

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**  
**ELC APPEAL NO. E048 OF 2024**

SAMMY AREKAI SARICH .....1<sup>ST</sup> APPELLANT  
MARY JELAGAT SARICH.....2<sup>ND</sup> APPELLANT

-VERSUS-

PETER GATHIGI MARIGI.....1<sup>ST</sup> RESPONDENT  
JOAN NJERI KAGEMA.....2<sup>ND</sup> RESPONDENT  
JULIUS OKELLO WAMAYA.....3<sup>RD</sup> RESPONDENT  
DANIEL GICHURU MARIGI.....4<sup>TH</sup> RESPONDENT  
THE LAND REGISTRAR, KAJIADO NORTH.....5<sup>TH</sup> RESPONDENT

**JUDGEMENT**

**Background**

1. This judgment is in respect of an appeal lodged by the Appellants herein, being dissatisfied with the judgment and decree of the Honourable Helen C. Maritim (SRM), delivered on 15th November 2024 in Ngong **MCELC Case No. E033 of 2021**.
2. The dispute before the trial court revolved around the ownership and transfer of the parcel of land known as **NGONG/NGONG/3142**. The Appellants had entered into a written Sale Agreement with the 1st and 4th Respondents on **29th November 2008** for the purchase of two adjoining parcels, including the suit property, at a total consideration of **Kenya Shillings One Million Fifty Thousand (KShs. 1,050,000/=)**. Pursuant to the said agreement, the Appellants paid a substantial portion of the purchase price amounting to **Kenya Shillings Seven Hundred Seventy Thousand (KShs. 770,000/=)**, leaving a balance of **Kenya Shillings Two Hundred Eighty Thousand (KShs. 280,000/=)**.

3. The Appellants contended before the trial court that they had duly complied with their contractual obligations, including part-payment, possession of the property, and readiness to complete the transaction. They maintained that despite these efforts, the 1st and 4th Respondents, without notice or just cause, purportedly rescinded the contract and unlawfully transferred the suit parcel to the 2nd and 3rd Respondents.
4. The Learned Trial Magistrate, upon considering the evidence, dismissed the Appellants' claim. The court held that the contract between the parties had automatically rescinded owing to the Appellants' failure to pay the balance of the purchase price; that the subsequent transfer of the suit property to the 2nd and 3rd Respondents was not tainted by fraud; and that the said Respondents were bona fide purchasers for value without notice. The trial court consequently dismissed the Appellants' prayer for specific performance.
5. Aggrieved by the said findings, the Appellants lodged their Memorandum of Appeal dated 19th November 2024 before this court raising the following grounds:
  - a) **THAT** the Learned Magistrate erred in law and fact in her interpretation of the Contract for the sale of land between the Appellants and the 1st and 4th Respondents with regard to the completion conditions.
  - b) **THAT** the Learned Magistrate erred in law and fact in concluding that failure to pay the balance of the purchase price by the Appellants automatically voided the entire agreement without considering the full circumstances and the intent of the parties.
  - c) **THAT** the Learned Magistrate erred in law and fact in concluding that the contract automatically rescinded.

- d) **THAT** the Learned Magistrate erred in law and fact in finding that the transfer of the suit parcel to the 2nd and 3rd Respondents was not done fraudulently by the 1st and 4th Respondents.
- e) **THAT** the Learned Magistrate erred in law and fact in dismissing the Appellants' claim for specific performance by failing to consider their compliance with key conditions of the contract including payment and willingness to complete the transaction.
- f) **THAT** the Learned Magistrate erred in law and fact in finding that the property did not pass to the Appellants by virtue of the act of the 1st and 4th Respondents not surrendering the Title Deed of the suit parcel to the Appellants.
- g) **THAT** the Learned Magistrate erred in law and fact by ignoring the evidence of the certified copy of the Green Card of the suit parcel showing entries of transfer were made in favour of the Appellants.
- h) **THAT** the Learned Magistrate erred in law and fact in finding that the suit property was available to pass to the 2nd and 3rd Respondents who failed to investigate the ownership chain sufficiently.
- i) **THAT** the Learned Magistrate erred in law and fact by misapplying the principle of indefeasibility of title which allows a Title Deed to be challenged on grounds of fraud.
- j) **THAT** the Learned Magistrate erred in law and fact in holding that the 2nd and 3rd Respondents are the bona fide purchasers and owners of the suit parcel, disregarding the fraudulent nature of the transfer, specifically the 5th Respondent's actions in prior cancellation of entries on the Green Card and the subsequent

transfer which was improper and should not benefit from prima facie evidence of ownership.

6. Consequently, the Appellants pray that the judgment and decree of the trial court be set aside in its entirety, and that judgment be entered in their favour as per the reliefs sought in their Further Amended Plaint dated 26th April 2023. In the said amended Plaint, the Appellants sought the following substantive orders:

- a. A declaration that the Appellants are the proprietors and bona fide owners of the property known as **NGONG/NGONG/31482**.
- b. A declaration that the registration of the transfer of the property **NGONG/NGONG/31482** in favour of the 2nd and 3rd Respondents was fraudulent and therefore void.
- c. An order directing the Land Registrar, Kajiado North Registry, or such other competent officer, to cancel the entry of the transfer in favour of the 2nd and 3rd Respondents on the Green Card of the property and to revoke the Title Deed issued to the 2nd and 3rd Respondents on 25th September 2013.
- d. An order directing the Land Registrar, Kajiado North Registry, to rectify the records and/or register at the Land Registry, Ngong, so as to read that the Appellants are the registered proprietors of the property known as **NGONG/NGONG/31482**.
- e. An order directing the Land Registrar, Kajiado North Registry, to reissue and/or issue a new Title Deed to the property **NGONG/NGONG/31482** in favour of the Appellants.

