IN THE COURT OF APPEAL
AT NAKURU

(CORAM: WARSAME, MATIVO & GACHOKA,

JJ.A.) CIVIL APPEAL NO. NAK E015 OF 2021

BETWEEN

KIHOTO FARMERS COMPANY LIMITED.....1ST APPELLANT SAMUEL GAKINYA KARIUKI.2ND APPELLANT

AND

MUGURE MAHINDA *(suing as the administrator of the estate of the late Geoffrey Wanjohi Mahinda).....***RESPONDENT**

(Being an appeal against the whole decision of the High Court of Kenya at Nakuru ***(M. J. A. Emukule, J.)*** *dated 15th June 2012*

in

HCCC No. 163 of 1988).

****

JUDGMENT OF THE COURT

1. Kihoto Farmers Company Limited and Samuel Gakinya Kariuki (the appellants) seek to overturn the judgment delivered by *Emukule, J.* (as she then was) on 15th June 2012. The said judgment determined three consolidated suits. The first suit is Nakuru HCCC No.142 of 1987, Gerald Wanjohi Mahinda vs. Kihoto Farmers Company Limited, Kabazi Estates Limited and Attorney

General in which the late Geoffrey Wanjohi Mahinda (herein after

referred to as the deceased) complained that the 1st appellant had fraudulently transferred his Land Parcel LR No. 7502/4/1 to itself. He sought the following reliefs:

a) a declaration that land plan number 90147 in the transfer to the 1st appellant and the resultant certificate of title to the extent of referring and inclusion of the excision formally known as LR No 7502/4/1 is null and void;

b) an order directing the Director of Surveys and/or Registrar of titles and or Commissioner of Lands to rectify the said land survey plan and all records relating to the said piece of land so that the deceased's said piece of land is identified separately and distinctly from the appellants;

c) general damages;

d) costs of the suit;

(e) interests on (c) and (d); and (c) any other costs the court may grant.

2. The second suit is Nakuru HCCC No. 163 of 1989, Mugure Mahinda vs. Kihoto Farmers Company Limited in which by a plaint dated 24th May 1988, the late deceased sued the appellants herein claiming that he was the registered proprietor of all that parcel of land known as L.R No. 7502/4/1 and 7502/6 which was consolidated to LR No. 12109. He claimed that he occupied the said land uninterrupted since 1973.

However, on diverse dates from 6th March 1988 the appellants and or persons acting on their behalf unlawfully entered into the said land and

wantonly destroyed his crops, trees, fencing and other properties and as a consequence he suffered damages. The deceased prayed for:

a) **A perpetual injunction restraining the appellants and or their servants from entering and or remaining in his land;**

b) **Punitive damages;**

c) **General damages;**

d) **Costs of the suit;**

e) **Interests on (ii), (iii) and (iv);**

f) **Any other relief that this Court may deem fit to grant.**

3. In their written statement of defence dated 19th July 1988, the appellants disputed the deceased's claim and maintained that the 1st appellant is the registered proprietor of the suit property. They denied the deceased enjoyed an uninterrupted occupation of the land. Without prejudice to the said assertion, they averred that the 1st appellant purchased the land from its previous owner in 1973, and since then, it enjoyed uninterrupted possession, occupation and ownership until 1983 when the deceased started making unfounded claims touching on the land. They denied they had unlawfully invaded the land and committed acts of destruction, and asserted that

even if its members entered into the land as claimed, they did so as a matter of right. They denied that the deceased suffered any loss or damage. The 2nd appellant asserted that the suit against him in his personal capacity disclosed no reasonable cause of action. They prayed that the suit be dismissed with costs. In his reply to defence dated 29th July 1988, the deceased refuted the appellants' claims.

4. The 3rd suit is HCCC No. 213 of 1988 which the deceased sued the Attorney General seeking the following orders:

(a) a declaration do issue that Plan No. 90147 in the Transfer to Kihoto Farmers Co. ·Ltd and the resultant Certificate of title to the extent of referring or inclusion of the excision formerly known as L.R No. 7502/4/1 measuring 19.30 Ha. or thereabouts are null and void;

(b) an order directing the Director of Surveys and, Registrar of Titles and or Commissioner of Lands to rectify the said Land Survey Plan and or records relating to the said pieces of land so that so that the plaintiff's said land is identified separately and or distinctly from that of Kihoto Farmers Co. Ltd;

(c) general damages;

(d) costs of the suit and interests;

(e) any other or further relief the court may deem fit to grant.

