

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KWALE

ELCLA NO. E006 OF 2024

CATHERINE WAVINYA MUTUKU.....

APPELLANT

- VERSUS -

CRISANTUS SOITA WASIKE

MWANAU LU ALI JUMA

BAKARI ALI JUMA.....

.....RESPONDENTS

JUDGMENT

I. Preliminaries

1. The Judgment herein pertains to an appeal lodged before this Honorable Court by *Catherine Wavinya Mutuku* - the Appellant herein. The appeal was filed through a Memorandum of Appeal dated 24th May, 2024 and a 163 pages Record of Appeal dated 16th October, 2024 against *Crisantus Soita Wasike, Mwanaulu Ali Juma* and *Bakari Ali Juma*, the Respondent herein. In a nutshell, the appeal revolves around the entire Judgment of Honourable L.T. LEWA, Principal Magistrate at Kwale made on 20th December, 2023 in ***“Kwale Land Case No. 51 of 2018 Catherine***

Wavinya Mutuku - Versus - Crisantus Soita Wasike, Mwanaulu Ali Juma & Bakari Ali Juma".

2. The Appeal emanates from the entire Judgment of Honourable L.T. LEWA, Principal Magistrate at Kwale made on 20th December, 2023 in "***Kwale Land Case No. 51 of 2018 Catherine Wavinya Mutuku - Versus - Crisantus Soita Wasike, Mwanaulu Ali Juma & Bakari Ali Juma***". Based on the Affidavit of Service on record the Record of Appeal was properly served upon the Respondent pursuant to the leave granted by Court on 22nd May, 2024 in Kwale ELCMISC No. E003 of 2024.
3. On 25th February, 2025 the parties having fully complied with court's direction in filing the written submissions and the fixing of the Judgment date which the parties discharged effectively.

II. The Appellant's case.

4. The Appellant prayed that;-
 - a) ***This Appeal be allowed.***
 - b) ***The Judgment of the trial Magistrate be set aside and this Honourable Court accordingly make appropriate Judgment thereof allowing the Plaintiff's Complaint dated 25th September, 2018.***
 - c) ***The Respondents be condemned to costs of this Appeal and the entire suit.***
 - d) ***Any other and/or further order this Honourable Court might deem fit in the circumstances.***

5. From the filed Memorandum of Appeal, the Appellant averred as follows:-

- a. THAT the trial Magistrate erred in law and fact in his failure to take into consideration the evidence, witness and exhibits brought by the Appellant/Plaintiff.**
- b. THAT the trial Magistrate erred in law and fact by failing to make a finding that the parcel of land sold to the Appellant had been corroborated by the 2nd Appellant's witness to be the same parcel in contestation in the ground.**
- c. THAT the trial Magistrate erred in law and fact by failing to make a finding that during the picking process the Appellant was on the ground.**
- d. THAT the trial Magistrate erred in law and fact by making a finding that the 2nd Respondent was an owner of the suit property despite having been established that the Appellant was in possession of the suit property by virtue of the sale agreement before allocation to the 2nd Respondent and no documentary evidence of the 2nd Respondent having received the property from her father.**
- e. THAT the trial Magistrate erred in law and fact by making a finding that Plaintiff had not proved ownership of the land.**
- f. THAT the trial Magistrate erred in law and fact by placing reliance on a copy of the sale agreement brought in court despite there being no objection to the production of the same by the Respondents herein and the current court**

procedure allowing both production of documents as per list of documents and adoption of witness statements.

g. THAT the trial Magistrate erred in law and fact by placing reliance on evidence that came out in cross examination to the exclusion of filed statements adopted in evidence by the Appellant and her witness.

h. THAT the trial Magistrate erred in law and fact by failing to make a finding with regards to the allegation made against the 3rd Respondent and terming the same immaterial whereas the same went to the core of the Appellant's case.

i. THAT trial Magistrate erred in law and fact by in failing to appreciate the Appellant/Plaintiff's submissions in the entirety

6. From the filed pleadings, the brief facts of the Appeal are the Appellant/Applicant contends that in the year 2015 and 2016, the 2nd and 3rd Defendants approached the Plaintiff to advance them money to aid in settlement of hospital bills and further treatment of their ailing father. In total, the 2nd and 3rd Defendants family received a sum of Kenya Shillings Sixty Thousand (Kshs.60,000.00/=). The Appellant averred that vide an agreement dated 7th March, 2016, the 2nd and 3rd Defendants' family acknowledged receipt of the sum of Kenya Shillings Sixty Thousand (Kshs. 60,000.00/=) and in return, sold a plot to the Appellant, subsequently the Appellant took

possession, the Appellant was present as well as the family of the 2nd and 3rd Respondents and her name was entered/ given as the bona fide owner of the Plot. Notwithstanding her propriety rights over the plot, she alleged that the 2nd and 3rd Respondents went ahead to fraudulently procured title in her name and later sold the property to the 1st Respondent. The trial court failed to consider her evidence, ignored corroborative testimony of PW - 2, and disregarded particulars of fraud.

7. It was the Appellant's case and contention therefore that the 2nd Defendant fraudulently misrepresented herself and without authority alienated her, the suit property into her name thus she urged the Court to find in favour and award the reliefs sought.
8. She relied on Sections 24 and 26 of the Land Registration Act, No. 3 of 2012 arguing that the 2nd Respondent's title was impeachable on grounds of fraud and misrepresentation. She also cited the conviction of the 3rd Respondent for obtaining money by false pretence as corroborative evidence of fraud.
9. Upon service of the Memorandum of Appeal to the Respondents, the Respondents filed their submissions in opposition of the Appeal.

