

**IN THE COURT OF
APPEAL AT KISUMU**

(CORAM: ASIKE-MAKHANDIA, KIAGE & OMONDI,

JA.) CIVIL APPEAL NO.7 OF 2020

BETWEEN

**ALICE NANDWA OKANGA *Substitute legal representative of*
JARED OKANGA OPANDA**

.....

APPELLANT AND

WASHINGTON INDIMULI.....RESPONDENT

*(Being an appeal arising from the Judgment & decree of the
environment and Land Court at Kakamega (Matheka, J.) dated
18th December 2019*

in

Case No. 113 of 2014)

JUDGMENT OF THE

COURT

1. The late Jared Okanga Opanda (Jared) initially instituted this matter before the trial court in the year 2014; and upon his demise on 4th June 2018, he was duly substituted by Alice Nandwa Okanga (the appellant herein), who is the legal representative of his estate. It was Jared's case that at all material times preceding the institution of the suit, he was the registered proprietor of all that piece or parcel of land known as East Wanga/Isongo/2083 "the suit property". However, in the year 2013, upon conducting an official

search at the relevant land registry, the late Jared discovered that the

respondent had illegally, irregularly and or/through a corrupt scheme caused the transfer of the suit property into his name, and constructed a structure thereon. The particulars of fraud were listed as:

- a) Causing the transfer in the absence of the plaintiff's consent.**
- b) Causing transfer in the absence of the land control board consent.**
- c) Presenting false documents before the land registrar purporting them to be genuine documents while fully aware they were not.**
- d) Obtaining title through treachery and without consideration.**

2. The deceased maintained that at no time did he execute or authorize the transfer of the suit property to the respondent, and he sought orders of eviction of the respondent's agents and cancellation of the respondent's name from the register in respect of the suit property.
3. In defence, the respondent denied the allegations maintaining that on 4th September 1997, he purchased the suit property from the late Jared at an agreed consideration of Kshs.35,000/= which was fully paid; that on 11th February 1998, Jared accompanied the respondent to Mumias Land Control Board where he obtained consent to transfer the Land to the respondent; consequently the parties executed the transfer of land form before which they presented to the

lands registry; and a title deed was issued to the respondent on 24th February 1998. It was thus the respondent's case that he was the lawful owner of the suit property, and had been in occupation and use from the date the title was issued to him.

4. The respondent maintained that in the year 2008, the late Jared unlawfully trespassed on the suit. The respondent thus filed a counterclaim and sought an order of eviction of Jared from the land.
5. Jared, who described the respondent as his area mate, insisted that the latter fraudulently caused the suit property to be transferred into his name, yet they did not have any sale of land agreement nor did they attend to the Land Control Board, saying in his verifying affidavit:

"I was surprised to find that he had changed my parcel of land into his name. I want him to be removed from the register and my name restored. The defendant has settled his nephew on the suit land. He should be evicted from the suit land. He should also pay costs."

6. The evidence of Jared's wife Alice Nandwa Okanga through her witness statement was that the respondent had given Jared a loan of Kshs.4930 to pay for a hospital bill they had incurred at St. Mary's Hospital, Mumias; they had orally agreed that the loan was to be refunded if not, then

they would give the

respondent a portion from the suit property measuring 100
x

50ft, and the respondent was to add them more money. Even before they could settle the debt the respondent brought his nephew on the suit property who started residing on thereon after constructing a semi-permanent house; that eventually Jared, after conducting a search, discovered that the respondent had fraudulently transferred the suit property to his name. She claimed that when Jared questioned this activity, the respondent claimed that he had brought his nephew simply to guard the suit property because they had no son after their only one died.