5. The three suits were consolidated on 18th September 2007 because the court and the parties were in agreement that the common denominator in the suits was who between

the deceased and the 1st appellant was the rightful owner of parcel of LR No. 7502/4/1 (the suit property).

6. During the pendency of the suits, the original plaintiff died and he was substituted with his legal representative, the respondent herein.

7. As the learned Judge observed in the impugned judgment, apart from the conflicting ownership claims by the two protagonists, the respondents' evidence as tendered by its witness M/s Mugure Mahinda and the appellant's evidence as presented by Sammy Gakinya Kariuki was substantially similar. It was common ground that LR Nos. 7502/3, 7502/4 and 7502/7 were part of a large estate previously known as Kabazi Estates Limited (then in receivership). It was liquidated through K.F.A. Auctioneers Ltd who were the selling agents of the properties. The parties only point of divergence was who among the two owned LR No. 7502/4/1 which was a sub-division of LR No. 7502/4. This is the germane issue in this case.

8. To answer this question, the learned Judge first analyzed the appellant's evidence as presented by DW1

who produced a copy of an application for issuance of a

certified copy of a Certificate of Title IR No. 26591 registered as No. IR 26591 on 15th November 1973. (DWexh. 1). This document showed that by a transfer registered as Number 6091/23, the 1st appellant was registered as the proprietor of 134 .3 hectares, being LR No. 7502/4 (original No. 7502/2/3) as delineated on Survey Plan Number 90147 annexed to the transfer. DW1 also produced a statement of accounts dated 24th June 1974 from Jones and Jones Advocates which showed the completion of the transfer of LR Nos. 7502/3, 7502/4 and 7502/7 to the 1st appellant. DW1 also produced a copy of a letter dated 16th October 2001 (DExh 3) and a copy of an order issued on 16th October 2001 (DExh 4) which was a consent letter (setting aside the consent judgment entered on 10th June 1989 and all consequential orders including the cancelation of Title No. 7502/4 and the order to that effect. Dw1 maintained that the 1st appellant owned the suit land.

9. On the other hand, the respondent maintained that the deceased owned the suit land, and that they were in continuous occupation since 1973. To support her

case,

she produced correspondence showing how the deceased acquired excision of LR No. 7502/4/1 from LR No. 7502/4 which the appellant herein had incorporated in his Certificate of Title IR No. 26591.

10. After evaluating the evidence in totality, and the appellants' objection questioning the multiplicity of the suits, the learned Judge dismissed the appellant's challenge on the multiple suits as a failure by all the counsel to see the substantive issues in the suit and to consider the rival claims holistically. This, according to the learned Judge was the reason why the consent judgment entered in HCCC No. 142 of 1987 was set aside and the claim against the Commissioner of Lands was withdrawn. The learned Judge also dismissed the respondent's claims in HCCC No. 142 of 1987 and HCCC No. 213 of 1988 accusing the Director of Surveys of Negligence for want of evidence.

11. Ultimately, the learned Judge ruled in favour of the respondent and issued the following orders: (a) declared Land Survey Plan No. 901476 attached to the transfer registered as No. 6091/23 to Kihoto Farmers Co. Ltd and

the resultant Certificate of Title registered as No. 2659/1 null and void to the extent it refers or includes the excision known as LR. No. 7502/4/1 measuring approximately

19.30 Ha. or thereabouts; (b) directed the Director of Land Survey to prepare and issue within 90 days a new land survey plan reducing the area due to Kihoto Farmers Co. Ltd from 134.3 Ha to 115.0 Ha from the original L.R. 7502/4; (c) directed the Registrar of Titles to cancel forthwith the Certificate of Title No. I.R. 26591/1 and issue a new title to Kihoto Famers Co. Ltd depicting the area of LR. No. 7502/4 after excision of LR No. 7502/4/1; (d) issued a permanent and a perpetual injunction restraining Kihoto Farmers Co. Ltd, its directors, servants, agents or its members from entering or remaining in the respondent's land; and (e) Lastly, the costs of the suits to be agreed or taxed.

12. Aggrieved by the said decision, the appellants filed a notice of appeal dated 21st June 2012 and the memorandum of appeal dated 23rd February 2021. In summation, the appellants fault the learned Judge for: (a) finding that the respondent is the owner LR. No.

