



**Aono & another v Ochola & 2 others (Environment and Land Appeal
E034 of 2021) [2025] KEELC 7524 (KLR) (30 October 2025) (Judgment)**

Neutral citation: [2025] KEELC 7524 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E034 OF 2021
SO OKONG'O, J
OCTOBER 30, 2025**

BETWEEN

LEONIDA SANGONDA AONO 1ST APPELLANT

GEORGE ODHIAMBO AONO 2ND APPELLANT

AND

ELISHA OTIENO OCHOLA 1ST RESPONDENT

KENGA KALUME NURU 2ND RESPONDENT

BERTRAND LUBANGA GAYWA 3RD RESPONDENT

*(Being an appeal from the judgment and decree of Hon. W.K. Onkunya,
SRM delivered on 12th May 2021 in Kisumu MCELC No. 28 of 2018)*

JUDGMENT

1. The Appellants filed a suit against the Respondents in this court on 6th September 2016, namely, Kisumu ELCC No. 237 of 2016. The suit was transferred to the lower court sometime in 2018, where it was given a new case number, Kisumu CMC ELC No. 28 of 2018 (hereinafter referred to only as “the lower court”). In their plaint, the Appellants averred that all that parcel of land known as Title No. Kisumu/Chiga/2 (hereinafter referred to as “the suit property”) was at all material times registered in the name of one Henry Aono Onyuro, deceased (hereinafter referred to as “the deceased”). The Appellants averred that the 1st Appellant was the wife of the deceased, while the 2nd Appellant was his son. The Appellants averred that they were the legal representatives of the estate of the deceased.
2. The Appellants averred that the deceased died on 25th October 1984 and that before and after the death of the deceased, they were using the suit property for cultivation. The Appellants averred that on 31st August 2016, they discovered that the 1st Respondent had caused the suit property to be registered in his name on 5th March 1992 and that the property was subsequently transferred to the 2nd and 3rd



Respondents on 27th April 2004 and 16th October 2013, respectively. The Appellants averred that the Respondents caused the suit property to be transferred to their names after the deceased's death, but before a Grant of Letters of Administration in respect of his estate was issued.

3. The Appellants sought judgment against the Respondents for a declaration that the suit property was illegally and fraudulently transferred to the Respondents and an order for the rectification of the register of the property by the cancellation of the entries thereon relating to the Respondents' titles and the restoration of the property to the name of the deceased as the proprietor thereof.
4. The suit was defended by the 3rd Respondent only. The 3rd Respondent averred that he purchased the suit property from the 2nd Respondent in good faith and was given a title and possession thereof. The 3rd Respondent averred that the suit against him was malicious and did not disclose any reasonable cause of action. The 3rd Respondent averred that he was a bona fide purchaser of the suit property without notice of any defect in its title. The 3rd Respondent averred that he had been in possession of the suit property since he acquired the same and that at no time was it used for agricultural purposes as claimed by the Appellants. The 3rd Respondent denied that he acquired the suit property fraudulently.
5. The lower court heard the suit and rendered a judgment on 12th May 2021. The lower court made a finding that the Appellants had not proved their case to the required standard and dismissed their suit with costs to the 3rd Respondent. The court held that the Appellants had failed to prove that the 3rd Respondent acquired the suit property fraudulently. The court found that the 3rd Respondent had demonstrated that he was a bona fide purchaser of the suit property for value without notice of any defect in its title and that if there was any fraud, he was not a party to it.
6. The Appellants were aggrieved by the decision of the lower court and preferred this appeal. In their memorandum of appeal dated 21st May 2021, the Appellants challenged the lower court's judgment on the following grounds:
 1. The Learned Magistrate erred in fact and law by misapprehending and/or ignoring the Appellant's specific prayer in the plaint for a declaration that the suit property was illegally and fraudulently transferred to the Respondents, and concentrated on the fraudulent transfer only, therefore reaching a wrong conclusion and decision.
 2. The Learned Magistrate erred in fact and law as even after having evidence that there was no succession in respect of the estate of Henry Aono (deceased) failed to appreciate that the 1st Respondent acquired a bad title to the suit property from a deceased person without a Grant contrary to Sections 45 (1) and 82 (b)(ii) of the *Law of Succession Act*.
 3. The Learned Magistrate erred in law and fact in failing to appreciate that the 1st Respondent lacked the legal capacity to sell and did not have a good title to the suit property to pass to the 2nd Respondent and subsequently to the 3rd Respondent.
 4. The Learned Magistrate erred in law and fact, even after appreciating the purview of Section 26 of the *Land Registration Act*, misapprehended that the title to the suit property from the 1st Respondent to the 2nd Respondent and finally to the 3rd Respondent was tainted with an illegality and unprocedural process and therefore challengeable.
 5. The Learned Magistrate erred in law and fact in misapprehending that the 3rd Respondent need not know or be a party to an illegality, fraud, or an unprocedural process to vitiate a title acquired by an illegality.