III. The Submissions

10. On 2nd December, 2024, as stated the Memorandum of Appeal and 163 pages Record of Appeal was admitted and directions given specifically in the presence of all the parties. The Honorable Court directed that the said appeal be disposed of by way of written submissions with given stringent time lines. Pursuant to that the parties herein fully complied on, the Honourable Court reserved a Judgment on 10th March, 2026.

A. Written submission by the Appellant

11. The Appellant through the firm of Messrs. Rono Donald and Company Advocates filed their written submissions dated 13th January, 2025. Mr. Rono Advocate commenced his submissions by stating that the Appellant instituted this appeal via a Memorandum of Appeal dated 22nd May 2024, in which she based her appeal on several grounds.

12. The Learned Counsel submitted that the Appellant prayed for:

a) That the Appeal be allowed.

b) That the Judgment of the trial Magistrate be set aside and the Honourable Court accordingly make appropriate Judgment made thereof allowing the Plaintiffs Plaint dated 20th September, 2018.

c) That the Respondents be condemned to costs of this appeal and the entire suit.

d) That any other order and/or further order this Honourable Court might deem fit in the circumstance

13. On the ground that the trial Magistrate erred in law and fact in his failure to take into consideration the evidence, witness and exhibits brought by the Appellant/Plaintiff. The Learned Counsel submitted that the provision of Section 107(1) of the Evidence Act, Cap. 80 provides that: -

“whoever is desirous any court to give Judgment to any legal right or liability dependent of the existence of facts which he asserts must prove those facts exists.”

14. According to the Learned Counsel, further, the provision of Section 109 of the Evidence Act provides that:

“the burden of proving any fact necessary to be proved in order to enable person to give evidence of any other fact is on the person who wishes to give such evidence.”

15. The Learned Counsel submitted that looking at the witness statement of the Appellant Catherine Wavinya Mutuku, they noted that the Learned Magistrate did not take into consideration the following issues that came up to include:

- a. The Agreement for sale of unsurveyed land in Kwale/Shimoni Village SS/942.
- b. The suit property was sold by the 2nd and 3rd Respondents.
- c. The 2nd and 3rd Respondents fraudulently sold the suit property to another buyer;

d. The entries in the search, being Plaintiff Exhibit 2, clearly showed that the entry for Mwanaulu Ali Juma is entry number 1, meaning the land being Kwale/Shimoni Village S.S/942, could not have been bequeathed by her father and that it emanated from a settlement scheme.

16. The Learned Counsel averred that the Learned Magistrate erred by failing to recognize that the Appellant in her statement clearly demonstrated that there were two distinct properties to include;

a. A plot she paid a sum of Kenya Shillings Sixty Thousand (Kshs. 60,000/=) being the suit property paid to Bakari Ali Juma.(Being the suit property).

b. A plot which she paid for a sum of Kenya Shillings Eighty Thousand (Kshs. 80,000/=), which is distinct from the suit property.

17. Plaintiff Witness 2, Nassoro Kassim Ngimwa confirmed that he indeed was a witness to the agreement dated 7th March 2016 and corroborates that the Appellant testimony that she was shown the land and it's four corners, this signified the location of the land sold to the Appellant as being the suit property. The Learned Magistrate erred by failing take into consideration this factor. Further, they further noted that the Plaintiff Exhibit 4

clearly showed a charge sheet. It clearly showed that charges were preferred against the 3rd Respondent for obtaining money by false pretense contrary to the provision of Section 313 of the Penal Code, which charge would later lead to a conviction in Judgment dated 8th June 2021, whereby the learned Magistrate erred by not taking into consideration this evidence tendered by the Appellant.

18. They first cited the provision Sections 24 (a), 25 and 26 of the Land Registration Act, No. 3 of 2012.

19. The Learned Counsel further cited the provision of Section 26(1) of the Land Registration Act 2012 provides that:

“the Certificate of title issued by the Registrar upon registration, or to a purchaser of land upon transfer or transmission by the proprietor shall be taken by the Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefensible 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.”

20. The Learned Counsel argued that the Learned Magistrate erred by not considering the Appellant's allegation of fraud as pleaded. Fraud as per the legal dictionary means

“that fraud consists of some deceitful practice or willful device, restricted to with intent to deprive another of his right or do in some manner an injury”.

21. The Learned Counsel further stated that the Learned Magistrate failed to take into consideration the evidence of the Appellant to prove that indeed fraud occurred by there being;

- a. A sale agreement dated 7th March 2016, which clearly shows the Appellant being the first purchaser of the unsurveyed land, herein being the suit property.**
- b. Fraudulent registration of the 2nd Respondent as the first owner with intent to defraud the Appellant of the suit property and causing her harm through financial loss.**
- c. Fraudulent sale of the suit property being Kwale/Shimoni village S.S/942, to the second buyer being the 1st Respondent.**

22. On the ground that the trial Magistrate erred in law and in fact by failing to make a finding that the parcel of land sold to the Appellant had been corroborated by the Appellant's 2nd witness to be the same parcel in contestation on the ground. The Learned Counsel submitted that the Appellant's 2nd Witness was called Nassoro Kassim Ngimwa, who confirmed that:

- i. He was an elder of Nyumba Kumi, village chairman and neighbor who came to witness the transaction on about the year 2016. (This information is also confirmed by the 3rd Respondent in his cross-examination).