7502/4/1; (b) failing to

consider the lack of Land Control Board consent; (c) declaring the Land Survey Plan No. 90147 null and void; (d) finding that there was misrepresentation on the part of the appellants advocates; (e) failing to consider the issues in dispute, the evidence and the submissions. The appellants pray for the appeal to be allowed, the impugned judgment be set aside, and the 1st appellant be declared the owner of LR No. 7502/4 and the survey deed plan No. 00147 be declared valid.

13. During the virtual hearing of this appeal on 3rd February 2026, learned counsel Mr. Lawrence Karanja appeared for the appellants, while M/s Nancy Njoroge appeared for the respondent.

14. In support of the appeal, Mr. Karanja filed submissions dated 23rd October and supplementary submissions dated 30th January 2026 which we have considered. In a nutshell, counsel faulted the learned Judge for arriving at findings which were contrary to the evidence. Counsel argued that the respondent's evidence rested primarily on the assertion that her late husband acquired land from one John Ward. He stated that in June 1973, the

deceased, found himself unable to access the river, accordingly he sought to purchase an additional portion of land, which is the suit property. Counsel maintained that the transaction was subject to stringent conditions, including: (a) obtaining the requisite Land Control Board consent, (b) the purchaser assuming responsibility for all survey and legal costs, and (c) the full purchase price being paid before the transfer could be effected. He maintained that no evidence was tendered to show that the full purchase price was paid and relied on ***Sisto Wambugu vs. Kamau Njuguna (Civil Appeal 10 of 1982) [1983] KECA 69 (KLR),*** in which the Court of Appeal overturned a judgment on the grounds that the respondent had failed to demonstrate full payment of the purchase price. Therefore, no evidence was tendered to demonstrate that the deceased was a *bona fide* purchase for value.

15. Mr. Karanja contended that PW1 during cross-examination, testified that the deceased initially acquired parcel LR 7502/6 from Kabazi Estates through KFA Auctioneers but due to lack of access to roads and water, the deceased requested Kabazi Estates to grant

him access

to the land. An application for the excision and transfer of 10 acres was subsequently made and approved. It was counsel's submission that in light of the above testimony, it is clear that the respondent's original intention was to secure access to the river through the excision of 10 acres. However, when respondent proceeded to the Director of Surveys, she excised 46 acres, for which no payment was made. Therefore, a transaction for excision of 10 acres cannot be presented as one for 46 acres, especially in the absence of credible evidence demonstrating full payment for the additional land.

16. In light of the foregoing, counsel submitted that a transaction involving the excision of 10 acres cannot be misleadingly presented as one for 46 acres, especially in the absence of credible evidence demonstrating full payment for the additional land. He further contends that the learned Judge gravely misapplied the law by finding that the respondent had satisfied the standard of proof necessary to establish ownership of LR. No. 7502/4/1. Counsel cited ***Agnes Nyambura Munga vs. Lita Violet Shepard [2018] eKLR*** in support of the

proposition that

the respondent did not establish ownership of the land.

17. Counsel also argued that the learned Judge erred in concluding that the Land Control Board consent dated 7th June 1973, which purportedly facilitated the sale of LR No. 7502/4 from Kabazi Estates Ltd to Kihoto Farmers Company Ltd, included an excision for 19.30 hectares for transfer to Mr. G.W. Mahinda.

18. Further, the learned Judge erred by concluding that the Land Control Board consent dated 7th June 1973, which purportedly facilitated the sale of LR No. 7502/4 from Kabazi Estates Ltd to Kihoto Farmers Company Ltd, included an excision of 19.30 hectares for transfer to Mr.

    G.W. Mahinda.

19. Counsel contended that the respondent did not provide evidence to substantiate the claim that 19.30 hectares were earmarked for excision, rendering the learned Judge's reliance on this unsubstantiated assumption a significant error. To fortify his argument counsel cited ***Abbay Abubakar Haji vs. Marain Agencies Company & Ano. [1984] 4 KCA 53*** in support of the

holding that the courts’ duty to determine issues of fact does not extend to

supplying a theory as to what happens when the inferences from the primary facts do not support the conclusion.