7. Lubisia Opanda who knew the parties very well, recorded his statement in support of Jared, to the effect that the respondent loaned Jared Kshs.4930/- to settle a hospital bill for his sick son Joseph Mulama; that it was agreed that if Jared failed to repay, the money then he would sell to the respondent a plot measuring 100 X 50 ft at a price to be agreed, and the Kshs.4,930/= would form part of the purchase price. However as far as he was concerned, there was no sale agreement and there is no way Jared could have sold the suit property without his involvement as he was involved in the loan agreement. This witness stated that the respondent was allowed to till the suit property to recover his money; and the latter started utilizing

the suit property to date. Suspicions grew when he did not appear keen to leave; a search was carried out and it was discovered that he had changed ownership. The witness described the change of ownership as fraudulent, pointing out that the respondent failed to produce any documents at the chief's office to show that he had legally acquired the suit property.

8. Micheal Ouma Makwali, a brother to Jared in his witness statement confirmed that the suit property belonged to Jared; that the respondent helped Jared to pay a hospital bill of his son Joseph Mulama who later died; on the basis of the help the respondent was to be refunded the money or get a plot of the suit property. That Jared later invited the respondent to refund himself the money through the sugar cane he had planted on the suit property however, the respondent took advantage of this arrangement and brought his nephew on the suit property and constructed a semi-permanent house on it. the land. Eventually Jared conducted a search and discovered that the respondent had illegally acquired the suit property. The matter was reported to the chief who summoned them to his office; and that is when the respondent made claims that he had

purchased the suit property and obtained registration,

but was unable to prove; and claimed that the sale agreement had been destroyed by termites, the he later brought fake documents.

9. According to the witness statement by Wycliffe Olumasyi Okanga (Wycliffe) a grandchild to Jared, the respondent loaned his grandfather money to settle the son's hospital bill at St. Mary's Mumias Hospital, and in the event that he was unable to pay him back his money then the respondent would be given a portion of the suit property measuring 100x50ft portion. Later Jared and the respondent agreed that the latter would get back his money from the sugar cane farm dividend, but the respondent harvested the sugar cane 4 times and exceeded the agreed limit by 1 stake, and eventually changed the title deed. The witness disputed the claims of purchase and pointed out that even in the purported agreement, there appeared to be an overwriting of the parcel No. 2083, then changed to 2084; and that the writings appearing on the title deed that the suit property was bought at 40,000/= and Washington said that he bought and the paid for it in two instalments of 35000/= and 40000/= respectively was untrue.
10. Herbert Akaliche Kombo who served as Area Chief for Makunga Location in Mumias East Sub County in the year

2013, confirmed handling the dispute between Jared and the respondent; which was laced with allegations of the respondent having fraudulently obtained ownership of the suit property; summoned immediate neighbours to get information from witness of both parties on 17th August 2013. His findings were that:

“...in view of the witness and the available documents provided, the process used by the defendant to obtain land from the Plaintiff appeared suspect to fraudulent (sic). I made my fair recommendation that the process be investigated and legal redress applied to make good the situation. The Plaintiff and defendant each received copy of the report of my finding and recommendations...”

11. The respondent denied the claim, stating that the suit land was sold to him by the late Jared Okanga Opanda [Jared] on 4th September 1997 upon payment of full consideration; and the late Jared thereafter took him to the land control board and obtained consent to transfer the land; that the late Jared executed the transfer of land before an Advocate and the transfer which was duly registered and title issued to him on 24th February 1998; and since then he has been and is still in occupation and use of the suit land. The respondent also filed a counterclaim in which he accused the late Jared of trespass from the year 2008, and prayed

for his eviction

12. The trial court considered the version presented about the loan, the intended refund, and the default option in which the respondent registering it in his name without clear knowledge and consent of Jared who was the rightful owner to the suit property and that he would get a portion of the suit property, against the other version presented by yet other witnesses, that the respondent harvested sugarcane as a way of recovery the money he had loaned out and was not to take the suit property. The learned judge observed that the appellant, in defence asserted that the deceased effected the transfer, claimed that the deceased was a drunkard who may have given out his National Identity card while in an airborne inebriated state.