- f. An order empowering the Land Registrar, Kajiado North Registry, to enforce and/or perform any other order issued by the Court including execution of transfer documents in favour of the Appellants.
  - g. A permanent injunction restraining the 1st, 2nd, 3rd and 4th Respondents, their agents, servants or whosoever from entering upon or in any way dealing with the suit property.
  - h. An order directing the 2nd and 3rd Respondents to pay general damages to the Appellants for trespass.
  - i. Costs of the suit together with interest thereon at such rate and for such period as the Court may deem fit to order.
7. It is against this backdrop that the Appellants now seek the intervention of this Court to grant them the remedies they contend they are lawfully entitled to.

#### **Directions by the Court**

8. The court directed that the appeal be canvassed by way of written submissions. The parties complied by filing their respective submissions. The court has had occasion to read and consider the submissions in the writing of this judgement.

#### **Analysis of Submissions**

9. The appellants in their submissions contend that the trial court erred in its interpretation and application of both contractual and land law principles. They maintain that the learned magistrate misdirected herself in finding that the agreement for sale between them and the 1st respondent was automatically rescinded for non-payment of the balance of the purchase price. It is their case that under section 39 of the Land Act, a

contract for the disposition of land cannot be unilaterally rescinded without written notice where time has not been expressly made of the essence.

10. The appellants cite the Court of Appeal decision in *Gurdev Singh Birdi & Another v Abubakar Madhbuti [1997] KECA 89 (KLR)*, which restated that time is not of the essence in land contracts unless expressly stipulated or made so by notice. The appellants argue that no such notice was ever issued by the 1st respondent and that they had, in any event, substantially performed their obligations by paying part of the purchase price, obtaining the necessary land control board consent, paying stamp duty, and taking possession of the property. They further submit that the 1st respondent's subsequent sale of the same property to the 2nd and 3rd respondents, without notice to them, amounted to a breach of contract and the equitable duty to act in good faith. In their view, the burden of proving rescission lay with the 1st respondent pursuant to **section 109 of the Evidence Act**, and such burden was not discharged.
11. The appellants also advance the argument that the trial court erred in declining to grant specific performance. They submit that they had at all times been ready and willing to complete the transaction, but that completion was frustrated by the 1st respondent's failure to surrender the second title deed for transfer. To support this position, they rely on authorities including *Nga'nga & 4 Others v M'Arimi [2023] KEELC 21759 (KLR)*, *Macharia Mwangi Maina & Others v Davidson Mwangi Kagiri [2014] eKLR*, and *Thomas Openda v Peter Martin [1984] eKLR*, all of which, according to them, affirm the principle that part performance and possession justify the equitable remedy of specific performance where damages would not be an adequate remedy. They assert that their

continuous possession and development of the property since 2009 demonstrate good faith and substantial compliance with the agreement.

12. The appellants further challenge the trial court's acceptance of the 5th respondent's administrative action in cancelling the entries in the register. They argue that once the Green Card reflected their ownership on 30th January 2009, they acquired proprietary rights that could not lawfully be cancelled without due process. They cite **section 35(2)** and **section 107** of the **Land Registration Act**, **Article 47** of the Constitution, and **section 4(3)** of the **Fair Administrative Action Act**, which collectively provide for procedural fairness in administrative decisions. To reinforce this point, they refer to *Lawrence Muriithi Mbabu v District Land Registrar, Nyeri [2019] eKLR* and *Kuria Greens Ltd v Registrar of Titles [2011] eKLR*, where courts emphasized that land registrars lack authority to revoke registered titles without prior notice and an opportunity to be heard. The appellants maintain that the 5th respondent acted outside the scope of his statutory powers and that the cancellation was therefore unlawful.

13. Another key plank of the appellants' case is the assertion that the 2nd and 3rd respondents were not bona fide purchasers for value. They rely on the decision of the Supreme Court in *Dina Management Ltd v County Government of Mombasa [2023] KESC 30*, which outlines the three essential elements of bona fide purchase: **acquisition of a valid title, exercise of due diligence, and payment of valuable consideration**. They also invoke *Arthi Highway Developers Ltd v West End Butchery Ltd [2015] eKLR* and *Lwanga v Mubiru [2024] UGSC 7* to emphasize that a purchaser cannot rely on the doctrine where reasonable inquiry was not made.

14. The appellants state that the 2nd and 3rd respondents failed to conduct an official search prior to purchase, did not produce documentary proof of completion such as transfer forms, consents, and receipts, and did not inquire into the appellants' visible possession of the property. In their submission, such omissions negate the defence of bona fide purchase under **Section 26(1) of the Land Registration Act and Article 40(6) of the Constitution.**
15. The appellants also question the validity of the transfer to the 2nd and 3rd respondents, terming it fraudulent and void. They submit that entries in the Green Card already reflected their ownership at the time the transfer was purportedly effected, and that the sale contravened section 6 of the Land Control Act as no fresh consent of the Land Control Board was obtained. They rely on *Munyu Maina v Hiram Gathiha Maina [2013] eKLR* and *Funzi Development Ltd v County Council of Kwale [2014] eKLR*, both of which recognize that indefeasibility of title does not extend to property acquired illegally, unprocedurally, or through a corrupt scheme. On this basis, the appellants argue that the 2nd and 3rd respondents' titles are incapable of statutory protection and should be cancelled.
16. In their submissions, the 1st and 4th respondents begin by challenging the very foundation of the appeal, asserting that the record of appeal filed by the appellants is materially defective. They submit that crucial documents from the lower court proceedings were omitted, including their complete pleadings, the original defence, and the full set of submissions filed at trial. It is their contention that these omissions are not mere procedural oversights but deliberate attempts to obscure material evidence from the appellate court's consideration. The respondents therefore urge the court to find that

the appeal, being founded on an incomplete record, is fatally defective and liable to be dismissed on that basis. They premise this argument on the principle that an appellate court's jurisdiction is properly invoked only through a complete and accurate record, enabling the court to review all matters contested before the lower court.