6. The Learned Magistrate erred in law and fact in failing to appreciate that the 1st and 2nd Respondents, having not filed their defence against the Appellants' suit, then the Appellants' allegations against the 1st and 2nd Respondents were uncontroverted and therefore vitiating the 3rd Respondent's title.
 7. The Learned Magistrate erred in law and fact in raising issues and delving into issues that were never pleaded by the 3rd Respondent, and specifically the issue of the 3rd Respondent being a bona fide purchaser of the suit property for value without notice.
 8. The Learned Magistrate erred in law and fact by shifting the burden of proof of a fact proving fraud in the form of a land parcel file from the Respondents to Appellants when it was the 3rd Respondent in possession of the fact, information and knowledge through DW2 (the Land Registrar) who was the custodian of the parcel file and testified on it but did not produce it.
 9. The Learned Magistrate erred in law and fact by finding that the Appellants neither pleaded fraud nor proved fraud in the 1st, 2nd, and 3rd Respondents' respective acquisition of the titles to the suit property.
 10. The Learned Magistrate erred in law by totally disregarding the Appellants' constitutional right to own property by divesting the Appellants' beneficial interest in the suit property.
7. The Appellants prayed that the appeal be allowed and the decision of the lower court be set aside, and substituted with an order granting the prayers that the Appellants had sought in the lower court.
 8. The appeal was argued by way of written submissions.

Appellants' submissions

9. The Appellants filed submissions dated 27th March 2025. The Appellants framed the following issues for determination by the court;
 1. Whether a property of a deceased person could be legally transferred before succession.
 2. The effect of failure by the 1st and 2nd Respondents to defend the suit.
 3. Whether the defense of bona fide purchaser for value suffices in the face of Section 26 of the [Land Registration Act](#) 2012.
 4. Who should bear the costs of the appeal?
10. The Appellants submitted that, this being a first appeal, this court should re-evaluate and analyse the evidence on record afresh to come to its independent conclusion and/or finding on facts. The Appellants submitted that while doing so, the court should be careful and should give allowance for the fact that it did not see the witness testify and run the risk of missing out on the aspect of the demeanor of the witness. In support of this submission, the Appellants cited *Selle & Another v. Associated Motor Boat Co. Ltd.* [1968] E.A 123.
11. On the first issue, the Appellants submitted that Section 45 of the [Law of Succession Act](#) protects the estate of a deceased person. The Appellants submitted that it was common ground that the suit property was registered in the name of the deceased, Henry Aono, as the first registered owner on 14th December 1983, and that the deceased died on 25th October 1984. The Appellants submitted that anything done affecting the estate of the deceased before a Grant is issued amounts to intermeddling, contrary to Section 45 of the [Law of Succession Act](#). In support of this submission, the Appellants relied on *Gladys Nkirotim'itunga v. Julius Majaum'itunga* [2016]eKLR.



