is challenged. Second, the mirror principle has been rendered ineffectual. The implication of this is that a purchaser or lender or investor must walk the extra mile beyond the register which will include but not limited to investigating the comprehensive history of the property right from the first allocation to the potential vendor or chargor. Third, the burden has now shifted from the government to the purchaser or lender or investor to ensure legality of the title.

53. The SCORK decision in Dina Management Limited, supra, affirmed the judicial views which were expressed in Republic vs. Minister for Transport & Communication & 5 Others Ex Parte Waa Ship Garbage Collector & 15 Others [2006] 1 KLR (E&L) 563, Maraga J. (as he then was); Esther Ndegei Njiru & Another vs. Leonard Gatei [2014] eKLR, J.M. Mutungi, J.; and Munyu Maina vs. Hiram Gathiha Maina [2013] eKLR, per Visram, Koome & Otieno-Odek, JJA (as they then were). In Republic vs. Minister for Transport & Communication & 5 Others Ex Parte Waa Ship Garbage Collector & 15 Others [2006] 1 KLR (E&L) 563, Maraga J. (as he then was) took a judicial view that "Courts should nullify titles by land grabbers who stare at your face and wave to you a title of the land grabbed and loudly plead the principle of the indefeasibility of Title Deed... It is quite evident that should a constitutional challenge succeed either under the trust land provisions of *the Constitution* or under section 1 and 1A of *the Constitution* or under the doctrine of public trust a title would have to be nullified because *the Constitution* is supreme law and a party cannot plead the principle of indefeasibility which is a statutory concept." Similarly, in Esther Ndegei Njiru & Another vs. Leonard Gatei [2014] eKLR, J.M. Mutungi, J. reasoned that "Whereas the law respects and upholds sanctity of title the law also provides for situations when title shall not be absolute and indefeasible. The rampant cases of fraudulent transactions involving title to land has rendered it necessary for legal practitioners dealing with transactions involving land to carry out due diligence that goes beyond merely obtaining a certificate of search. Article 40 (6) of *the Constitution* removes protection of title to property that is found to have been unlawfully acquired. This provision of *the constitution* coupled with the provision of section 26(1) (a) and (b) of the *Land Registration Act* in my view places a responsibility to purchasers of titled properties to ascertain the status of a property beyond carrying out an official search. In this era when there are many cases of what has been described as "grabbed public lands" it is essential to endeavour to ascertain the history and/or root of the title..." In the Court of Appeal decision in Munyu Maina vs. Hiram Gathiha Maina [2013] eKLR, Visram, Koome & Otieno-Odek, JJA (as they then were) rendered themselves as follows: "The appellant denied he was a licensee. It is our considered view that the respondent did not discharge the evidential burden to rebut the testimony of the appellant that it was their deceased father who put both of them into possession of the suit property and to occupy the same in equal share. We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is

in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant's testimony. We find that a trust exists in relation to the suit property."

54. Ultimately, despite the varied positions taken by other superior Courts as discussed at length supra, owing to the legal position that the SCORK binds all Courts below, this Court can only proceed on the footing of Dina Management Limited vs. County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment).

55. It is common ground that the Defendant is now the registered proprietor of the suit property. From the foregoing confab, the Torrens System of land registration along which the land law in Kenya is woven, imported the principle of sanctity of title – now housed in section 26(1) of the *Land Registration Act* – which effectively renders the registered proprietor the absolute and indefeasible owner thereof, subject only to such encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and/or unless fraud or misrepresentation or illegality or unprocedural process or corrupt scheme is proved.

56. The Plaintiff claimed that the Defendant acquired registration of the suit property in his name fraudulently. Whereas the ground of illegality and unprocedural process require a standard of proof of balance of probabilities, it is now settled that the ground of fraud can only be successful if the evidence adduced rises to the intermediate standard of proof which is higher than balance of probabilities but lower than proof beyond reasonable doubt. See Ratilal Gordhanbhai Patel vs. Lalji Makanji [1957] 1 EA 314, where Sir Newnham Worley P, Sir Ronald Sinclair V-P and Lowe, J. rendered themselves as follows: "There is one preliminary observation which we must make on the learned judge's treatment of this evidence: he does not anywhere in the judgment expressly direct himself on the burden of proof or on the standard of proof required. Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required. There is no specific indication that the learned judge had this in mind: there are some indications which suggest he had not." This standard of proof has since been adopted in Mike Maina Kamau vs. Attorney General [2017] eKLR by L. Gacheru, J.; Urmila w/o Mahendra Shah vs. Barclays Bank International Ltd & another [1979] eKLR, per Madan, Wambuzi and Law, JJA (as they then were), et alia. See also Evans Kidero vs. Speaker Nairobi County Assembly [2015] eKLR; and Vijay Morjaria vs. Nansing Madhusingh Darbar & Others [2000] eKLR.

57. What yardstick is applied to measure this standard of proof? It will be noted that this distinctive intermediate standard of proof also applies to proof of any election petition grounds except election offences and data-specific grounds which require proof beyond reasonable doubt. The threshold of this standard is attained when a Court is satisfied as to be sure or driven to a point of certainty by cogent, specific, satisfactory, definitive and certain evidence.