20. Counsel contended that the Learned Judge erred in law and fact in holding that the 1st appellant was not entitled to the whole parcel of land known as LR No. 7502/4, including LR No. 7502/4/1 and by not considering the absence of Land Control Board consent regarding the transaction between the former owner of LR No. 7502/4 and the deceased to excise a portion of LR No. 7502/4.

21. To support his submissions, counsel relied on ***David Sironga Ole Tukai vs. Francis Arap Muge, Kiprotich Arap Kirui & Johannah Kiprono Arap Mosonik*** ***(Sued as Chairman, Secretary & Treasurer of Kapkween Farmers' Co-operative Society Ltd) (Civil Appeal 76 of 2014) [2014] KECA 155 (KLR)*** where the court citing ***Onyango & Ano. vs. Luwayi*** ***[1986] KLR 513 at P. 516*** found a land transaction to be null and void for lack of consent from the Land Control Board. Counsel questioned how the consent to excise 10 acres changed to 46 acres and

faulted the learned Judge for overlooking this crucial

fact.

22. Counsel posed the question, who holds the better title between the two parties, that is, whether it was the respondent who sought consent for only 10 acres or the appellant, who not only paid the full purchase price but also applied for consent for the entire parcel of land.

23. Counsel also faulted the learned Judge for holding that the Land Survey Plan No. 90147 attached to the transfer registered as number I.R. 6091/23, LR No. 7502/4 to the 1st appellant is null and void to the extent it includes the excision known as LR No. 7502/4/1 and in holding that there was misrepresentation by the appellants to their advocates concerning the deed plan for the parcel of land known as LR No. 7502/4.

24. Mr. Karanja emphasized that the law recognizes the finality and legitimacy of a duly prepared and registered survey plan and argued that the survey plan impinged by the trial court was prepared in accordance with the legal requirements and accurately reflected the boundaries of LR No. 7502/4, including the excision of LR No. 7502/4/1. Further, the trial Judge's finding that

the appellants

misrepresented the Deed Plan to their advocates is without merit because for misrepresentation to be established, several elements must be established: These are: (i) a false statement of fact was made, (ii) the false statement was material, (iii) the statement was intended to induce reliance, and (iv) the reliance caused loss or damage. Counsel submitted that these elements were not proved by way of evidence and cited ***Derry vs. Peek* [1889] 14 App. Cas. 337** in support of the holding that the burden of proof lies with the claimant to demonstrate misrepresentation was intentional and material to the transaction. He maintained that the appellants acted in good faith and provided correct documentation, including the accurate Deed Plan, therefore, the learned Judge's findings were erroneous. Further, the survey plan was valid, the deed plan was accurate, and there was no misrepresentation on the part of the appellants.

25. It was the appellants' counsel's submission that the learned Judge erred in law and fact by failing to consider the fact that the respondent never adduced evidence of payment for the purchase of LR No.

7502/4/1, and is not

considering the issues arising from the dispute, the evidence presented, and the appellants' submissions.

26. In his supplementary submissions, the appellants' counsel essentially addressed the same issues highlighted earlier, namely, the question of ownership of the land, the submission that the Judge failed to consider all the evidence, that the Judge shifted the burden of prove to the appellants, that fraud was not proved and concluded by arguing that the respondent's claim was statute barred.

27. In opposition to the appeal, the respondent's counsel submitted that the Director of Surveys confirmed the consolidation of LR No. 7502/2/1 and 7502/6 and the consolidated parcel LR No. 12109 (original parcel LR No. 7502/4/1 and 7502/6). Further, the letter of consent from the Nakuru Land Control Board dated 16th Aril 1973 addressed to M/S KFA Auctioneers, the receivers of Kabazi Estates Limited clearly stated that the Land Board in a meeting held on 4th June 1973 granted consent to Kabazi Estates Limited to transfer to Kihoto Farmers LR Nos. 7502/4 and 7502/7 and the consent stated the Kshs.660,000/- paid by the appellant was

less the portion

which was to be excised and consolidated with LR 7502/6 purchased by the deceased and a title deed issued to him. Therefore, the transfer of LR No. 7502/4 to the appellant which included 19.30 Ha being LR No. 7502/4/1 which had already been purchased by the respondent was questionable, hence the trial court rightly held in favour of the respondent.