12. The Appellants submitted that the only person authorised by law to deal with the estate of a deceased person is the administrator of the estate appointed by the court under Section 82 of the [Law of Succession Act](#). The Appellants submitted that despite the 1st Respondent being served, he failed to appear before the court to defend the suit and explain how the suit property was transferred to his name. The Appellants submitted that the 3rd Respondent never challenged the fact that the deceased died in 1984.
13. On the issue of failure of the 1st and 2nd Respondents to file a defense and tender evidence, the Appellants submitted that a party who alleges the existence of a set of facts has a duty to prove that the facts indeed exist. The Appellants cited Sections 107 and 108 of the [Evidence Act](#) in support of this submission. The Appellants submitted that the only exception to this general rule is where the facts are within the special knowledge of the opposite party. In support of this submission, the Appellants cited Section 112 of the [Evidence Act](#). The Appellants submitted that the 1st Respondent never discharged the burden of proof of how and the circumstances under which the suit property was transferred to him. The Appellants submitted that their case against the 1st Respondent was not controverted. The Appellants submitted that they discharged the burden of proof to the required standard. The Appellants submitted that the land registrar did not help the court with his testimony owing to the fact that he only carried to court the Green Card without the parcel file that contained all the instruments of transfer and documents to support all the entries in the Green Card.
14. The Appellants submitted that none of the Respondents ever took possession of the suit property. The Appellants submitted that the suit property was always in the possession of the Appellants' family, who periodically planted sugarcane and other subsistence crops thereon. The Appellants submitted that they proved that the transfer of the suit property to the 1st Respondent was fraudulent, given the fact that at the time the suit property was transferred to the 1st Respondent, the registered owner thereof was deceased, and succession had not been done. The Appellants submitted that the suit property was transferred to the 3rd Respondent without the consent of the Land Control Board in violation of the express provisions of the [Land Control Act](#), Chapter 302 Laws of Kenya.
15. On the issue of whether the defense of bona fide purchaser for value without notice would suffice in the face of Section 26 of the [Land Registration Act](#), the Appellants submitted that a person who relies on the defence of a bona fide purchaser for value without notice has the burden to prove that he or she acted in good faith. The Appellants submitted that for the defence to succeed, the purchaser must have given due consideration to the transaction and purchased the land without notice of the fraud. In support of this submission, the Appellants relied on *Alice Chemutai Too v. Nickson Kipkirui Korir & 2 Others* [2015]eKLR, *Alberta Mae Gacci v. Attorney General & 4 Others* [2006] e KLR, *Jane Gachoki Gathega v. Priscilla Nyawira Gitumu & Another C.A. Civil Appeal No. 343 and 345 of 2002* [2008]eKLR, *Dina Management Limited v. County Government of Mombasa & 5 Others* (Petition 8 (E010) of 2021) (2023) KESC 30 (KLR) and *Jones v. Smith* (1841) 1 Hare 43.

The 3rd Respondent's submissions

16. The 3rd Respondent filed submissions dated 13th May 2025. The 3rd Respondent submitted that, this being a first appeal, this court, as the first appellate court, must re-evaluate the evidence adduced in the lower court and make its own conclusion based on the applicable law. In support of this submission, the Respondents relied on *Mbae (Suing as the Legal Representative of the Estate Koome Mbae) v. Kinya* (Civil Appeal E018 of 2022) [2024] KEHC 2285 (KLR) (6 March 2024) (Judgment). The 3rd Respondent framed the same issues for determination as the Appellants. On whether a property of a deceased person could be legally transferred before succession, the 3rd Respondent submitted



that the Appellants were phishing (sic) since the Green Card gave the registration history of the suit property, and the same was produced in evidence by the Appellants. The 3rd Respondent submitted that he conducted his due diligence and engaged the services of an advocate who facilitated the transfer of the suit property from the 2nd Respondent to his name. The 3rd Respondent submitted that the property had no encumbrance. In support of this submission, the 3rd Respondent cited *Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) v. Stephen Njoroge Macharia* [2020] KECA 232 (KLR). The 3rd Respondent submitted that the entries on the Green Card take precedence over those in the official search. The 3rd Respondent submitted that no evidence of any land transfer was adduced before the trial court to support the Appellants' argument that there was a fraudulent transfer. The Respondents submitted that the entries on the Green Card were clear on the history of the ownership of the suit property.