13. Against this backdrop, the learned Judge found reason to believe the respondent, taking note that while confirming the loan, the respondent had presented documents to demonstrate that Jared sold to him the parcel vide the sale agreement produced as D.Ex1, the search (D.Ex2), the minutes from the Land Control Board (D.Ex3), the Consent (D.Ex4), Transfer (D.Ex5) and the Title Deed (D.Ex 6); and that Jared signed all the documents. The learned judge drawing from the provisions of Section 24(a) of the Land Registration Act

found as a fact that the respondent was the registered proprietor of the suit property, a position fortified by the copy of the search certificate.

14. The learned judge thus held that the title was indefeasible and could only be challenged if it was fraudulently obtained, which had not been done thus the claim had not been proved on a balance of probabilities and was dismissed. The court held that the respondent had proved his counterclaim on a balance of probabilities and granted the following orders;

a) The plaintiff, his servants, agents and relatives are to vacate the suit Land Parcel No. East Wanga/Isongo/2083 within the next six (6) months from the, date of this judgement and in default eviction order to issue.

b) Each party to bear its own costs.

15. This outcome aggrieved the appellant leading to filing of the present appeal on ground that the learned trial Judge erred both in law and fact by holding that the respondent's title was indefeasible and in issuing orders for the eviction of the appellant from the suit property. The appellant contends that the judgment was contrary to the weight of the evidence and the applicable legal principles as outlined in the Memorandum of Appeal to the effect that trial Judge

erred in fact and law by:

- a) Failing to consider the evidence adduced by Chief of Makunga Location in East Wanga Division through minutes dated 2nd August 2013 and 17th August 2013 held at the Chief's office at Maraba Market where it was found that the disputed parcel of land was transferred fraudulently and also evidence adduced by one Wycliffe Olumasayi Okanda and Michael Ouma Makwali thereby arriving at a wrong decision;**
- b) In finding that there was no fraud on the part of the respondent when it was all clear from the agreements filed in court on 7th April 2014; and the one filed on 5th November 2019 where the first agreement filed on 7th April 2014 indicated that the said Jared Okanga had signed the agreement and the one filed in court on 5th November 2019 indicated that the same Jared Okanga had thumb printed on the agreement as his signature, when the defendant was well aware that the said plaintiff was illiterate and unable to write and/or sign a signature. The learned trial Judge did not consider forgery of all the transfer documents a matter that was clearly showing on the face of transfer documents.**
- c) By dismissing the plaintiff's case without considering and asking how much cumulatively the defendant had actually paid for parcel of land No. East/Wanga/ Isongo /2083 measuring 0.4 Hectares, a question that the respondent failed to give a conclusive evidence of how much he had paid for the land and the mode and evidence of payment in order to ascertain the amount paid with the market value of the land but unfortunately the learned Judge decided to surrender the whole parcel of land to the defendant and inordinately ordering eviction of the plaintiff and his family from the suit parcel of land consequently rendering them destitute.**
- d) Failing to consider the sugarcane harvested by the defendant from parcel of land No.**

East/Wanga/Isongo /2083 as being recovery of the amount the defendant paid to the plaintiff's hospital bill but decided to champion for forgery

and corrupt schemes to solely disinherit the rightful beneficiaries of the disputed parcel of land.

e) Believing the respondent's allegations that the appellant had forcefully moved on the disputed land from somewhere else built a house and started utilizing the land in dispute when it is clearly indicated that the appellant with his family members had never moved out since he was born.

f) Shutting her eyes from evidence presented by the plaintiff and his witnesses and only considered one side an action which clearly indicates that she was hell bent to deny the appellant a fair outcome in arriving at her decision which resulted in a miscarriage of justice.

g) Not determining the entire dispute as her judgment did not consider the fate of the appellant who had invested heavily in the disputed ancestral land and he has no other parcel of land to sustain herself and the family at large.

16. The appellant therefore prays that: this appeal be allowed; the Judgment and all consequential orders issued by the trial court be set aside, and be substituted with an order cancelling the respondents name from the register in respect of the suit property and that the suit property do revert to its original owner and/or their legal representatives; and the respondent be condemned to bear the costs of the appeal.