- ii. Indeed, there was a sale agreement between the Appellant and the 2nd and 3rd Respondent.
- iii. The 3rd Respondent and Ali Bakari sold the property to the Appellant.
- iv. That indeed the land said to the Appellant was the suit property being Kwale/Shimoni S.S/942 and gives credibility as to the location of the land.
- v. There was a verification process, rebutting the evidence tendered by the 2nd Respondent that the suit property was bequeathed by the 2nd Respondent's father.
- vi. He was shocked that the suit property was issued to the 2nd Respondent.

23. The Learned Counsel averred that the evidence by Appellant's second witness was not rebutted and was indeed factual but the learned Magistrate failed to consider all the facts above mentioned in arriving that at the decision that the parcel of land the Appellant bought was not the suit property.

24. On the ground of the trial Learned Magistrate erred in law and fact by failing to make a finding that during the picking process the Appellant was on the ground. They noted that the suit property is Kwale/Shimoni Village Settlement Scheme/942. The

provision of Article 260 of the Constitution of Kenya 2010 gives the interpretation of land to include;

- a. The surface of the earth and the subsurface rock.
- b. Any body of water on or under the surface.
- c. Marine waters in the territorial area and exclusive economic zone.
- d. Natural resources completely contained on or under the surface; and
- e. Airspace above the surface.

25. The Learned Counsel contended that having identified what is presumed to be land they must interrogate the methods of acquisition of the land, whereby the provision of Section 7 of the Land Act 2012 provides for the methods of acquisition of title to land through:

- (a) Allocation**
- (b) Land Adjudication Process**
- (c) Compulsory Acquisition**
- (d) Prescription**
- (e) Settlement programs**
- (f) Transmissions**
- (g) Transfers**
- (h) Long term leases exceeding twenty-one years created out of private land.**
- (i) Any other manner prescribed in an Act of parliament**

26. The Learned Counsel relied on the provision of Section 134 of the Land Act, No. 6 of 2012 provides for settlement programs

and noting that the suit property falls within the ambit of settlement programs, where the provision of Section 134(1) of the Land Act 2012 provides that the National Government shall implement settlement programs to provide access to land for shelter and livelihood. 2). Settlement Programmes shall for the purposes of this Act include but not limited to provide access to land to squatters, persons displaced by natural causes, development projects, internal conflicts or such other causes that may lead to movement and displacement. The provision of Section 134(4) provides identification of beneficiaries shall be carried out and verified by a statutory selection committee appointed by the Cabinet Secretary.

27. The Learned Counsel noted that the Appellant through her witness testimony, which was adopted as her evidence in chief, confirmed that the office of the Deputy County Commissioner (D..C.C) Lunga Lunga convened a sensitization meeting for survey and processing of title deeds. The Learned Counsel further stated that it was fundamental requirement for a plot owner to be physically present and stand on his /her plot and she confirmed that she was on the suit property when the surveyors were present and her name being recorded. This fact was not disputed as she was on the ground when the Picking

process was conducted and her name recorded. In Contrast, the 2nd Respondent claimed that the land in Kwale/Village Squatters S.S/942 was bequeathed to her by her father. which statement amounts to a misrepresentation, whose intent was to defraud the Appellant of her property.

28. According to the Learned Counsel, unlike the Land Adjudication process, which provides for any legal redress of the Adjudication process, the settlement programs do not have an avenue of legal redress save for the Court process. which the appellant has decided to exercise. Having established from the corollary of the above, the Appellant was indeed present during the picking process and the land was allocated to her the Learned Magistrate erred by failing to make this finding.

29. On the ground that the trial Magistrate erred in law and fact by making a finding that the 2nd Respondent was the owner of the suit property despite having established that the Appellant was in possession of the suit property by virtue of the sale agreement before allocation to the 2nd Appellant and no documentary evidence of the 2nd Respondent having received the property from the father. The Learned Counsel submitted that the 2nd Respondent in her giving evidence stated that the land was bequeathed to her by her father. They reiterated that

as highlighted earlier one of the processes of acquisition of the land is through a process of transmission by dint of the provision of Section 7 of the Land Act 2012. Section 50 of the Land Act 2012, provides that:

“if a sole proprietor or a proprietor in common dies the proprietors personal representative shall on application to the Registrar in the prescribed form and on production to the Registrar of the grant, be entitled to be registered by transaction as proprietor in the place of the deceased with addition after the representative’s name of the words “as executor of the will or.....deceased or administrator of the estate of.....deceased: as the case may be”.

30. The Learned Counsel submitted that there was no grant of representation produced by the 2nd Respondent to show that the suit property was bequeathed or a succession was conducted on the estate of the 2nd Respondent’s father. Flowing from the above they cited the provision of Section 116 of the Evidence Act, Cap. 80 which provides that “when the question is whether any person is owner of anything of which he is shown to be in possession the burden of proving that he was not the owner was on the person who affirms that he is not the owner.