17. On the effect of failure by the 1st and 2nd Respondents to defend the suit, the 3rd Respondent submitted that matters of land registration and transactions are best dealt with by looking at the official land registration records that are kept by the land registrar. The 3rd Respondent submitted that the entries on these official land records are prima facie evidence of the history of the ownership of the land and the current actual owner of the land. In support of this submission, the 3rd Respondent cited Section 26 of the *Land Registration Act* 2012, and *Moses Parantai & Peris Wanjiku Mukuru* (supra). The 3rd Respondent submitted that the failure of the 1st and 2nd Respondents to defend the suit was inconsequential to the pertinent issues of the suit, as they had no interest in the matter and would not be affected by the outcome. The 3rd Respondent submitted that the Green Card produced in evidence by the parties was sufficient to prove the 1st and 2nd Respondents' position on the previous ownership of the suit property.
18. On the issue of the defence of bona fide purchaser for value without notice, the 3rd Respondent submitted that a bona fide purchaser is one who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title; one who has in good faith paid valuable consideration for a property without notice of prior adverse claims. In support of this submission, the 3rd Respondent cited the Ugandan case of *Katende v. Haridar & Company Limited* [2008] 2 E.A.173. The 3rd Respondent submitted that the due diligence conducted by him before the purchase of the suit property revealed a free title being held by the 2nd Respondent, with no adverse claims. The 3rd Respondent submitted that he, in good faith, paid valuable consideration for the suit property. The 3rd Respondent submitted he was not privy to the transaction between the 1st Respondent and Henry Aono Onyuro (deceased), and even if he did, he would still have dealt with the 2nd Respondent as he was the registered proprietor of the suit property as of the time of his purchase and therefore this qualified him as a bona fide purchaser for value without notice.
19. The 3rd Respondent submitted that he gave a detailed testimony in the lower court on the due diligence he conducted on the suit land up to and until the time of its purchase and transfer to him. The 3rd Respondent submitted that no evidence of fraud and/or misrepresentation and/or an illegal and/or unprocedural and/or a corrupt scheme had been alluded to by anyone on the part of the 3rd Respondent. The 3rd Respondent submitted that he bought the suit property after a thorough due diligence and paid for it as per the sale agreement produced during his testimony. The 3rd Respondent submitted that his defense of being a bona fide purchaser for value at the lower court was merited and had been substantiated. In support of this submission, the 3rd Respondent cited *Chemei Investments Limited v. The Attorney General & Others*, Nairobi Petition No. 94 of 2005, *Mwangi v. Wambugu* [1984] KLR 453 and *Mwanasokoni v. Kenya Bus Services Ltd* [1985] KLR 931.



20. On the issue of costs, the 3rd Respondent cited Section 27 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya, and Phyllis Wairimu Macharia v. Kiru Tea Factory [2016] KEHC 7259 (KLR) and submitted that he should be awarded the costs of this appeal.

Analysis and Determination

21. I have considered the pleadings and the proceedings of the lower court, the judgment of the court, the grounds of appeal filed by the Appellants, and the submissions by the Appellants and the 3rd Respondent. As correctly submitted by both parties, this being a first appeal, the court must reconsider and reevaluate the evidence on record and draw its conclusions on the issues that were raised for determination before the lower court.

22. In *Gitobu Imanyara & 2 Others v. Attorney General* [2016] KECA 557 (KLR), the Court of Appeal stated as follows on the mandate of the court on a first appeal:

“...this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect. See *Selle and Another v Associated Motor Boat Company Limited and others* [1968] EA 123 and *Williamson Diamonds Ltd. V. Brown* [1970] E.A.L.

As we discharge our mandate of evaluating the evidence placed before the High Court, we keep in mind what the predecessor of this Court said in *Peters –vs- Sunday Post Ltd* [1958] EA 424. In its own words: -

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide.”

23. In *Kenya Ports Authority v. Kuston (Kenya) Limited* [2009] 2EA 212 the Court of Appeal stated that:

“On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

24. On a first appeal, the court will also not interfere with the findings of fact by the trial court unless they were not based on evidence at all, or they were based on a misapprehension of the evidence, or where it is demonstrated that the court acted on wrong principles in reaching its conclusion. See, *Peter v. Sunday Post Ltd.* [1958] E.A 424 and *Makube v. Nyamuro*[1983] KLR 403.

25. In my view, the Appellants’ grounds of appeal raise only three issues for determination, namely;
1. Whether the trial magistrate erred in her finding that the Appellants had not proved their case on a balance of probabilities to warrant the orders sought in their plaint.