58. First, in such disputes, it is instructive to first inquire into the date of transfer because it can on a preliminary offered a determinative riposte. In this case, the date of transfer was on 18th April 20006. Having died on 6th July 2011, it follows that at the time of transfer to the Defendant, Mwilu Mumo was still alive. Otherwise, it would have been rendered void, since upon death, even in circumstances where the registered proprietor had signed the transfer documents but transfer is yet to be effected, the suit property becomes the estate of the deceased by operation of law. See Elias & another vs. Hezekiah & 2 others (Suing as the Legal Representatives and Administrators of the Estate of Kinga M'abira – Deceased) (Environment and Land Appeal 2 of 2022) [2023] KEELC 429 (KLR) (1 February 2023) (Judgment).

59. In his witness statement, the Plaintiff stated that in 2015, the Defendant attempted to 'sneak' his late father to the Land Control Board (hereinafter "LCB") but the family declined to give consent to the transfer in the first sitting of the board. He further stated that the board did not sit again to consider the application in the lifetime of his late father and hence, the consent which was presented to the land registry to effect the transfer was forged. While under cross-examination, the Plaintiff conceded that there is a time his late father Mwilu Mumo, informed the family that he desired to gift the Defendant the suit property and that together, they attended a sitting of the Yathui Division LCB meeting which referred them to the chief, after the family declined to give their consent to the intended transfer. The Plaintiff further stated in cross-examination, that he is the one who lodged a complaint with the chief on grounds that his said late father wanted to give the Defendant the suit property.

60. We should not lose sight that the cause of action in this matter is fraud. Courts of law have always deemed such a claim grave. It explains why, contrasted to other civil claims which can pass upon prove on a balance of probabilities, a sui generis standard of proof was adopted for actions based on the tort of fraud.

61. First, although the Plaintiff so fervently asserted that his late father, Mwilu Mumo, did not transfer the suit property to the Defendant, this Court finds that beyond the fervent assertions, none of the particulars of fraud pleaded (namely presenting transfer documents for registration which were never signed by the said Mwilu Mumo [deceased], attaching a consent which was never granted, and forging the signature of Mwilu Mumo [deceased]), were established in evidence to the required intermediate standard of proof (above balance of probabilities but below proof beyond reasonable doubt).

62. Second and intricately connected to the first finding, this Court finds that in relation to the averment that the impugned LCB consent was never granted by the said Yathui Division LCB, no records and/or minutes of the Yathui Division LCB were exhibited beyond the oral assertions of PW2. This Court was thus deprived of the opportunity to ascertain whether or not consent was granted.

63. Third and also knottily connected to the first and second findings, in relation to the averment that the transfer documents which were the basis of registration of the Defendant as the proprietor of the suit property were never signed by the said Mwilu Mumo [deceased] and that they were hence forgeries, this Court finds it instructive to highlight that the procedure fashioned for authentication of handwritings and signatures was side-stepped by the Plaintiff. Whenever proof of a party's case will be contingent on laying a nexus between the asserted handwriting and/or signature and the asserted author, the burden falls upon the asserting party to prove that it was authored by the person so asserted. Section 48 of the *Evidence Act* provides that "(1) When the Court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions. (2) Such persons are called experts." The purport of the said section 48 was explicated by the Court of Appeal in Mutonyi vs. Republic (1982) KLR 203, at page 210, where Potter, JA. (as he then was) expressed himself as follows: "Expert evidence is evidence given by a person skilled and experienced in some professional or special sphere of knowledge of the conclusions he has reached on the basis of his knowledge, from facts reported to him or discovered by him by tests, measurements and the like. Section 48 of the *Evidence Act* (Cap 80) provides that where, inter alia, the Court has to form an opinion upon a point "of science, art, or as to identity or genuineness of handwriting or finger or other impressions", opinions on that point are admissible if made by persons "specialist skilled" in such matters. In Cross on Evidence 5th edition at page 446, the following passage from the judgement of President Cooper in Davie versus Edinburgh magistrates (1933) SC 34, 40, as scenting the functions of expert witnesses: "Their duty is to furnish the judge or jury with the necessary

scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgement by the application of these criteria to the facts put in evidence." So, an expert witness who hopes to carry weight in a Court of law, must, before giving his expert opinion: 1. Establish by evidence that he is specially skilled in his science or art. 2. Instruct the Court in the criteria of his science or art, so that the Court may itself test the accuracy of his opinion and also form its own independent opinion by applying these criteria to the facts proved.3. Give evidence of the facts on which may be facts ascertained by him or facts reported to him by another witness." The place of opinion evidence was illuminated in Shah and Another vs. Shah and Others [2003] 1 EA 290, where the Court expressed itself as follows: "One of the special circumstances when witnesses may be called to give evidence of opinion is where the situation involves evidence of expert witness and this is an exception to the general rule that oral evidence must be direct...The expert opinion is however limited to foreign law science or art; including all subjects on which a course of study or experience is necessary to the formation of an opinion and handwriting is one such field...However as a rule of practice, a witness should always be qualified in Court before giving his evidence and this is done by asking questions to determine and failure to properly qualify an expert may result in exclusion of his testimony...The opinion of the expert witness is not binding on the Court, but is considered together with other relevant facts in reaching a final decision in the case and the Court is not bound to accept the evidence of an expert if it finds good reasons for not doing so...If there is a conflict of expert opinion, with experts appearing for both parties, resolution of conflicting evidence or the acceptance of the evidence of the expert in preference to the opinion of the other, is the responsibility of the Court... Properly grounded expert evidence of scientific conclusion will be extremely persuasive in assisting the Court to reach its own opinion." Although not binding, opinion evidence should be accorded the highest regard. See the Court of Appeal's judicial view in Juliet Karisa vs. Joseph Barawa & Another Civil Appeal No. 108 of 1988. Failure to call expert evidence where necessity so requires translates that the party relying on such handwriting and/or signature fails to discharge his burden of proof and ultimately fails to pass the standard of proof for civil cases. Faced with similar situation in Re estate of Julius Mimano (Deceased) {2019} eKLR, the Court held that "It is the applicants contention that the signatures on the Will were forged and did not belong to the deceased. He did not call a document examiner to give expert opinion on the said signatures. The applicant did not express himself to be a qualified document examiner, or handwriting expert, whose word on the matter could be given weight (See Section 109 of the *Evidence Act*). That places the burden of proof on him. The proviso states that "The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any Law that the proof of that fact shall lie in a particular person." Beyond mere assertions, consequently, the Plaintiff did little to demonstrate and prove that the signature of the Mwilu Mumo [deceased] was forged. This would have been achieved by calling an expert witness trained in forensic document examination.

64. Fourth and also connected to the first, second and third findings, the alternative to section 48 of the Evidence namely section 76 of the *Evidence Act*, which empowers a Court to compare the handwriting and signature with the known handwriting and signature would have been invoked by the Plaintiff but for its bottlenecks. Section 76 aforesaid provides that "(1) In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal, admitted or proved to the satisfaction of the Court to have been written or made by that person, may be compared by a witness or by the Court with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose. (2) The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person. (3) This section applies with necessary modifications to finger impressions." The *Evidence Act* is one of the Indian intellectual exports and so, in interpreting it, Indian decisions

are helpful. In interpreting the same text namely section 67 of the Indian *Evidence Act*, the Indian decision in Stamper vs. Griffin 1856, 20 Ga 312, at page 320, the Court expressed a judicial view and held that "No handwriting can be received in evidence as a genuine writing until it has been proved to be a genuine one, and none as a forgery until it has been proved to be a forgery. A writing of itself, is not evidence of the one thing or the other. A writing, of itself, is evidence of nothing, and therefore is not, unless accompanied by proof of some sort, admissible as evidence." So was the holding in Venkatachala vs. Thimmajamma A1959 SC 443. Also, see Sarkar's Law of Evidence, Thirteeth Edition, pages 669-675 for the same position. When this mode is adopted, therefore, two conditions must be present alternately. Either, the asserted known signature and/or handwriting should either plain and obvious or uncontested or incontestable, or as contemplated by subsection (2), the Court should have at its disposal an option to verify by calling upon the asserted author to write words or figures and sign in open Court, which option presupposes that the asserted author must be a person before the Court or subject to the jurisdiction of the Court. See Machakos County Government vs. Kapiti Plains Estate Ltd & another [2019] eKLR, per Angote, J. The Plaintiff failed to avail himself within any of the two conditions since first, no known signature and/or handwriting which can be said to be plain and obvious, or uncontested or incontestable was exhibited by the Plaintiff. Second, since the subject in this case is deceased, there is no way this Court could verify the authenticity of the signature or handwriting in accordance with the said subsection (2). Further, since this Court does not, certainly, know and is expected not to know the signature and handwriting of the deceased, it was necessary to call a handwriting forensic expert in this regard, without which the signature so badly asserted by Plaintiff is certainly unverifiable.

65. In any event, the cause of action having arisen on 18th April 2006, and this suit having been filed on 30th November 2020, long after 12 years expired on 17th April 2018, and since no extension of time to file a suit out of time was sought by the Plaintiff before filing this action, it translates that this suit is time-barred.

66. The Plaintiff's evidence has thus failed to generate persuasion in the mind of this Court that an order for rectification of the register by cancellation of the Defendant's name as the registered proprietor of the suit property and reversion to the original registered proprietor Mwilu Mumo [deceased] has been earned.

(ii) Which party should bear the costs of this suit?

67. Upon considering the cause of action and circumstances unique to this case including but not limited to the history of the matter and the fact that it a matter involving brothers, this Court has found a good cause to depart from the general proposition of the law that costs follow the event.

Part vi: Disposition

i. Wherefore this Court finds this suit without merit and dismisses it. Each party to bear his own costs the suit.

68. It is so ordered.

VIRTUALLY DELIVERED, SIGNED AND DATED THIS 27TH DAY OF SEPTEMBER 2024

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C.N. Ondieki

Principal Magistrate

Advocate for the Plaintiff:

Advocate for the Defendant:

Court Assistant: Mr. Ndonye