17. On the substantive issues, the respondents restate the factual background of the dispute as one arising from a sale agreement executed on 29th November 2008 between the appellants as purchasers and themselves as vendors for two parcels of land — **Ngong/Ngong/31482** and **Ngong/Ngong/31483** — at a total purchase price of Kshs. 1,050,000, each plot being valued at Kshs. 525,000. They submit that the appellants paid Kshs. 770,000 in total, leaving a balance of Kshs. 280,000 outstanding. The respondents emphasize that the 1st appellant, during cross-examination in the trial court, candidly admitted that she did not complete the payment of the purchase price. Relying on clause 6 of the sale agreement, they argue that full payment of the purchase price was a condition precedent to the transfer of the title deed, which was to be “surrendered on full payment of the purchase price less deposit paid therefore.” Consequently, they maintain that the appellants’ failure to discharge this obligation constituted a fundamental breach going to the root of the contract.

18. The 1st and 4th respondents further aver that despite repeated demands for payment over a period of one and a half years — during which the 1st respondent personally visited the 1st appellant’s business premises — the appellants remained non-committal, with the 1st appellant remarking that land was not a priority at the time. The respondents assert that, in good faith, they nonetheless released the title for the first plot, **Ngong/Ngong/31483**, upon its full payment. However, following the continued default

with respect to the second plot, Ngong/Ngong/31482, they instructed the Land Registrar to cancel the transfer process. The Registrar duly complied and returned the original title deed in the 1st and 4th respondents' names, whereafter they resold the parcel to the 2nd and 3rd respondents in 2010. The latter, they contend, took possession immediately, developed the property, and have remained in occupation without interruption to date. They also submitted that they offered to refund Kshs. 245,000 — the amount paid by the appellants towards the second plot — but that the appellants declined to provide account details for purposes of the refund.

19. In addressing the legal implications of these facts, the respondents agree with the trial magistrate's conclusion that the appellants' failure to pay the full purchase price amounted to a fundamental breach, thereby entitling the vendors to treat the contract as rescinded. They rely on the statutory principle under the **Sale of Goods Act**, particularly **sections 3(4) and 3(5)**, which provide that an agreement to sell becomes a sale only when the conditions are fulfilled subject to which the property is to pass. They submit that, since the payment of the full purchase price was such a condition precedent, the property in Ngong/Ngong/31482 never passed to the appellants.
20. They place reliance on judicial authority to fortify this position. They cite the decision in *Moses Parantai & Peris Wanjiku Mukuru (suing as legal representatives of the estate of Sospeter Mukuru Mbeere (Deceased)) v Stephen Njoroge Mcharia [2020] KECA 232 (KLR)*, wherein the Court of Appeal reiterated that a first appellate court must re-evaluate the evidence and reach its own independent conclusion, bearing in mind that it did not see or hear the witnesses. They also draw guidance from *Kamau v Mungai [2006] 1 KLR 15*, which the appellate court in *Parantai* approved, underscoring the

standard of review applicable in appeals from subordinate courts. These authorities, they argue, define the duty of this court in its reappraisal of the record — a process that, in their view, must yield the same finding as the trial court given the uncontroverted evidence of breach and default.

21. On the allegation of fraud, the 1st and 4th respondents categorically deny any wrongdoing. They maintain that the subsequent transfer to the 2nd and 3rd respondents was legitimate and supported by proper documentation, given that the title for Ngong/Ngong/31482 had never lawfully passed to the appellants. They note that fraud must be strictly proved to a standard higher than a balance of probabilities but lower than beyond reasonable doubt, citing the well-established principle in *R. G. Patel v Lalji Makanji [1957] EA 314*, which holds that allegations of fraud must be strictly proved and cannot rest on mere suspicion. The respondents argue that no such proof was tendered at trial, as the appellants failed to show any collusion, forgery, or unlawful dealings on the part of the vendors or the Land Registrar. The cancellation of the transfer, they contend, was done in accordance with the law since the property had never been fully paid for and the transfer process was incomplete.

22. Through these submissions, the respondents invite the appellate court to view the appellants' case as one of self-inflicted misfortune arising from non-performance of contractual obligations rather than from any illegality or fraud. They emphasize that equity does not assist the indolent and that parties seeking specific performance must themselves demonstrate readiness and willingness to perform their part of the bargain. They rely on the equitable maxim that he who comes to equity must come with clean

hands, suggesting that the appellants, having admitted default, are estopped from seeking equitable relief such as cancellation of titles or reinstatement of ownership.

23. The respondents thus pose several key questions for the court's consideration: whether the appeal is competent in view of the alleged omissions in the record; whether failure to pay the full purchase price constituted a fundamental breach entitling rescission; whether the transfer to the 2nd and 3rd respondents was tainted by fraud; and whether any equitable relief can issue in favour of a defaulting party. The submissions present these questions without concession, urging the court to affirm the trial court's reasoning on both law and fact.