17. The appellant has identified two issues that arise for determination as:

a) Whether the trial court erred in failing to

find that the title held by the respondent was acquired illegally, irregularly, and/or through

a corrupt scheme, and in failing to hold that the said title ought to be cancelled.
b) Whether the appellant is entitled to the reliefs sought.

18. With regard to the manner that the title was acquired and why it ought to have been cancelled, Ms. Karimi learned counsel for the appellant submits that, that the learned trial judge failed to consider critical facts which would have led to the conclusion that the respondent acquired the certificate of title to the suit property through a process tainted by misrepresentation, irregularity, illegality and/or a corrupt scheme. The appellant refers us to Section 26 (I) of the Land Registration Act No. 3 of 2012 to argue that although a certificate of title is strong legal proof that the person named therein is the true and absolute owner of the land, there are exceptions to this general rule; and the validity of a title can be challenged where for instance there are allegations of fraud, misrepresentation, regularity, corrupt scheme or illegality are raised.
19. The appellant argues that the trial court failed to consider the Chiefs minutes from a meeting held on 2nd August 2013, which both the appellant and the respondent attended to address the dispute. It is contended that the respondent did not challenge

the authenticity of the minutes; in fact, he confirmed

convening of the meeting regarding the suit property. According to the appellant, at the meeting, the respondent failed to produce supporting documents such as the Land Control Board minutes, letter of consent and other transfer documents; that although he later produced a sale agreement witnessed by one Jason Masinde, this was undermined as during the said meeting, Jason Masinde, had already denied any knowledge of the alleged transaction.

20. The appellant contends that this inconsistency casts doubt on the validity of the entire sale process, and further points out that the respondent initially claimed he could not recall how much additional money was paid as consideration for the alleged sale, then six years after the meeting stated in his testimony that it was Kshs.40,000/-. The appellant urges us to find that this sudden recollection raises questions about the credibility of his testimony.

21. The appellant also pokes holes in the respondent's testimony which claimed that the sale agreement for the suit property with the appellant was drawn by Peter Indayi Achila, Advocate, on 2nd March 1998 in Kakamega, yet the agreement produced in court bore a different date as 4th September 1997; that this inconsistency, coupled with the absence of the advocate's

stamp or signature on the said document, casts doubt on the authenticity of the agreement; and that despite the respondent filing a counterclaim and asserting lawful acquisition, the learned judge failed to address these discrepancies or consider that the burden had shifted to the respondent to prove the legality of the title transfer.

22. To fortify this argument, the appellant also draws from the provisions of Section 80 (I) of the Land Registration Act No. 3 of 201 which states:

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.

23. It is argued that the learned Judge failed to interrogate the suspicious timing of these documents and did not consider why they remained unproduced for over five years, only surfacing after the Jared's demise; that during cross-examination, the respondent admitted that the appellant had continuously resided on the suit property and that he had never taken any steps to evict her. That the respondent also acknowledged that Jared returned to the suit property in 2008, and despite this, he neither raised

any objections nor

pursued any form of eviction; and that the Jared was buried

in the suit property. It is submitted that the trial court failed to consider, on a balance of probabilities, the glaring inconsistency as to why the respondent, having allegedly lawfully acquired the suit property in the 1990s, would allow the appellants to remain on it without objection or any attempt to enforce his ownership rights through eviction or other legal action.

24. It is also contended that there was no single witness to support the claim that the appellant sold him the suit property and facilitated the transfer process; that the respondent's testimony regarding how much he paid and when the sale agreement was drafted was inconsistent between his witness statement and oral testimony. The learned judge failed to properly consider these discrepancies and inconsistencies, which should have cast doubt on the legality of how the respondent acquired the certificate of title.