28. This is a first appeal, therefore, our duty is to analyze, re- evaluate and make our own independent findings of fact and law, while bearing in mind that we did not have the opportunity to observe the witnesses' demeanor. (See ***Machuka & Ano. vs. Nyangute & Ano. [2025] KECA 538).*** An Appellate Court must be slow to interfere with the factual findings of a trial court. This deference is rooted in the trial court's unique advantage of seeing and hearing witnesses first hand, including observing their demeanor and idiosyncrasies. An Appellate Court will only disturb factual findings if it can be shown that the trial Judge committed a clear misdirection or the findings were plainly wrong, or the judgment suffers from patent perversity or is based on a misreading or omission of material evidence,

or the inferences drawn by the trial court from established facts are manifestly mistaken, absurd, or impossible. The Appellate Court is not bound by the trial court's findings of fact if they are based on a misunderstanding of evidence, although it must respect findings based on witness demeanor (See ***Selle vs. Motor Boat Co. [1968].***

29. As mentioned earlier, the germane issue in this appeal is whether the learned Judge properly held that the respondent was the lawful proprietor of LR No. 7502/4/1. Each party was required to discharge the evidential burden of demonstrating he owned the said land. In ***Jones vs. National Coal Board [1957] 2 All ER 155 (CA) at 159A-B.*** Denning LJ said: ***"… was it not Lord Eldon, LC, who said in a notable passage that "truth is best discovered by powerful statements on both sides of the question …"*** Where the Court is faced with two mutually destructive versions, the proper approach was elucidated in ***Stellenbosch Farmers Winery Group Ltd & Ano. vs. Martell et Cie & Others 2003 (1) SA 11 (SCA) at 14J-15E*** where *Nienaber, JA* said:

“To come to a conclusion on the disputed issues a
court must make findings on (a) the credibility of

the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as:

(i) the witness' candour and demeanour in the witness-box,

(ii) his bias, latent and blatant,

iii) internal contradictions in his evidence,

(iii) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions,

(iv) the probability or improbability of particular aspects of his version,

(v) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c), the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The

more convincing the former, the less convincing will be the latter. But when all factors are

equipoised probabilities prevail."

30. In ***National Employers' General Insurance Co. Ltd vs.***

Jagers, 1984 (4) SA 437(E) at 440E it was stated:

> ***". . . where there are two mutually destructive stories, [the plaintiff] can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false."***

31. In the definitive findings, after evaluating both parties evidence, the learned Judge stated:

> ***"It is clear from the correspondence that the discussions of the suit property had commenced as way back as October 1971 followed by a letter dated 22nd January 1972 (PExh. 2) to Mr. J.F. Ward of Kabazi Estate Ltd. That letter was followed by further discussions ending in letter dated***

4th August 1972 (Pex 3) in which Mr. J.F. Ward of Kabazi Estates Ltd. gave the plaintiff firstly, the right

to move his cattle from one part of his farm to the other by one route that has been agreed, and, secondly, subject to the necessary consent by the Land Control Board, the cost of surveying documentation, legal fees etc, and the price iof Kshs.4,000/- the option to purchse-

"All that land between your present plot (No. 7) and the road pf access granted to Mr. Gichua and others (known as plot No. 6) from the boundary of plot No. 10 running alongside the road above mentioned, to the bridge across the river, the turn- off to our forest Borehole (No. 3) and back to your farm; making certain that borehole No. 3 remains in plot no. 9 as does the pipe line and entrance thereto."

32. The learned Judge also recalled that the respondent also testified that the consent to the excision was granted to

K.F.A Auctioneers Ltd, but the consent for the sale was deferred until the beacons would be placed. This evidence, according to the learned Judge was supported by a letter dated 25th July 1972 by the Nakuru Divisional Land Control Board to K.F.A Auctioneers Ltd the consent was for approximately 10 acres. The learned Judge also noted that the respondent testified that by a letter dated 23rd June 1973, the Director of Survey instructed the Provincial Surveyor to carry out the necessary survey in respect of the excision and consolidation of

LR Nos. 7502/4 and 7502/6- N. E of Nakuru Municipality. The

letter, read:

> ***"The portion of LR. 7502/4 shown bordered in red on the enclosed development plan is to be combined with L.R. No 7502/6… A section bordering the Borehole which is to remain on the side of LR. No, 7502/4. A print 117/66 is forwarded for data…"***

33. The learned Judge also noted that plaintiff's exhibit 6 was a copy of the letter of consent dated 7th June 1973 to K.F.A Auctioneers Ltd in respect of the proposed sale of LR. Nos. 7502/3, 7502/4 & 7502/7 to the 1st appellant by Kabazi Ltd which reads:

> ***"(f) Consideration- Shs. 660,000/= less amount for the portion being excised and consolidated to LR No. 7502/6 purchased by G.W. Mahinda."***

34. Also, the learned Judge made reference to a letter dated 3rd January 1984 from Bahati Divisional Land Control, Board to the appellant referenced excision of 19.30 ha from Plot LR No 7502/4 i.e. LR No 7502/4/1 for transfer to Mr. G.W. Mahinda.