24. The 2nd and 3rd respondents' submissions generally aim to fortify the sanctity of their title and shielding it from challenge on the two pillars of statutory protection under the Section 26 of the Land Registration Act and the equitable doctrine of bona fide purchase for value without notice. Their argument proceeds from the premise that they lawfully acquired the property— referred to in their submissions as Title No. Ngong/Ngong/31483 — from the 1st respondent on 6th March 2010, having paid the full purchase price and been duly registered as proprietors. They present themselves as innocent purchasers whose ownership is insulated from prior disputes between the appellants and the original vendors.

25. The 2nd and 3rd respondents recount that the 1st respondent had previously entered into a sale agreement with the appellants in November 2008, but that transaction never matured into transfer because the appellants defaulted on the payment of Kshs. 280,000. In the 1st respondent's testimony before the trial court, they confirmed that the initial sale had effectively "aborted," leaving the vendors free to dispose of the land to new

purchasers. The 2nd and 3rd respondents assert that they came into the transaction thereafter, paid the entire purchase price, and obtained a clean title without notice of any prior encumbrance, dispute, or defect.

26. Legally, the respondents anchor their case on **Section 26(1) of the Land Registration Act, No. 3 of 2012**, which provides that a certificate of title issued by the Registrar is to be taken as conclusive evidence of proprietorship and that such title is not subject to challenge except on limited grounds — namely, fraud or misrepresentation to which the proprietor is proved to be a party, or where the title was acquired illegally, unprocedurally, or through a corrupt scheme. They emphasize that the Kenyan land registration system is premised on the doctrine of indefeasibility of title, which accords primacy to registration as the ultimate guarantee of ownership. In their view, registration confers absolute and indefeasible ownership, and the state, through the system of statutory indemnity, provides monetary compensation to any person wrongfully deprived of land due to inaccuracies in the register.

27. On this footing, they argue that their title, having been acquired through a lawful transfer and in good faith, cannot be impeached merely on account of the appellants' uncompleted prior agreement. They submit that a registered proprietor's title can only be set aside upon strict proof of fraud or illegality to which that proprietor was directly a party — a threshold that the appellants have not met. In support of this position, they rely on the decision in *Joseph Arap Ngok v Justice Moiwo Ole Keiwua & 5 Others, Civil Appeal No. 60 of 1997*, where the Court of Appeal held that under the registered land system, title is conferred by registration, and that once a person becomes a registered proprietor, their ownership cannot be defeated except as provided by law. The Court in

that case underscored that the title of a bona fide purchaser for value without notice can only be impugned by proof of fraud or misrepresentation involving the proprietor.

28. The respondents further submit that they fall squarely within the category of bona fide purchasers for value without notice. They contend that they purchased the land in good faith, for valuable consideration, from a person who appeared to be the lawful owner; that they conducted due diligence before the transaction; and that they had no notice, actual or constructive, of any prior interest claimed by the appellants. They emphasize that the sale was conducted transparently, with all requisite documents executed and the transfer registered by the Land Registrar. They assert that the appellants tendered no evidence of bad faith or collusion that would displace their status as bona fide purchasers for value without notice.

29. A central part of their argument is the absence of any pleaded or proved fraud against them. The respondents point out that the amended plaint before the lower court contained no particularized allegations of fraud against the 2nd and 3rd respondents. The allegations of impropriety, they submit, were directed solely at the 1st and 4th respondents and the process of transfer, not at them as subsequent purchasers. In the absence of specific pleadings and proof, they maintain that they cannot be held liable for fraud. To fortify this submission, they invoke the definition of “fraud” in **Black’s Law Dictionary, 9th Edition**, describing it as a deceitful practice or willful device intended to deprive another of a right or cause injury — an intentional act distinct from negligence or error. They argue that since they were neither privy to the initial transaction nor aware of its details, they could not possibly have engaged in deceitful conduct within this definition.

30. The respondents insist that whatever procedural dispute existed between the appellants and the 1st and 4th respondents did not taint their acquisition of title, which was completed in accordance with the formal requirements of the Land Registration Act. They assert that any grievances arising from the earlier sale agreement or from the Registrar's administrative acts cannot dislodge a subsequently registered title acquired for value and in good faith.
31. The 2nd and 3rd respondents urge the court to uphold the trial court's finding that their ownership is valid and protected under section 26 of the Land Registration Act. They contend that since no fraud or illegality has been proved against them, and since they remain the registered proprietors of the suit property, their title is indefeasible. The appellants' claim, they argue, is a contractual dispute that may only entitle them, if at all, to monetary compensation against the original vendors, not to a reversal of registration. They therefore pray that the appeal be dismissed with costs, maintaining that the sanctity of title and the protection accorded to bona fide purchasers for value are fundamental tenets of land law which the court should preserve.
32. The Appellants' Further Submissions are structured as a detailed rejoinder to the responses filed by the 1st, 2nd, 3rd, and 4th Respondents, and seek to address what the Appellants term as "new and misleading issues of fact and law" introduced in the Respondents' submissions. The Appellants assert that these submissions, filed outside the court's prescribed timelines, distort both the factual record and the governing legal principles.
33. The Appellants submit that the 1st and 4th Respondents have attempted to introduce unpleaded factual allegations — notably, the claim that the 1st Appellant had orally

indicated that “land was not a priority” and that the 1st Respondent allegedly offered a refund of the deposit. The Appellants contend that no such evidence was adduced before the trial court, and that these claims were neither pleaded nor corroborated by the 1st Respondent’s testimony during cross-examination. They emphasize that the purported offer of refund only arose after the institution of the suit, as evidenced by the 1st Respondent’s advocate’s letter that was produced before the lower court.