2. Whether the trial magistrate erred in her finding that the 3rd Respondent was a bona fide purchaser of the suit property for value, and as such, his title to the suit property was impeachable.
 3. Whether the appeal should be allowed.
26. The Appellants' case in the lower court was straightforward. The Appellants contended that they were the administrators of the estate of Henry Aono Onyuro, deceased, and had brought the suit in that capacity. The Appellants contended that the suit property was at all material times registered in the name of the deceased. The Appellants averred that the deceased died on 25th October 1984. The Appellants averred that they were all along using the suit property for cultivation and continued to do so even after the death of the deceased. The Appellants averred that no grant of letters of administration had been issued in respect of the estate of the deceased, save for the Grant of Letters of Administration Ad Litem that was issued to them on 30th August 2016 for the purposes of filing the lower court suit. The Appellants averred that on 31st August 2016, they learnt that the 1st Respondent had transferred the suit property to his name on 5th March 1992 and subsequently to the 2nd Respondent on 27th April 2004. The Appellants averred that the 2nd Respondent had, in turn, transferred the suit property to the 3rd Respondent on 16th October 2016. The Appellants averred that they discovered these transactions when the 3rd Respondent sent his agents to the suit property on 21st August 2016 to commence development thereon. The Appellants contended that since the suit property was purportedly transferred to the 1st Respondent after the death of the deceased and before succession in respect of his estate was undertaken, the purported transfer was fraudulent and unprocedural, which fraud affected the subsequent transfer of the property to the 2nd and 3rd Respondents. The Appellants asked the lower court to make a declaration that the transfer of the suit property to the 1st Respondent and subsequently to the 2nd and 3rd Respondents was illegal and fraudulent, and the cancellation of the same so that the property was restored to the name of the deceased.
27. The 1st and 2nd Respondents did not defend the lower court suit. The 3rd Respondent's defence was that he was a bona fide purchaser of the suit property for value without notice of any defect in the titles that the previous owners of the property held.
28. In *Kurshed Begum Mirza v. Jackson Kaibunga* [2017] eKLR, the court stated as follows:
- “(16) Turning to the second issue; according to section 107 of the *Evidence Act*, the burden of proof in any case lies with the party who desires any court to give judgment as to any legal right or liability. It is for that party to show that the facts which he alleges his case depends upon exist. This is known as the legal burden.”
29. In *Halsbury's Laws of England*, 4th Edition, Volume 17, at paras 13 and 14, the authors have stated as follows on the burden of proof:
- “13. The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.
 14. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a



particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

30. The suit property was registered under the Registered [Land Act](#), Chapter 300 Laws of Kenya (now repealed). Sections 27, 28, and 143 of the Registered [Land Act](#) provide as follows:

27. Subject to this Act –

- a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;
- b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.

28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –

- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- (b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.

143.

- (1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.
- (2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.

Sections 24, 25, 26, and 80 of the [Land Registration Act](#) 2012, which repealed the Registered [Land Act](#), provide as follows:

24. Subject to this Act—

- a. the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and



- b. the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25.(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.”

26.(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.

80. (1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.

31. Fraud is defined in Black’s Law Dictionary 9th Edition, as follows:

Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a Court of equity, properly



includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another”.

32. In *Vijay Morjaria v. Nansingh Madhusingh Darbar & another* [2000] eKLR, the court (Tunoi JA) stated as follows:

It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

33. In *Railal Gordhanbhai Patel v. Lalji Makanji* [1957] E.A 314, the court stated as follows at page 317:

“Allegation 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.”

34. It is clear from the provisions of the repealed Registered *Land Act*, and the *Land Registration Act* 2012 reproduced above that, a land title can be nullified on the grounds that the same has been acquired through fraud, mistake, misrepresentation, illegality, unprocedurally, or through a corrupt scheme. I am satisfied from the evidence on record that the Appellants proved before the lower court that the 1st Respondent acquired the suit property fraudulently and illegally. The Appellants proved that the 1st Respondent, who was a stranger to them, acquired the suit property after the death of the deceased. The Appellants proved that when the 1st Respondent acquired the suit property, a grant of letters of administration in respect of the estate of the deceased had not been issued, which means that the 1st Respondent did not acquire the suit property from the administrators of the estate of the deceased. Section 79 of the Law of Succession, Chapter 160 Laws of Kenya provides as follows:

35. The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.

Section 45 of the *Law of Succession Act* provides as follows:

45. (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
- (2) Any person who contravenes the provisions of this section shall-
- (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
 - (b) be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

36. The Applicants having proved that the suit property was transferred and registered in the name of the 1st Respondent after the death of the deceased, Henry Aono Onyuro, and before a grant of letters of administration was issued by the court in respect of his estate, the burden of proof shifted to the 1st



Respondent to prove that he acquired the suit property procedurally and lawfully. The 1st Respondent did not defend the suit. The averments of illegality and fraud in the way he acquired the suit property made against him in the plaint were not rebutted. I am not in agreement with the 3rd Respondent that the production of the extract of the register of the suit property showing that the 1st Respondent was one of the previous owners of the suit property after the deceased was sufficient proof of the validity of the 1st Respondent's title. It is now settled that the mere registration of a person and issuance of a title to him in respect of a property is not sufficient proof of the legality of such title when the same is challenged.