31. The Learned Counsel further stated that the Appellant had correctly proved that indeed the Land in Kwale/Shimoni Village S.S/942 was not transferred by transmission and we cite that the case of **“Bandi - Versus - Dzomo & 76 Others (Civil Appeal No**

16 of 2022) K.E.C.A 584(eKLR) 24 June 2022(Judgement)” where the Court stated:

“This was the wisdom of the Court in “Munyu Maina - Versus - Hiram Gathiha Maina (2013) eKLR” where it was stated: -

“.....When a registered proprietor right of title is under challenge; it is not sufficient to dangle the instruments of title as proof of ownership. If it is the instrument of title that is under challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and to show that the acquisition was legal, formal and free from encumbrances including any interests which would be noted in the Register.”

32. The Learned Counsel submitted that having noted that the appellant was present during the picking process as confirmed by the 2nd and 3rd Respondents neighbor who was the Plaintiffs second witness number two, Nassoro Kassim Ngimwa. The Learned Magistrate erred by failing to consider that the appellant had a sale agreement and she was first in priority in the suit property being Kwale/Shimoni Squatter S.S/942.

33. They reiterated that the equity maxim that equity will not suffer a wrong to be without a remedy, in this instance the fraudulent registration of land in Kwale/ Shimoni Village S.S/942 ought to be cancelled and a new registration effected to the Appellant to rectify the wrong done by the Respondents.

34. The Learned Counsel on the ground on the trial Magistrate erred in law and fact by making a finding that the Plaintiff has not

proved ownership of the land, submitted that with a keen eye of the holistic look at the Appellant's case, one would realized that she proved her case on the balance of probabilities. Furthermore, they humbly submitted that the evidence as shown by the Plaintiff clearly points to her being the owner of the suit property as seen in the following documents:

- a. A copy of the sale agreement dated 7th March, 2016.
- b. Copies of the photographs.
- c. Copy of the charge sheet.
- d. Judgment delivered on 8th June, 2021.

35. They noted that the purchase was one of an outright purchase and the Appellant had purchased the suit property and knew of its location as corroborated by the Appellant's second witness Mr. Nassoro Kassim Ngimwa who was the village chairman and neighbor to the 2nd and 3rd Respondents. The Learned Counsel submitted that, having taken into consideration the meaning of land as enshrined in Article 260 of the Constitution of Kenya, 2010, the Appellant had clearly proved ownership by providing a sale agreement as the first purchaser of the property and annexures of photographs which clearly showed the existence of the suit property and the developments erected by the

Appellant on the property, confirming that she had indeed cleared and cultivated the suit property.

36. The Learned Counsel further submitted that, the Learned Magistrate had erred by failing to keenly interrogate the evidence adduced by the Appellant and to reach a finding that the Appellant had clearly proved ownership of the suit property.

37. On whether the trial Magistrate erred in law and fact by placing reliance on a copy of the sale agreement brought in court despite there being no objection to the production of the same by the Respondents herein and the current court procedure allowing both the production of documents as per list of documents and adoption of witness statements. The Learned Counsel argued that the Learned Magistrate in her Judgment stated that the piece of evidence brings to question the authenticity of the Plaintiff Exhibit - 1 being the sale agreement, which she noted a copy was availed in evidence as opposed to the original and the Appellant did not bother basis on why the original could not be produced as the primary evidence court.

38. They noted that the provision of Section 97 of the Evidence Act, Cap. 80 provided that: -

“when the terms of the contract , or of a grant or any other disposition of property have been reduced to the form of a document, and in all cases in which any matter is required by

law to be reduced to the terms of that contract ,grant or other disposition of property of such matter, except the document itself or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act.”

39. They further noted that documentary evidence was grouped into two being primary evidence and secondary evidence as seen in the provision of Section 64 of the Evidence Act, Cap. 80. Section 66 of the Evidence Act stated that secondary evidence includes:

- (a) Certified Copies under the provisions hereinafter contained.
- (b) Copies made from the original by mechanical provisions which themselves ensure the accuracy of the copy.
- (c) Copies made from or compared with the original.
- (d) Counterparts of documents as against the parties who did not execute it.
- (e) Oral accounts of the contents of a document given by some person who has himself seen it.

40. The Learned Counsel submitted that the admissibility of the secondary evidence can be found under the provision of Section 68 (1) b of the Evidence Act which provides:

“when the existence, conduct or contexts of the original are proved to be admitting in writing by the person against when it is proved, or by representative in interest”

41. The sale agreement admitted as Plaintiff Exhibit 1 was a secondary evidence when the same was admitted in court, there was no objection by the Respondent's in its admission and the 3rd Respondent being in the sale agreement as a party and his signature being there did not raise any objection to its contents nor its existence. The Learned Magistrate erred by stating that the document can easily be read to have been altered especially looking at where the number was, this statement is false as the same was not interrogated by a document examiner to arrive at an inference that the document was altered in any way. As it stood the document being the Plaintiff Exhibit 1 met the criteria for admission as evidence and there being no objection to the production of the same it becomes evidence of the law.

42. On the ground that the trial magistrate erred in law and in fact by placing reliance on evidence that came out in cross-examination to the exclusion of filled statements adopted in evidence by the Appellant and her witness. The Learned Counsel submitted that the Learned Magistrate erred by failing to give reliance on filled statements to include;

- (a) That the Appellant identified Mwanaulu Ali Juma and Bakari Ali Juma as having sold the land to her.