34. The Appellants further argue that the Respondents have distorted the contractual framework of the disputed transaction. They maintain that the *Agreement for Sale dated 29th November 2008* was a single and indivisible contract for the purchase of both parcels at a total consideration of KShs. 1,050,000. The attempts by the Respondents to portray it as two separate transactions are described as “afterthoughts,” allegedly intended to justify the subsequent sale of one of the parcels, **Ngong/Ngong/31482**, to the 2nd and 3rd Respondents. In their view, the Appellants’ partial performance — payment of the purchase price, taking possession, and carrying out related obligations — was consistent with the performance of one composite agreement.

35. The Appellants also clarify the subject matter of the dispute, noting that the 1st and 4th Respondents’ repeated reference to parcel **Ngong/Ngong/34482** is erroneous. They assert that their claim concerns only **Ngong/Ngong/31482**, and that their registration as proprietors of this parcel was unlawfully cancelled, thereby precipitating the present appeal. They urge the Court to disregard submissions predicated on what they characterize as a “false premise.” In support of the principle that parties are bound by their pleadings, they invoke the authority of *Independent Electoral and Boundaries Commission v Stephen Mutinda Mule & 3 Others [2014] eKLR*, where the Court of

Appeal held that parties cannot introduce unpleaded matters at the submission stage, as such evidence “goes to no issue.”

36. On the question of the alleged unlawful cancellation of their interest, the Appellants maintain that they discharged the evidentiary burden of proving fraud by producing a certified copy of the green card, which, under **Section 35(2) of the Land Registration Act, 2012**, constitutes *prima facie* evidence of the parcel file’s contents. The entries therein, they assert, confirm that as of 30th January 2009, the Appellants were the duly registered proprietors. They argue that the subsequent cancellation of their registration and substitution with entries in favour of the 2nd and 3rd Respondents was done by the Land Registrar without any supporting documentation, notice, or court order — a process they term clandestine and ultra vires.

37. The Appellants further challenge the Respondents’ assertion that the 1st Respondent could verbally instruct the Land Registrar to reverse or halt registration. They characterize this position as legally untenable and contrary to the integrity of the land registration system. They submit that once a registrable interest has been created through the lodgment of transfer documents and entries made on the register, it cannot be nullified by oral instruction. They contend that any cancellation must follow due process, including notice to affected parties and, where appropriate, a court order. Citing *Lawrence Muriithi Mbabu v District Land Registrar, Nyeri & another; John Githu Kinyua (Interested Party) [2019] eKLR*, they argue that the Registrar lacks authority to cancel a title without adherence to procedural fairness as enshrined in **Article 47 of the Constitution** and the **Fair Administrative Action Act**.

38. The Appellants next address the claim by the 2nd and 3rd Respondents that they are bona fide purchasers for value without notice. They submit that this argument is overly simplistic and legally incomplete, as it fails to consider the concept of constructive notice. Relying on the Supreme Court decision in *Dina Management Limited v County Government of Mombasa & 5 Others [2023] KESC 30 (KLR)*, the Appellants stress that bona fide purchaser status is contingent upon the purchaser conducting due diligence to establish ownership, and that the burden of proving such status lies with the purchaser. They argue that the 2nd and 3rd Respondents failed to produce an official search certificate or any documentation evidencing such due diligence.
39. The Appellants also highlight their possession of the property at the time of the second sale, contending that such possession ought to have triggered inquiry by a prudent purchaser. Their continued occupation, they assert, placed the 2nd and 3rd Respondents on constructive notice of their interest. They cite *Wambugu v Ng'ethe [2022] KEELC 2542 (KLR)*, where the court held that a purchaser who fails to make inquiries from persons in possession cannot claim the protection of a bona fide purchaser.
40. In response to the Respondents' position that specific performance is unavailable, the Appellants maintain that this argument collapses once the defence of bona fide purchase fails. They submit that the 2nd and 3rd Respondents' title, tainted by procedural irregularity and constructive notice of prior interests, is impeachable under **Section 26 of the Land Registration Act**. They argue that equity should intervene to compel performance of the original contract rather than allow parties to benefit from fraudulent or negligent conduct. Citing the equitable maxims "he who seeks equity must do equity" and "equity aids the vigilant," the Appellants argue that their conduct — paying a

deposit, taking possession, and fulfilling obligations — demonstrates fairness and diligence, in contrast to what they describe as the Respondents' indolence and lack of candour.

41. The Appellants reiterate that the Respondents' submissions have failed to dislodge the core grounds of appeal or to explain the procedural improprieties in the cancellation and transfer of title. They urge the Court to find that the learned magistrate erred in law and fact in holding that the contract was properly rescinded, that the Appellants had not established a case for specific performance, and that the subsequent transfer was valid. They pray that the judgment and decree of the lower court be set aside, the agreement for sale of 29th November 2008 be specifically performed, the title in favour of the 2nd and 3rd Respondents be cancelled, and the Appellants be registered as absolute proprietors of **Ngong/Ngong/31482**. In the alternative, they seek damages for breach of contract and fraud, together with costs in both courts.

42. It is worth pointing out that this court did not consider the further written submissions of the 2nd and 3rd respondents which were filed without leave of the court. In any event given that this is the appellants' appeal, they are the ones entitled to the final word.