> ***"Record in this office clearly shows that LR. No 7502/4 was excised and amalgamated to Mr. G.W. Mahinda's farm LR No. 7502/6. The piece excised was given a new number L.R No. 7502/4/1.***
>
> ***The purpose of writing to you is to ask you to sign a land transfer form to enable Mr. Mahinda to officially transfer the portion***

to

his name. This is actually as matter of formality. I note that the sub-divisional plan produced before the Bahati Land Control Board did exclude this parcel No. 7502/4/1. Please note that it is therefore in your interest to cooperate in this matter.

Yours faithfully,

Zachariah H.

Kerama
For Cjairman, Nakuru Land Control

Board. Cc

The Commissioner of Lands
The Land Adjudication
Officer The District Officer
Mr. G.W. Mahinda.

35. Addressing his mind to the above letter, the learned judge stated ***"there was no reference in either the evidence of DW1 or any other correspondence by the defendant to that letter."*** The learned Judge also referred to a letter dated 19th December 1983 from the manager, K.F.A Auctioneers Ltd addressed to the Samuel G. Kariuki, the 2nd appellant. It read:

"RE: EXCISSIO OF 46.74 ACRES FROM LR NO. 7502/4, SOLD TO G.W. MAHINDA.

Dear Sir;

You are advised that 46.74 acres which was an excision from L.R No. 7502/4 was sold to the above named on recommendation of the Land Control, Board long before the remaining portion was sold to you.

This is clearly indicated in your application for consent to the Land Control Board of 4th

June 1973.

The Commissioner of Lands in his letter 17668/1/173 of 30th May 1973 instructed the Director of Survey to undertake the surveying work. The land was surveyed and the portion handed over to Mr. Mahinda.

The Chairman was informed of this change by us (K.F.A Auctioneers Ltd) who were the agents and replied confirming this fact in his letter dated 31st May 1973.

There is therefore no problem as far as we are concerned, we sold the land to you and to Mr. Mahinda and the dates quoted above is enough evidence that you purchased the remaining portion and not the whole of plot no. 7502/4.

However, it would appear that your title is based upon a wrong Deed Plan which should have been presented to your lawyers for the purpose of a title deed. This means it may be necessary for you to make a fresh title deed for a correct Deed Plan if you find it difficult to sign the usual transfer forms for Mr. Mahinda.
As agents entrusted to sell the two portions, we hold you responsible for this mistake since you had already been advised by us in writing of the sale of LR. 7502/4/1 to Mr. Mahinda, You should have insisted that your lawyers make a title deed for LR No 7502/4/1 since the later had been surveyed, beaconed and change reflected on the plan.

Yours faithfully,

J. Araba
For Manager."

36. The learned Judge noted that DW1 made no reference to the above letter nor was the information rebutted by

way

of evidence. Lastly, the learned Judge also noted that the respondent produced a copy of a Certificate of Title L.R. No. I.R. 104219 dated 5th January 2009 registered as number IR 104219/1 (a consolidation certificate of title in respect of LR No 7502/4/11 and LR No 7502/6 delineated on Survey Plan No. 117463 comprising of the two parcels of land.