25. Clearly what emerges from the thread of appellant's submissions is that the trial court failed to interrogate the late filing of documents by the respondent, the allegations of the respondents delaying the proceedings. It is reiterated that the respondent acquired the title in a questionable manner as to render an otherwise indefeasible title

challengeable; and in

this regard, the inconsistencies, irregularities and questionable conduct only fortify what reeks of mischief on the part of the respondent, and should have been considered by the learned Judge as sufficient grounds to warrant an order that the title be restored to its rightful owner, Jared, now represented by the substituted Appellant. In this regard the appellant cites the case of **Njoroge vs. Karuku [2024] KECA 553 KLR** in which it was held that the mere issuance of a title document does not confer the status of indefeasibility.

26. Ultimately, it is the appellant's contention that the respondents account of how he acquired the title raise serious doubts regarding the legality and regularity of the said process; that in contrast, the appellant presented witnesses who corroborated the assertions; has never been evicted from the suit property for trespass by the respondent; and his testimony has remained consistent since 2013, when the Chief convened a meeting to resolve the dispute; and the same level of consistency cannot be attributed to the respondents testimony.

27. In opposing the appeal, learned counsel Mr. Osango for the respondent submits that, the decision was very sound and well reasoned and there is absolutely nothing to fault the

decision

as the respondent proved his case as stated in the Counter Claim as the appellant had trespassed onto the suit property whose ownership was supported by the documentary evidence on record. Further, that the appellant failed miserably to prove her case on a balance of probability and thus her suit was unfounded and baseless as the respondent followed all the laid down procedures in law prior to being registered as the proprietor of the suit property right from presenting a sale agreement dated 4th September 1997, Land Control Board minutes of 11th February 1998, letter of consent dated 19th February 1998, copy of the Title Deed for the suit property together with its certificate of official search in support of his case.

28. Drawing from the provisions of section 107 and 109 of the Evidence Act, it is pointed out that the evidential burden was upon the appellant to prove that the respondent acquired the title of the suit property by fraud which did not happen. That a mere suggestion of dishonesty, without particular proof of how that amounts to fraud is not enough as fraud is a serious allegation that must be pleaded, particularized and proved to a standard higher than on balance of probabilities. In this regard, the respondent refers to the case of **Central Bank of**

Kenya Limited vs. Trust Bank Limited & 4 Others

[1996] eKLR, where the court rendered itself as follows:

“The appellant has made vague and very general allegations of fraud against the respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in an ordinary civil case.”

29. It is the respondent's contention that the date of the agreement made on 4th September 1997 is binding upon all parties to it and the court cannot rewrite the party's agreement rather than to enforce the same. In support of this position, we are referred to the case of **Shah vs. Guiders International Bank Ltd (2003) KLR** where in considering the terms of the parties contracts it was observed that:

“The parties exercised the same willingly and they are therefore bound by it”.

30. The respondent argues that the appellant never made any attempts to prove that the consent from Mumias Land Control Board was obtained by means of fraud; and if that were to be the case, nothing easier could have stopped the appellant from laying evidence in support of the same, urging us to be guided by the recent decision of this Court (differently constituted) on

the impact of failure to obtain consent in the case of Willy

Kimutai Kiti vs. Michael Kibet (2018) eKLR:

“A contract for sale of land to which the Land Control Board Act applies is not void from the inception nor is it an illegal contract. It becomes void when no application for consent of Board is made. It is refused and the appeal from refusal, if any has been dismissed”.

31. We are thus urged to uphold the decision as the appellant’s own witness, Lubisia Opanda had confirmed that indeed the respondent took possession of the suit property land; and the respondent proved his counter-claim that the appellant trespassed onto the same in the year 2008. Drawing from the provisions under sections 24 (a) and 26 (1) of Land Registration Act on the issue of ownership of land, we are urged to find that certificate of title is conclusive evidence of ownership of land.

Section 24 provides:

Subject to this Act the registration of a person as the proprietor of land shall vest in the person absolute ownership of the land together with all rights and privileges.

32. Section 26 (1) of the Act makes it very clear that the certificate of Title once registered by the Registrar, shall be taken by all courts as prima facie evidence that the

person named as

proprietor of land is the absolute and in defeasible owner, and the title of that proprietor shall not be challenged except in some few instances.