#### **Issues for Determination**

43. In framing the issues for determination, this court is conscious of its responsibilities as the first appellate court. Mativo J (as he then was) in *Mursal & another v Manese (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR) (6 April 2022) (Judgment)* held that,

*"A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on*

*whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in *Selle & another v Associated Motor Boat Co. Ltd.& others* and in *Peters v Sunday Post Limited*. A first appellate court has jurisdiction to reverse or affirm the findings of the trial court. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it.*

*A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. While considering the*

*scope of Section 78 of Civil Procedure Act, a court of first appeal can appreciate the entire evidence and come to a different conclusion."*

44. Having carefully considered the Memorandum of Appeal, the record of the trial court, and the submissions by the Parties, the main question is whether this appeal is merited. In resolving that question, the following issues arise for determination:

- I) *Whether the appeal is competent in light of the 1st and 4th Respondents' contention that the Record of Appeal is incomplete*
- II) *Whether the trial court erred in law and fact in holding that the contract for sale of land between the Appellants and the 1st and 4th Respondents was automatically rescinded.*
- III) *Whether the transfer of the suit property to the 2nd and 3rd Respondents was tainted with fraud and whether the appellants herein can properly be regarded as bona fide purchasers for value without notice.*
- IV) *Whether the Appellants are entitled to the equitable remedy of specific performance in respect of the agreement for sale of the suit property.*
- V) *Whether the Appellants are entitled to the orders sought in this appeal, and who should bear the costs of the appeal.*

#### Analysis and Determination

- I) *Whether the appeal is competent in light of the 1st and 4th Respondents' contention that the Record of Appeal is incomplete.*

45. Order 42 Rule 13(4) of the Civil Procedure Rules, 2010 outlines the documents that must form part of the record of appeal before the appeal can be set down for hearing. The Rule provides that:

*“Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—*

- (a) the memorandum of appeal;*
- (b) the pleadings;*
- (c) the notes of the trial magistrate made at the hearing;*
- (d) the transcript of any official shorthand, typist notes, electronic recording or palantypist notes made at the hearing;*
- (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;*
- (f) the judgment, order or decree appealed from; and*
- (g) where appropriate, the order (if any) giving leave to appeal.”*

46. The 1st and 4th Respondents submitted that the appeal is incompetent for want of a complete record, asserting that it lacks certain documents, namely the original defence, complete pleadings, and the full set of submissions.

47. It is the Court’s view that the documents identified by the Respondents are not strictly speaking primary documents within the meaning of Order 42 Rule 13(4). The memorandum of appeal, judgment, decree, pleadings, and proceedings—which constitute the essential components of the record—are duly contained in the file. Moreover, this Court has access to the original trial court record, from which any missing document can be referred to for purposes of a just determination of the appeal.

48. Accordingly, the Court finds that the omission alleged does not go to the root of the appeal, and the appeal is competent for hearing and determination on its merits.

II) Whether the trial court erred in law and fact in holding that the contract for sale of land between the Appellants and the 1st and 4th Respondents was automatically rescinded.

49. The Land Act, 2012 provides a comprehensive statutory framework governing rescission of contracts for the sale of land. Section 39 stipulates that:

*“If, under a contract for the sale of land, the purchaser has entered into possession of the land, the vendor may exercise his or her contractual right to rescind the contract by reason of a breach of the contract by the purchaser by—*

*(a) resuming possession of the land peaceably; or*

*(b) obtaining an order for possession of the land from the court in accordance with the provisions of section 41.”*

50. Section 41 of the Act requires the vendor to serve a completion or default notice in the following terms:

*“(1) A vendor who proposes to seek to regain possession of private land under section 39, shall serve a notice on the purchaser which shall inform the purchaser*

*—*  
*(a) of the nature and extent of the breach by the purchaser of the contract for the sale of land concerned;*

*(b) of the action that must be taken by the purchaser to rectify the breach;*

*(c) the time, being not less than thirty days, within which the actions referred to in paragraph (b) must be completed by the purchaser;*

*(d) the consequence that if the breach is not rectified within the time specified in the notice, the vendor will seek to regain possession of the land and rescind the contract;* *and*

*(e) of the consequence where the purchaser fails to remedy the breach within the time specified in the notice, the vendor may seek an order from the court to possess the land and rescind the contract.”*

51. In *Mwangi v Kiiru [1984] KECA 43 KLR*, the Court of Appeal addressed the enforceability of time stipulations and notice in land sale contracts. The Court alluded to what the Halsbury’s Laws of England, 3rd Edition volume 8 paragraph 282 on page 165 says on the point;

*“Notice making time of the essence. In cases where time is not originally of the essence of the contract, or where a stipulation making time of the essence has been waived, time may be made of the essence, where there is unreasonable delay, by a notice from the party who is not in default fixing a reasonable time for completion and stating that, in the event of non-completion within the time so fixed, he intends to enforce or abandon the contract. But the time fixed must be reasonable having regard to the position of things at the time when the notice is given, and to all the circumstances of the case.”*

52. Similarly, in *Marete v Ndegwa & 2 others (Civil Appeal E042 of 2021) [2024] KECA 545 KLR*, the Court reached a conclusion in tandem with the holding of the Court in *Njamunyu vs. Nyaga [1983] KLR 282*, where the Court held that:

*“The principle to be acted upon in such a case is stated in Halsbury’s Laws (4th edn) p 338, para 482, i.e.: Apart from express agreement or notice making time*

*of the essence, the court will require precise compliances with stipulations as to time whenever the circumstances of the case indicate that this would fulfill the intention of the parties. Completion not having taken place upon consent as intended by the parties the issue between them then was when thereafter. In a case of this type a party who has been subjected to unreasonable delay may give notice to the party in default making time of the essence. The return of the money by the defendant was notice to the plaintiff that the defendant had made time of the essence and rescinded the agreement. Ordinarily before an agreement of this nature is rescinded the party in default should be notified of the default and given reasonable time within which to rectify.”*

53. The foregoing authorities establish that where time is not initially of the essence, a vendor must issue a **clear written notice** fixing a reasonable period for completion before rescission can lawfully occur. A mere failure by the purchaser to meet the contractual date does not automatically bring the contract to an end.