- (b) That there was an exercise of a settlement scheme at the Deputy County Commissioner (D.C.C) Lunga Lunga.
- (c) That the suit property was unsurveyed land and was initially sold to the Appellant.
- (d) The Appellant was present when the picking process was being conducted and was on the land unlike the 2nd Respondent.
- (e) That the Appellant reported the 3rd Respondent to Shimoni Police Station.
- (f) That the 3rd Respondent was arraigned in court and subsequently found guilty of the offence of obtaining money by false pretense.
- (g) That Nassoro Kassim Ngimwa who was prosecution witness two confirmed that indeed he was the neighbor and village chairman to the 2nd and 3rd Respondent and that he confirms the land sold was the suit property.
- (h) That Nassoro Kassim Ngimwa confirmed the connection of the 2nd Respondent to the transaction by virtue of being the wife to Ali Bakari, who showed the boundaries of the subject property to the Appellant

43. The Learned Counsel asserted that by reliance on the evidence of cross-examination and not taking into complete account the

evidence in examination in chief if the same was done then there would have been a different outcome of the same and in that she erred.

44. On the ground that the trial Magistrate erred in law and fact by failing to make a finding with regards to the allegation made against the 3rd Respondent and terming the same immaterial, whereas the same went into the core of the Appellant's case. The Learned Counsel stated that having noted the Appellant's list of documents being that of:

- i. A sale agreement.
- ii. A copy of the Charge Sheet.
- iii. A copy of the Judgment.

45. The learned Counsel submitted that the charge sheet and Judgment are against the 3rd Accused person who is the brother to the 2nd Respondent. There existed a nexus between the 2nd and 3rd Respondent and the land in Kwale/Shimoni Village S.S/942 was family land and the Appellant could not be said to be a fool when she bought property and looked at the same. The standard of proof in criminal cases was that of beyond reasonable doubt and the Conviction of the 3rd Respondent confirmed that he indeed;

- a) Sold the land to the Appellant alongside the 2nd Respondent.
 - b) That the land sold was the suit property in dispute being Kwale/Shimoni Village S.S/942.
 - c) That the 2nd and 3rd Respondent conspired to effect the registration of the land in Kwale/ Shimoni Village S.S/942, in the names of the 2nd Respondent so that the Appellant can lose her interest in her land
46. The Learned Counsel stated that the Judgment and conviction in the material was immaterial the Learned Magistrate erred and missed out on an opportunity to realize the fraud that was committed by the 2nd and 3rd Respondent which had caused the Appellant immense pain.
47. On the ground that the trial Magistrate erred in law and fact by failing to appreciate the Appellant/Plaintiff's submissions in entirety, it was the Learned Counsel's submission that the Learned Magistrate erred by failing to consider the Appellants submissions in its entirety whereby she failed to consider:
- a. That the subject property is the same property sold to the Appellant.
 - b. That there needed a holistic examination of the documents on record being the sale agreement to tracing

the origin of the unsurveyed land in this instance the sale agreement and all the ancillary documents.

- c. That the 2nd and 3rd Respondents committed acts of fraud and misrepresentation in obtaining title to land in the suit property yet the same had already passed hands.
- d. That the Appellant was in occupation of the suit property and that she has an occupier right as provided in article 40 of the Constitution of Kenya 2010.
- e. That the Plaintiff in her evidence established that the property belonged to the Bakari family and that there was evidence by the judgement in the criminal trial No. 771 of 2018, where it is was confirmed had been shown the Plot.
- f. That the title issued to the 2nd Respondent was by an act of fraud and the same ought to be cancelled

48. On who bears the costs of this suit. The Learned Counsel relied on Section 27 of the Civil Procedure Act Cap 21. Laws of Kenya states that subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time 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 power to determine by whom and cost of what property and to what extent such costs are to be paid and give all the necessary

directions for the purposes aforesaid and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of these powers, provided that of any action, cause or other matter of issue shall follow the event unless the Court or judge shall for good reason otherwise direct. The Hardbury's Law of England 4th Edition (Re-issue) ,(2010) Vol 10para 16 provides that: -

“The court has discretion as to whether costs are payable by one party to another the amount of those costs and where costs are in the discretion of the Court, a party, has no right to costs unless and until the court awards them to him and the Court has an absolute and unfettered discretion to award or not to award them. The discretion must be exercised judiciously, it must not be exercised arbitrary but in accordance with justice and reason.”

49. It was the Learned Counsel's submission that the costs normally followed the event and they would ask that if the Court agreed with them on the above issues, that it exercises discretion to award costs in the Appellant's favour.

50. In conclusion, the Learned Counsel averred that having established that the Learned Magistrate erred in all the nine grounds they sought that:

- a. That the Appeal be allowed.
- b. That the Judgment of the trial Magistrate be set aside and the Honourable Court accordingly make appropriate

Judgment made thereof allowing the Plaintiffs' Plaint dated 20th September, 2018.

c. That the Respondents be condemned to costs of this appeal and the entire suit.

d. That any other order and/or further order this Honourable Court might deem fit in the circumstance.

B. Written Submissions by the Respondent

51. The Respondents through the law firm of Messrs. L.A. Oketch & Co. Advocates filed their written submissions dated 12th March, 2025. M/s Oketch Advocate submitted that this appeal emanated from the decision of Hon. L.T. Lewa (PM) in Kwale MCELC NO, 51 OF 2018 dated 20th December, 2023 in the Magistrate's Court at Kwale. The Appellant herein disagreed with the said Judgment in its entirety resulting in the instant appeal.