37. In *Munyu Maina v. Hiram Gathiha Maina*, Civil Appeal No. 239 of 2009[2013] eKLR, the court stated 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.”

38. The 1st Respondent did not discharge the burden of proof of the legality of his title to the suit property. In the absence of such proof, the lower court should have held that the 1st Respondent acquired the suit property illegally and fraudulently. I agree with the Appellants that the purported transfer and registration of the suit property in the name of the 1st Respondent was illegal and amounted to intermeddling with the property of a deceased person, which is a criminal offence under Section 45(1) and (2) of the *Law of Succession Act*, Chapter 160 Laws of Kenya. Since the 1st Respondent acquired the suit property illegally in contravention of Section 45(1) of the *Law of Succession Act*, Chapter 160 Laws of Kenya, he did not have a valid title in the suit property, which he could pass to the 2nd Respondent. The 1st Respondent's title was a nullity, and as such, void having been acquired illegally. The purported title acquired from the 1st Respondent by the 2nd Respondent, who similarly did not defend the suit, was also null and void since its root was tainted with the same illegality and fraud. The 1st and 2nd Respondents' titles were, in the circumstances, impeachable under Section 26 of the *Land Registration Act* 2012. What of the title that was held by the 3rd Respondent?

39. I have held that the 1st and 2nd Respondents acquired the suit property illegally and fraudulently, and as such, the titles that they held in respect of the suit property were null and void. Could the 2nd Respondent, who held an invalid title in the suit property, pass a good title to the 3rd Respondent? My answer is in the negative. The 3rd Respondent contended that he was an innocent purchaser of the suit property for value without notice of any defect in the titles that were held by the previous owners thereof, particularly the 2nd Respondent, from whom he acquired the property. In *Mwangi James Njehia v. Janetta Wanjiku Mwangi & another* [2021] eKLR, the court stated as follows:

37. In *Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v. Attorney General & 4 Others*, Nairobi Civil Appeal No. 146 of 2014 this Court cited with approval the case of *Katende v. Haridar & Company Ltd* (2008) 2 EA 173, where the Court of Appeal in Uganda held that: -

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly.



For a purchaser to successfully rely on the bona fide doctrine as was held in the case of *Hannington Njuki v William Nyanzi* High Court civil suit number 434 of 1996, he must prove that:

1. he holds a certificate of title;
2. he purchased the property in good faith;
3. he had no knowledge of the fraud;
4. he purchased for valuable consideration;
5. the vendors had apparent valid title;
6. he purchased without notice of any fraud; and
7. he was not party to the fraud.”

40. We nonetheless wish to state that the law, including case law is not static and the above requirements which were crafted over twenty years ago cannot be said to have been cast in stone. We hold the view that (5) above will need to be revisited and the word “apparent” be done away with altogether.

38. We say so because in the recent past and even presently, fraudsters have upped their game and we have come across several cases where Title deeds manufactured in the backstreets have, with collusion of officers in land registries, been transplanted at the Lands Office and intending buyers have been duped to believe that such documents are genuine and on that basis they have “purchased” properties which later turn out to belong to other people when the correct documents mysteriously reappear on the register or the genuine owner show up after seeing strangers on their properties waving other instruments of title. It is the prevalence of these incidents that have necessitated the current overhaul and computerization of the registration systems at the Land Registry in Nairobi.

39. The elephant in the room is whether genuine, legitimate owners of property should be dispossessed of their hard earned property, because a party has “purchased” the property on the basis of an “apparent title” at the land registry which had been transplanted in place of the genuine title, only for the genuine one to reemerge after the transaction? In our view, no legitimate owner of property should be divested of their property unlawfully, under the guise that the “purchaser” was duped to buy land which he/she could have believed to be genuinely owned by the person holding himself out as the vendor.”