54. In the instant case, the trial magistrate found that the contract was automatically rescinded once the Appellants failed to pay the balance of the purchase price. **Clause 6** of the parties' sale agreement provided that *“The title deed shall be surrendered to the purchaser on full payment of the purchase price less deposit paid thereof.”* This clause merely tied the release of the title to full payment of the purchase price but did **not** make time of the essence, nor did it provide for automatic rescission upon default. Consequently, a valid notice of completion or rescission ought to have been issued. The record is silent on any issuance of a completion/default notice. No written notice was served specifying the breach,

prescribing a reasonable period for remedy, or warning of rescission. The absence of such notice is fatal to the court's conclusion of automatic rescission.

55. Furthermore, the Appellants partially performed their obligations—they paid a substantial portion of the purchase price, fulfilled incidentals (consent, stamp duty, transfer applications), and took possession of the land—thus making rigid application of an “automatic” rescission particularly unjust. Time must be explicitly made of the essence before rescission, and even then, a reasonable cure period is preempted.

*III) Whether the transfer of the suit property to the 2nd and 3rd Respondents was tainted with fraud and whether they can properly be regarded as bona fide purchasers for value without notice.*

56. It is trite in law that allegations of fraud are serious and must be strictly proved. **Section 26(1)** of the **Land Registration Act, No. 3 of 2012** sets out the principle of indefeasibility of title and its exception by providing as follows:

*“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.”*

57. In *Kinyanjui Kamau v George Kamau [2015] eKLR*, the Court of Appeal held as follows with regards to fraud allegations:

*“It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v Ndolo (2008) 1 KLR (G&F) 742* wherein the Court stated that:*

*“...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”*

58. Equally relevant is the doctrine of the bona fide purchaser for value. In *Katende v Haridar & Company Limited [2008] 2 EA 173*, the Court of Appeal for Uganda defined a bona fide purchaser thus:

*“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, (he) must prove that:*

*(a) he holds a certificate of title;*

*(b) he purchased the property in good faith;*

- (c) he had no knowledge of the fraud;*
- (d) he purchased for valuable consideration;*
- (e) the vendors had apparent valid title;*
- (f) he purchased without notice of any fraud; and*
- (g) he was not party to any fraud.”*

It is worth stating that the doctrine of bona fide purchaser is premised on equity. A purchaser who acquires title without notice of fraud or illegality and who has paid valuable consideration ought to be protected. But once a purchaser is shown to have participated in or had knowledge of the fraud, the protection dissipates.

59. Applying these principles to the instant case, the record shows that the Appellants had already executed a sale agreement with the 1st and 4th Respondents, paid a substantial portion of the purchase price, and taken possession of the suit property. In such circumstances, the subsequent transfer to the 2nd and 3rd Respondents raises serious doubts as to the regularity of that transaction. The Appellants' occupation and developments on the land constituted 'constructive notice' to any prospective purchaser.
60. No purchaser can claim to be bona fide when they ignored or failed to inquire into the rights of parties in possession. Indeed a person who purchases land which he knows to be in occupation of another person, other than the vendor, without making inquiries from such occupant, cannot be said to be a bona fide purchaser without notice of the rights of that other person in the land.
61. In the present case, the 2nd and 3rd Respondents cannot be accorded the protection of bona fide purchasers for value without notice. They either knew or ought to have known of the Appellants' interests and possession. The trial court's finding that the

transfer to the 2nd and 3rd Respondents was valid and unimpeachable ignored the appellant's interest.

62. The evidence on record demonstrates that the transfer of the suit property to the 2nd and 3rd Respondents was tainted with fraud or, at the very least, was unprocedurally procured in disregard of the Appellants' prior equitable interest. Of particular concern in this case is the cancellation of the Appellants' transfer entries on the register and the subsequent registration of the 2nd and 3rd Respondents as proprietors. **Section 79(2) of the Land Registration Act** expressly limits the powers of the Land Registrar to correct the register, providing that:

***"The Registrar shall not rectify, or direct the rectification of, a register unless the rectification is by order of the court or with the consent of all affected parties."***

Therefore, the purported cancellation of the Appellants' transfer and the subsequent registration of the 2nd and 3rd Respondents without their knowledge or consent was not only procedurally irregular but also violated the Registrar's statutory authority.

63. Consequently, the Appellants cannot be displaced as mere trespassers; they retain enforceable equitable rights, while the 2nd and 3rd Respondents cannot properly be regarded as bona fide purchasers for value without notice.

***IV) Whether the Appellants are entitled to the equitable remedy of specific performance in respect of the agreement for sale of the suit property.***

64. On the question whether the Appellants are entitled to the equitable remedy of specific performance in respect of the agreement for sale of the suit property, it is trite that

specific performance is an equitable remedy granted at the discretion of the court where damages are not an adequate remedy.