52. Vide a Plaint dated the 25th September, 2018, the Appellant herein filed the suit in the trial Court seeking orders of an injunction barring the Defendants from dealing with the land, a declaration that the sale between the 2nd and 3rd Defendants was null and void and the consequent cancellation of the title to the suit land held in the name of the 2nd Defendant. The matter proceeded to trial. The trial court in a Judgment dated the 20th

December 2023 found no merit in the Appellant's Complaint and the reliefs sought thereto and consequently dismissed the suit with costs. Aggrieved by the Judgment in its entirety, the Appellant lodged the instant appeal.

53. The Learned Counsel submitted that the Appellant in her Memorandum of Appeal dated 24th May, 2024, the Appellant anchored her appeal on the afore stated grounds. Therefore, the Appellant prayed that the appeal be allowed, the Judgment of the Learned Trial Magistrate be set aside, and that this Honourable Court do make appropriate orders allowing the Plaintiff's Complaint dated 25th September, 2018.

54. On analysis, the Learned Counsel submitted that they would to preface these submissions by stating that the grounds highlighted by the Appellant herein never clearly pointed out the main issue in dispute so as to make this court tamper with the findings of the trial court. They borrowed from the wise words of the Court of Appeal in the case of:- ***"Nancy Kahoya Amadiva - Versus - Expert Credit Limited & Another [2015] eKLR"*** that stated in Paragraph 10 of its decision that:

"10. From her submissions as filed and highlighted, the Appellant's eleven grounds were reduced to five. Rule 86(1) of the rules of this Court requires that grounds of appeal should be concise, without repetition, argument or narrative

and that unduly wordy and expansive grounds of appeal serve no purpose other than to obfuscate the issues.”...

55. They submitted that in the general sense that the Appellant comes before this court with no substantive issue which upon consideration by this court will lead to the conclusion that the trial Magistrate misapplied the law to warrant the setting aside of her judgement. Clearly the Appellant was clutching at straws by hoping that at least one of the grounds in Memorandum of Appeal sticks before the court. It was their humble submissions that the totality of the grounds of appeal was frivolous and wanting in merit.

56. On whether the trial Magistrate failed to consider the Appellants Evidence. The Learned Counsel argued that they noted that the Appellant in Paragraphs 12 and 13 of the submission has correctly stated the provision of Section 107 (1) and 109 of the Evidence Act. They saw no need to reproduce the said provisions considering that the Appellant has already quoted it. However, they noted that the said provisions spoke to the undisputed principle in law that whoever alleges must prove.

57. The question that begs was whether the Appellant proved that the unsurveyed plot that she purchased for a sum of Kenya Shillings Sixty Thousand (Kshs. 60,000.00/=) was the same as KWALE/SHIMONI VILLAGE S.S/942. As it came out in the course

of trial, the two plots were distinct from each other. The sale agreement dated 7th March 2016 was entered by the Appellant and the 3rd Respondent herein. The same did not capture correctly the number of the plot being purchased, neither was the original agreement produced in court. The 2nd Respondent was never involved in this transaction and was not party to the same.

58. The 2nd Respondent is the absolute proprietor of KWALE/SHIMONI VILLAGE S.S/942 the suit property herein having been issued with a title deed on 7th July 2017. The 2nd Respondent lawfully sold the same to the 1st Respondent herein vide a sale agreement dated 13th June, 2018 in which a valid consideration of a sum of Kenya Shillings One Hundred and Eighty Thousand (Kshs.180,000.00/=) was paid and the agreed was properly executed. As such, all the requirements of a valid contract were met and title in suit property passed to the 1st Respondent herein then. What remained was the actual transfer and issuance of title deed in the name of the 1st Respondent.

59. Before being issued with the title deed, the 2nd Respondent participated in the verification process by the select committee she stood on the suit property herein having been bequeathed the same by her late father who during the adjudication process

was long deceased. That was why when a register was opened for the suit land at the land's registry, the 2nd Respondent's registration was captured as the 1st entry. This evidence was never controverted. During the adjudication and verification process the Appellant stood on her piece of land which had already constructed a house therein and was rightfully registered as such.

60. They submitted that the trial court having appraised itself with totality of the evidence tendered by the Respondents was correctly guided thus arriving at its determination. The same was well captured in Paragraphs 41 - 43 of the Judgement which stated:-

“41. From the evidence emanating from the Plaintiff case, the Plaintiff was sold unsurveyed land/plot vide the agreement of sale dated 7.3.2016.

42. The agreement was between herself and BAKARI ALI JUMA, the 3rd Defendant.

43. The 2nd Defendant, owner of the suit property was never party to the agreement and from her evidence, she was not privy to the sale transaction between the Plaintiff and her brother.”

61. According to the Learned Counsel submitted that the Appellant had not proven any error in the trial Magistrates finding. They urged this Honorable court to find as such and not to interfere with the Judgement. It was worthwhile to reiterate that the

authenticity of the sale agreement dated 7th March 2016 was disputed. The original agreement was not produced in court. The copy produced appeared to have been altered on the number of the plot being sold hence its credibility could not be ascertained. They submitted that no amount of corroboration could resuscitate the said agreement let alone draw a conclusion that the parcel of land sold to the Appellant was the same as the suit property herein.

62. Further, the sale agreement was between the Appellant and the 3rd Respondent not the 2nd Respondent who was the registered owner of the suit land being KWALE/VILLAGE SQUATER S.S/942. The testimony by the Appellant's witness one NASSORO KASSIM NGIMWA apart from being a witness to the disputed agreement did not confirm and/or describe with certainty the property that was sold. They submitted that the trial magistrate took cognizance of all these in arriving at her determination. They humbly prayed that same should not be disturbed.