33. This is a first appeal where this Court is required to conduct an independent appraisal and analysis of the facts and the law and arrive at its independent conclusion as prescribed under rule 31(1)(a) of the Court of Appeal Rules, 2022. In so doing, the Court is required to take into consideration that unlike the trial court, it did not have the advantage of seeing and hearing the witnesses testify to be in a position to assess their demeanor. See **Kenya Ports Authority vs. Kuston (Kenya) Limited [2009] 2 EA 212 as reiterated in Mugwe vs. Waititu Babayao & Another; Speaker, Kiambu County Assembly & 2 Others (Interested Parties) (Civil Appeal 245 of 2018) [2023] KECA 1422 (KLR).**

34. Having carefully considered the record in the light of the rival submissions set out above and the principles of law relied upon by the respective parties, in this appeal the main issue for determination is who is the rightful owner of the suit property. Has the appellant established a valid claim for ownership of the suit property; and related to that is the question whether the appellant established fraud as

against

the respondent to the required standard to impeach the respondent's title to the suit property; did the trial court err in relying on what are impugned as suspicious/doctored documents, in reaching its verdict; and whether the award of costs to the respondents was warranted.

35. It is trite that he who alleges must prove. Section 107 of the Evidence Act provides that he or she who asserts must prove that the facts alleged exist. The burden of proof lay with the appellant to establish his right to the suit property. See **Swaleh Mohamed Waziri & 3 others vs. Houd Mohmoud Athman & Another [2020]eKLR.** In the case of **Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2004] eKLR,** this Court held that:

“As a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (1) of the Evidence Act Cap 80... There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in sections 109 and 112 of the Act...The two sections carry forward the often-repeated evidential adage: ‘he who asserts must prove’”.

36. There is no dispute that the initial engagement between the parties had nothing to do with the disputed suit

property,

which only reared itself as a default clause in the event that the loan given to Jared by the respondent was not repaid. There is also no dispute that initially the suit property was registered in the respondent's name, but that as matters stand currently, it is not only registered in the respondents' name, but he or his agent is also in occupation. This set up then morphed into a question as to whether the change of ownership was as a result of the default clause kicking in, and what portion of the land was the respondent entitled to upon that default?

37. The appellant has two versions to this: one is that the respondent was only entitled to a portion measuring 100x50ft, and even then, he was required to make an additional payment so as to qualify for ownership. The other version is that having defaulted, the respondent decided to move into the suit property to till it for a period so as to recover what he had lent. This latter version has a slight departure as laced by Alice and Wycliffe that the respondent was to recover the money from the sugarcane farm; and that he harvested four (4) cycles of cane, whose value infact exceeded what had been loaned. As far as the appellant is concerned the land was never sold to the Respondent, and the purported consents and transfer were

fraudulently obtained. The respondent through the documentary evidence adduced maintained that he was the registered owner of the suit property.

38. We admit that from the trial court's proceedings and judgment, it is rather challenging to pick out details that were presented to the court, but from the record of appeal, we have had sight of the sale agreement dated 4th September 1997, the plot No 2083 measuring one (1) acre was sold to the respondent at a sum of Kshs.35,000/-; and the reason for the sale was money needed to meet medical expenses for appellant's child at St. Mary's Hospital, Funeral Expenses, and general expenses listed as food clothing and beddings. There were also minutes from the Land Control Board as well as the Consent. The appellant claimed that the registration of the suit property was done secretly, and was thus imputing fraud on the part of the respondent. It is an established legal principle that fraud must not only be specifically pleaded but must also be strictly proved.