41. The Appellants, who are the administrators of the estate of the deceased legitimate owner of the suit property, cannot be divested of the suit property on account of the illegal title that the 3rd Respondent obtained from the 2nd Respondent, who had obtained his illegal title from the 1st Respondent, who acquired the property from the deceased illegally and fraudulently. This is the correct legal position, notwithstanding that the 3rd Respondent was an innocent purchaser of the suit property without notice of the fraud and illegality. In *Alberta Mae Gacie v. Attorney General & 4 Others* [2006] eKLR, the court stated as follows:

“Cursed should be the day when any crook in the streets of Nairobi or any town in this jurisdiction, using forgery, deceit or any kind of fraud, would acquire a legal and valid title deceitfully snatched from a legal registered innocent proprietor. Indeed, cursed would be the day when such a crook would have the legal capability or competence to pass to a third party, innocent or otherwise, a land interest that he does not have even if it were for valuable



consideration. For my part, I would want to think that such a time when this court would be called upon to defend such crooks, has not come and shall never come...”

42. As stated earlier, the title that was held by the 1st Respondent was fraudulent, illegal, null, and void. The 1st Respondent had no legal interest in the suit properties that he could pass to the 2nd Respondent. The tile that the 2nd Respondent obtained from the 1st Respondent was a nullity. This is what the 3rd Respondent acquired from the 2nd Respondent. In *Wambui v. Mwangi & 3 others*, (Civil Appeal 465 of 2019) [2021] KECA 144 (KLR) the Court of Appeal stated as follows:

“Sixth, the title was also tainted with nullity in that the court process on the basis of which the title to the suit property was anchored was subsequently declared null and void ab initio. The position in law as we have already highlighted above is that anything founded on nullity is also null and void and of no consequence. The title allegedly vested in the 3rd respondent and subsequently passed on to the appellant having stemmed from court proceedings that were subsequently declared null and void also stood vitiated by the same nullity and of no consequence. The Judge cannot therefore be faulted for stating the correct position in law in the manner done.

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

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

43. It is my finding from the foregoing that the 3rd Respondent held a null and void title in the suit property, however innocently acquired. The title being a nullity was impeachable under the provisions of the Registered *Land Act* and the *Land Registration Act* reproduced above, and that should have been the finding of the lower court. The lower court in its judgment found that the Appellants failed to prove that the 3rd Respondent acquired the suit property fraudulently. The lower court also found that the 3rd Respondent had demonstrated that he was a bona fide purchaser of the suit property for value without notice of any defect in its title.

44. As I have held above, the fact that the 3rd Respondent acquired the suit property in good faith for valuable consideration did not shield his title from impeachment. The titles held by the 1st and 2nd Respondents were nullities. The 2nd Respondent had no legal interest in the suit property, which he could pass to the 3rd Respondent. In *Macfoy v. United Africa Co. Ltd.*[1961] 3 All E.R 1169, Lord Denning stated as follows at page 1172 concerning an act which is a nullity:

“If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the Court to declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse”.



45. The lower court failed to appreciate that a void title, even if acquired for value without notice, does not confer proprietorship interest in land. The lower court erred in its finding that the Appellants did not prove their case because they did not prove that the 3rd Respondent was involved in the fraud through which the suit property was transferred from the deceased to the 1st Respondent. The Appellants having proved that the transfer of the suit property from the deceased to the 1st Respondent was fraudulent, that fraud rendered void not only the title that was held by the 1st Respondent, but also that which was transferred to the 2nd and 3rd Respondents as they were tainted with the same illegality and fraud. I agree with the Appellants that the 3rd Respondent's title could not be saved by the doctrine of innocent purchaser for value without notice, as the 1st and 2nd Respondents had no valid title in the property to transfer to the 3rd Respondent.
46. It is my finding that the lower court erred in its finding that the 3rd Respondent's title in the suit property was absolute and indefeasible.

Conclusion

47. In conclusion, I find merit in the appeal before me. The judgment of the lower court delivered by W.K.Onkunya SRM on 12th May 2021, dismissing the Appellants' suit in the lower court with costs, is set aside, and substituted with a judgment in favour of the Appellants against the Respondents in terms of prayers (a) and (b) in the plaint dated 5th September 2016. For the avoidance of doubt, the suit property shall be restored in the name of the deceased, Henery Aono. The Appellants shall have the costs of the appeal, and the lower court suit to be paid by the 1st and 2nd Respondents.

DELIVERED AND SIGNED AT KISUMU ON THIS 30TH DAY OF OCTOBER 2025

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Raburu h/b for Mr. Omondi for the Appellant

Mr. Wesonga for the 3rd Respondent

Ms. Anne-Court Assistant