63. On whether the trial magistrate failed to consider the 3rd Respondent's criminal charges. The Learned Counsel submitted that on the issue of the 3rd Respondent being charged with obtaining money by false pretense, the Appellant referred to the criminal case no.771 of 2018 and the Judgment dated 8th

June, 2021. A close scrutiny of the Judgment, particularly in 2nd Paragraph, the same reads,

“it is alleged that on the 7th March, 2010 with intent to defraud.....The Judgment refers to an alleged transaction that happened in the year 2010.The Appellant's contention has been that the sale of land transaction took place in the year 2016. Clearly, these are two distinct transactions and one cannot be taken to mean the other as proof of sale of the suit property or otherwise.”

64. Moreover, at the tail end of the Judgment, it was recorded that the accused therein kept quiet. That meant he never defended himself, did not have the benefit of counsel neither did he understand what was happening. The prosecution evidence was thus not subjected to challenge and cannot be taken as the gospel truth. They submitted that the trial Magistrate was justified in treating this evidence with abundance of caution. Thus, the Learned Magistrate properly applied herself to that evidence as such rightly arrived at the judgement subject of this appeal. They submitted and pray this Honorable court find as such and allow the Judgement to stand.

65. On whether the Learned Magistrate erred by failing to consider the fraud charges as pleaded. The Learned Counsel submitted that the Appellant was in his submissions asserted that the Learned Magistrate failed to consider the evidence. The court stated clearly in Paragraph 49 of its Judgment that no allegation

of fraud was proved. They quoted what the court had to say in its Judgment verbatim:-

“That observed, I am persuaded that the plaintiff did not in any way, prove the allegation of fraud and/or misrepresentation against the 2nd Defendant, the land owner herein.”

66. The court went into further discussion on the matter. In paragraph 50 the court had the following to say: -

“Whether she managed to prove the same allegations against the 3rd Defendant, that in my view is immaterial because the title deed, and or ownership of the land, is not in the names of this party. A finding against him therefore, is inconsequential, in my humble view.”

67. In the case of:- **“Vijay Morjaria - Versus - Nansingh Madhusingh Darbar (Supra)”** Tunol JA (as he then was) stated as follows: -

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

68. Further, in the case of:- **“Central Bank of Kenya Limited - Versus - Trust Bank Limited & 4 Others [1996] eKLR”** 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.”

69. They submitted that in this matter, the Appellant weakly pleaded fraud and failed to convincingly particularize and/or prove the same in the trial court. The Appellant also failed to lay a basis by way of evidence to the standard of proof as set out in the afore-mentioned decisions on the exact acts of fraud that each of the respondent did to defeat the authenticity of the 2nd Respondent's title. They submitted that it was on this basis that the Honorable Magistrate correctly dealt with the allegation of fraud made by the Appellant against both the 2nd and 3rd Respondents.

70. They noted that the Appellant failed to prove fraud against any of the Respondents. As a result, the Court was right to hold that the allegations of fraud against the 3rd Respondent/Defendant was baseless and could not in any way taint the ownership of the land by the 2nd respondent. They humbly submitted and pray that this Honorable court to maintain that finding and dismiss the Appeal.

71. On whether the Learned Magistrate erred in law by finding that the 2nd Respondent was the lawful owner of the suit property. The Learned Counsel submitted that as correctly submitted by the Appellant, the provision of Section 7 of the Land Act, No. 6

of 2012 provides for Land Adjudication process and settlement programs as some of the ways of acquiring title in land. There evidence on record was is that the 2nd Respondent being a native of Shimoni participated in adjudication and verification process as a beneficiary of the settlement program in the meaning of the provision of Section 134 of the Land Act initiated by the DCC Lunga Lunga Sub - County.

72. The 2nd Respondent herein participated openly in these processes that were being conducted by government officials in open broad day light which culminated in her being correctly registered as the owner of the suit property after all the verification processes and subsequently issued with a title deed on the suit property. The 2nd Respondent herein produced a valid title deed to the effect that she was the lawful registered proprietor of the suit property. The title was issued to her on 7th July, 2017 which he holds to date. The Title has never been challenged or cancelled to date. They highlighted the provision of the provision of Sections 24, 25 and 26 of the Land Registration Act to buttress their argument that the 2nd Respondent's interest in the suit land cannot be defeated by mere allegations.

73. There was no evidence that was tendered to show that the title deed was acquired illegally, unprocedurally or through corrupt schemes. We submit the sanctity of title has to be protected by courts of law. As such, the trial court was thus guided by these provisions of the law to find that the 2nd Respondent is protected by the law as the lawful registered proprietor whose title is indefeasible. On the other hand, the Appellant did not tender any shred of evidence to prove ownership of the suit land.

74. During the verification process, the Appellant also stood on her land and was also issued with her title deed. As to why the Appellant wanted to take the suit land which lawfully belonged to the 2nd Respondent was what beat logic. This conduct by the Appellant made any right - thinking person arrive at the conclusion that she was driven by greed in this endeavor. They urged this Honorable Court not fan the Appellant's greed.

75. The court in the case of:- ***“Gerald Mutua Mutea - Versus - Gakii M'mwitara & Another [2022] eKLR”*** stated as follows: -

39. The law is that any one claiming ownership to land has to provide an unbroken chain of events tracing his root of title to the record.