39. In the case of **Eldoret Express Limited vs. Tawai Ltd and Another [2019] eKLR**, this Court stated that:

“Fraud is a serious thing to allege and there is a requirement that it be particularized and

then proved to a standard that is higher than a mere

balance of probabilities. See R. G. Patel vs. Lalji Makanji [1957] EA 314. The degree of proof must be such as to create a moral certainty though it need not reach the criminal standard of proof beyond a reasonable doubt. This has to be so because allegations of fraud in a civil suit carry with them an element of criminality and are referred to as being quasi-criminal in nature. As Esther put it more than a century ago in Le Leure vs. Gould [1895] 1 & B. 491 at p. 498, “a charge of fraud is such a terrible thing to bring against a man that it cannot be maintained in any court unless it is shown that he had a wicked mind.”

40. Similarly, in **Vijay Morjaria vs. Nansingh, Madhusingh**

Darbar & Another [2000] eKLR, Tunoi JA stated:

“It is well established that fraud must be specifically pleaded and the particulars of fraud alleged must be stated on the face of the pleading. The act 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 distinctly proved and it is not allowable to leave fraud to be inferred from the facts.”

And in **Kinyanjui Kamau vs. George Kamau [2015] eKLR**

the Court stated that:

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo vs. 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. In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."

41. Given those parameters, did the appellant present sufficient evidence before the trial court on the basis of which the plea of fraud could be sustained? Was the burden of proof discharged?

To the appellant's credit, the particulars of fraud were set out

in the pleadings as:

- a) Causing the transfer in the absence of the plaintiff's consent.***
- b) Causing transfer in the absence of the land control board consent.***
- c) Presenting false documents before the land registrar purporting them to be genuine documents while fully aware they were not.***
- d) Obtaining title through treachery and without consideration(payment)***

42. Bearing in mind that the burden of proof lay on the appellant, it is not enough to simply say that Jared may have parted with his documents and facilitated the consent and transfer while under the influence of liquor, it is not enough to simply claim that the documents presented were false, then build a theory of possibilities that there seemed to be an overwriting in the parcel number referred to in the agreement or that the delay in presenting the documents as evidence, was due to their being doctored. Nay, there

must be specific forthright

demonstration of that fraud. In this instance, that demonstration is lacking, and mere suspicion as expressed by the chief is not enough.

43. Under Section 26 (1) of the Land Registration Act, a certificate of title issued by Registrar shall be taken by all courts to be conclusive evidence of proprietorship. However, the section recognises that the title of that proprietor is subject to challenge under the following circumstances:

- 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, un-procedurally or through a corrupt scheme.***

We concur with the respondent that section 26 (1) of the Act makes it very clear that the certificate of Title once registered by the Registrar upon registration, shall be taken by all courts as prima facie evidence that the person named as proprietor of land is the absolute and in defeasible owner, and the title of that proprietor shall not be challenged except in some few instances. The respondent's title is indefeasible being the registered owner of the suit property and the learned judge was right in holding that the appellant did not successfully challenge

the respondent's title to the suit property.

44. It is clear that the respondent's proprietary interest in the suit property was properly and lawfully registered, and in the absence of prove of fraud, his title cannot be impeached.
45. As relates to the evaluation of the evidence, the appellant contends that the learned judge disregarded and misapprehended the evidence produced regarding the ownership of the suit property and the actions of fraud. We agree that the learned judge adopted an extremely minimalist approach in evaluation of the evidence, not setting out in detail what each of the witnesses said in their statements, but this was redeemed by her analysis of the documentary evidence presented and her application of the law. There is thus no prejudice as to warrant interfering with the decision.
46. Finally on the issue of costs, which the appellant has lamented about, section 27 of the Civil Procedure Act provides as follows:

(1) 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.

The learned judge made a finding in favour of the respondent, and in exercising her discretion applied the principle that costs follow the event. There is no reason whatsoever to fault that discretion which in our view was exercised judiciously

In our view, we are satisfied that the appeal is without merit and accordingly dismiss it with costs to the respondent.

Dated and delivered at Kisumu this 13th day of February, 2026.

ASIKE-MAKHANDIA

.....
JUDGE OF APPEAL

P. O. KIAGE

.....
JUDGE OF APPEAL

H. A. OMONDI

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