65. In Reliable Electrical Engineers (K) Ltd v Mantrac Kenya Limited [2006] eKLR, the Court of Appeal held:

*“Specific performance, like any other equitable remedy, is discretionary and the Court will only grant it on well-established principles...The jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from defects such as failure to comply with formal requirements or mistake or illegality, which makes the contract invalid or unenforceable.”*

66. Further in, QPKA Limited v Kenyatta Hospital Association (KHA) t/a Nairobi Hospital [2021] KEHC 282, the Court stated that:-

*“An order for specific performance is an equitable remedy which, like all equitable remedies, is available at the court’s discretion. It is an order that is however rarely granted unless the plaintiff is able to show that damages would not be an adequate remedy.”*

67. Section 3(3) of the Law of Contract Act, Cap 23 Laws of Kenya provides:

*“No suit shall be brought upon a contract for the disposition of an interest*  
*in land unless—*  
*(a) the contract upon which the suit is founded—*  
*(i) is in writing;*  
*(ii) is signed by all the parties thereto; and*

*(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.”*

68. The sale agreement between the Appellants and the 1st and 4th Respondents was in writing, duly executed, and partly performed through payment of the purchase price and possession of the land by the Appellants. Damages would not be an adequate remedy in the circumstances since land is unique and has a special value beyond mere monetary compensation. Further, the Respondents have not demonstrated any hardship that would render the order inequitable. It follows that the Appellants have established a valid claim for the remedy of specific performance.

V) *Whether the Appellants are entitled to the orders as sought*

69. Turning to the final issue of whether the Appellants are entitled to the orders sought in this appeal and who should bear the costs; it is well settled under **Section 27(1) of the Civil Procedure Act, Cap 21** that costs follow the event. The provision states:

*“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”*

70. The Court of Appeal in Supermarine Handling Services Ltd v Kenya Revenue Authority [2010] eKLR, emphasized that:

*“The basic rule on attribution of costs is that costs follow the event... It is well recognized that the principle that costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”*

71. Regarding the prayer for a **permanent injunction**, the Appellants have established that they have an equitable and proprietary interest in the property known as **NGONG/NGONG/31482**, which the Respondents have unlawfully interfered with. The purpose of a permanent injunction is to restrain further violation of proprietary rights once ownership or entitlement has been judicially determined. In Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR, the Court of Appeal restated that:

*“An injunction is a remedy granted to prevent a continuing or threatened breach of a legal or equitable right... Once the right is established, the court will grant a permanent injunction to forestall its infringement.”*

72. Having found that the Appellants have a valid equitable claim to the suit land, a permanent injunction shall issue restraining the 1st, 2nd, 3rd, and 4th Respondents, their agents, servants, employees, or any other persons acting on their behalf from entering upon, interfering with, or in any manner dealing with the property **NGONG/NGONG/31482**.

73. As to the claim for general damages for trespass, the Court is guided by the principle that such damages are awarded to compensate a party for actual or proven loss occasioned by unlawful entry or occupation. In the present matter, it has been demonstrated that the Appellants have in possession of the suit property pursuant to a valid sale agreement, in spite of the transfer to the 2nd and 3rd Respondents. The court does not consider it appropriate to award general damages for trespass. Accordingly, the Court declines to award **general damages for trespass**, noting that an award of **costs** will sufficiently compensate the appellants for the inconvenience and expense occasioned by the Respondents' conduct.

74. The upshot is that the appeal succeeds, and the judgment of the trial court is hereby set aside. The Court accordingly makes the following orders:

- a. The judgment and decree of the trial court delivered on 15th November 2024 are hereby set aside in their entirety.*
- b. It is hereby declared that the agreement for sale entered into between the Appellants and the 1st and 4th Respondents in respect of the suit property known as NGONG/NGONG/31482 is valid and enforceable.*
- c. An order of specific performance is hereby issued directing the appellants to pay the remainder of the purchase price in 30 days from the date of this judgment. On the other hand, 1st and 4th Respondents shall complete the transfer of the suit property to the Appellants within ninety (90) days from the date of this judgment, failure to which the Deputy Registrar of this Court shall execute all necessary documents to effectuate the transfer.*

- d. The registration of the 2nd and 3rd Respondents as proprietors of the suit property known as NGONG/NGONG/31482 is hereby cancelled, and the Land Registrar is directed to rectify the register accordingly and cancel the title in the name of the 2nd and 3rd Respondents.*
- e. An order is hereby issued directing the Land Registrar, Kajiado North, to reissue and/or issue a new title deed in respect of NGONG/NGONG/31482 to the Appellants upon completion of the transfer in their favour.*
- f. A permanent injunction is hereby issued restraining the 1st, 2nd, 3rd, and 4th Respondents, their agents, servants, employees, or any other persons acting on their behalf from entering upon, interfering with, or in any manner dealing with the suit property NGONG/NGONG/31482.*
- g. The Respondents shall jointly and severally bear the costs of this appeal and of the proceedings in the trial court with interest at court rates.*

It is so ordered.

Dated Signed and Delivered at Kajiado Virtually this 30<sup>th</sup> Day of October 2025.

M.D. MWANGI  
JUDGE

In the virtual presence of:

Mr. Bett for the Appellant  
Ms. Wasilwa for the 1<sup>st</sup> and 4<sup>th</sup> Respondents  
N/A for the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Respondents  
Court Assistant: Mpoye

M.D. MWANGI

JUDGE

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