37. Regarding the transfer of the land to the 1st appellant, the learned Judge had this to say:

> ***"What though is clear from the statement of account by Jones & Jones Advocates for the 1st respondent on the transfer of the suit land along with others, from Kabazi Estates Ltd (in receivership) to the 1st defendant is that the apparent lack of attention to the several aspects of that transaction, the sale and transfer to Kihoto Farmers Company Ltd of the suit land.***
>
> ***Firstly, the Land Control Board Consent of 7th June 1973 to the sale by Kabazi Estates Ltd to Kihoto Farmers Company Ltd was subject to the excision of 19.30 Ha from L.R. No 7502/4 by Kabazi Estates Ltd to Mr. G.W. Mahinda. This is notwithstanding the fact that the initial application for excision was not approved because the beacons to delinate the area had not been put in lace. That was subsequently done as evidenced by issue of survey Deed Plan number 117463 referred to in the Certificate of Title No IR 104219 (consolidating LR No 7502/4/1 and 7502/6).***

Secondly, the defendant failed to produce or

adduce evidence on the exact area covered by Survey Deed Plan Number 90147. If that plan referred to the whole area, of land covered under LR No. 7502/4, then it was in light of the foregoing, clearly a mistake and in breach of the clear instructions by the Director of Surveys per his letter of 23rd June 1973, noting that the transfer to Kihoto Farmers Company Ltd. was not made until November 1973, some five months later. Thirdly, that was not only a breach but also a mistake of which Kihoto Famers Company Ltd were clearly aware.

Under section 23 of the Registration of Titles Act, a Certificate of Title issued by the Registrar to a purchaser of land upon a transfer or transmission shall be taken by all courts of the land as conclusive evidence that the person named thereon, subject to encumbrances, easements, restrictions and conditions contained or endorsed thereon, and the title to that proprietor shall not be subject to any challenge. The only exception is upon a ground of fraud or misrepresentation to which he (the purchaser) is proved to be a party."

38. The credibility of the respondents' evidence, her witnesses and the exhibits referred to above was not questioned. The contents of the above correspondence settle the appellants' much hyped argument that no consent of the Land Control Board was obtained, the size of the land that was excised to be transferred to the deceased and the question whether there was no

proof consideration was paid. More important, the excerpts are basically primary

findings of fact based on hearing and seeing the witnesses, and examining the documents tendered in evidence. As mentioned earlier, it is settled law that an Appellate Court should not interfere with the trial Judge's conclusions on primary facts unless it is satisfied that he was plainly wrong. In a recent UK Court of Appeal decision *in* ***Volpi vs. Volpi [2022] 4 WLR 48,*** Lewison LJ summed up the law as follows:

> ***a) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.***
>
> ***b) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.***
>
> ***c) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight***

which he gives

to it is however pre-eminently a matter for him.

d) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.

e) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

39. In short, so long as the Judge considers the evidence and comes to a decision that is not perverse, the Appeal Court will not intervene. In deciding whether the decision was rational (including, in this context, whether the Judge took into account all material considerations), there is an assumption that the Judge looked at and considered all the evidence even if they failed to refer to it. If a Judge's findings are perverse, that is a legal challenge. We can only add that paragraph (d) above answers the appellants' argument that the learned judge failed to consider the evidence and submission.

40. Regarding the transfer of the land the 1st appellant, the

learned Judge held that although the law protects the

rights of a transferee in good faith and for good consideration, there was certainly no good faith in the transfer of LR No.7502/4 to the 1st appellant. The learned Judge stated that the correspondence by the selling agents clearly showed that what was sold to the 1st appellant was part of L.R No. 7502/4 after excision of the part which had been sold to the deceased, which the appellant knew was LR No. 7502/4/1. The learned Judge proceeded to state *"they cannot claim they did not know, and in any event they did not refute the evidence of the plaintiff."* Therefore, the appellants clearly knew that the land was the subject of a sub-division to 7502/4/1. The earlier excerpts from the numerous correspondence show clearly that the land was subject to excision of the parcel of land which had been sold to the deceased. The learned Judge also concluded that rushing the registration of the transfer incorporating the deceased's portion was clearly designed to defeat the deceased's interests in LR No. 7502/4/1.

41. Confronted with the evidence highlighted above, the learned Judge held that the purported transfer to the 1st

appellant is null and void and proceeded to issue the

orders highlighted earlier. In our view, the lucid findings by the learned Judge are firmly grounded on the evidence. Accordingly, we find no merit in all the grounds of appeal. Therefore, we find no basis upon which we can fault the learned Judge. The upshot is that this appeal is devoid of merit. Accordingly, we dismiss it with costs to the respondent.

Dated and delivered at Nakuru this 17th day of March, 2026.

M. WARSAME

.....
JUDGE OF APPEAL

J. MATIVO

.....
JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

.....
JUDGE OF APPEAL

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

Signed.

DEPUTY REGISTRAR