76. The 2nd Respondent has submitted documents such as the letter from the adjudication office noting her ownership over the land. Section 23 (6) of the Land Adjudication Act provides as follows:

“(6) When completed, the form shall be signed by the chairman and the executive officer of the committee, and by the owner of each interest in the parcel or his authorized agent (or in the case of joint owners by at least one owner or his authorized agent), and the signature of the owner or authorized agent shall be witnessed: Provided that a form shall not be invalidated by the absence of the owner’s signature, if the chairman and the executive officer of the committee certify on it that the owner has withheld his signature or that his signature cannot be obtained without an amount of delay or expense which in the circumstances of the case is considered by them to be unreasonable.”

77. They submitted that the 2nd Defendant’s involvement in the adjudication exercise had not been disputed. They could logically conclude that the 2nd Respondent/Defendant was involved in the exercise from the start and that is how she obtained the certificate of title in a proper, legal manner. It was therefore proper to hold that the 2nd Respondent as the vendor had a valid title.

78. On whether or not the 2nd Respondent had Grant Letters of Administration to prove that the suit property was bequeathed to her. The Learned Counsel submitted that it should be noted that the suit property was bequeathed to the 2nd Respondent by

her father long before the titling process. As it came out from the evidence on record, the same was done during the lifetime of the 2nd Respondent's father. As such, when the titling process began, the suit property had already been bequeathed the father was deceased. By then, the property was directly registered in the 2nd Respondents name. Thus, the issue of Grant Letters of Administration never arose in a property that was bequeathed during the lifetime of the deceased.

79. On whether the Court erred by failing to rely on a sale agreement that had been disputed in cross - examination. The Learned Counsel stated that a close scrutiny of the evidence on record will reveal that the sale agreement relied upon by the appellant was disputed and controverted during cross - examination. Its credibility was brought to question which led to the trial magistrate doubt the authenticity of it. Thus, the Learned Magistrate correctly applied herself on the evidence tendered in arriving at her Judgement.

80. Vide a sale agreement dated 13th June, 2018, the 1st Respondent having ascertained ownership of the suit land, bought the same from the 2nd Respondent. He became a Bona fide purchase for value without notice. The Court of Appeal in "**Arthi Highway Developers Limited (Supra)**" pronounced itself on the doctrine of

bona fide purchaser for value without notice at paragraph 62 by offering a definition as outlined in Black's law Dictionary 8th Edition as:

“One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”

81. To aid in the quick resolution of this matter, they humbly submitted why this court should find that the 1st Respondent easily qualifies as a bonafide purchaser. The 2nd Respondent sold the suit land to the 1st Respondent who had started clearing the same and had fenced it. The 1st Respondent was in the process of transferring the same to him when a restriction emanating from the lower court suit was place halting the process.
82. They submitted that they agreed with the findings of the trial court that the 1st Respondent was a bona fide purchaser for value and should be left to enjoy quiet possession of his land. They prayed that this court dismisses the appeal so that the 1st Respondent who was a Bona fide purchaser could be transferred the same.

83. On who should bear the costs of the Appeal. The Learned Counsel submitted that they noted that the Appellant had prayed for costs in their Memorandum of Appeal and discussed it in their submissions. They submitted the following in response to the issue of costs. The Counsel referred Court to the provision of Section 27 of the Civil Procedure Act, Cap. 21. The Counsel submitted that the Supreme Court of Kenya has time and again aptly stated that costs follow the event but are in the discretion of the Court, as enunciated in the case of:- ***“Jasbir Singh Rai & 3 others - Versus - Tarlochan Singh Rai Estate of & 4 others; SC Petition 4 of 2012; [2013] eKLR”***. The court further reiterated this position in ***“Dickson Ngigi Ngugi - Versus - Commissioner of Lands & 64 Others S.C Petition No. 9 of 2019”*** by stating that the party who calls forth the event by instituting a suit, will bear the costs if the suit fails but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. They prayed that this Appeal be dismissed with orders as to cost.

84. In conclusion, the Learned Counsel submitted that from the foregoing submissions, they prayed and urged this Honorable court to decline the invitation by the Appellant to tamper with

the trial Magistrate's Judgement. Instead, the court should disallow the appeal, with costs to the Respondents.

IV. Analysis and Determination

85. I have had a chance to critically assess all the pleadings filed in this Appeal being the 163 pages Record of Appeal and its contents, the Memorandum of Appeal by the Appellant, the written submissions of both the parties, the plethora of cited authorities by the parties, the relevant provisions of the Constitution of Kenya, 2010 and the statutes.

86. For the Honorable Court to be in a proper position to arrive at an informed, plausible, just, fair and reasonable decision from the filed Appeal by the Appellant herein, the Honorable Court has condensed the subject matter into the following six (6) salient issues for its determination. These are:-

(a) Whether the Appellant proved ownership of the suit property.

(b) Whether the 2nd Respondent lawfully acquired title to the suit property.

(c) Whether fraud or misrepresentation was established against the Respondents.

(d) Whether the trial court erred in evaluation of evidence.

(e) What orders should issue.

(f) Who will bear the costs of the Appeal?

ISSUE No. (a) Whether the Appellant proved ownership of the suit property.

87. Before embarking on the issues for analysis under this sub-heading as indicated earlier in the Judgement the Honorable Court in a preamble form the court makes two assertions. First on the re - evaluation of the evidence from trial court and secondly the brief facts of this case. Fundamentally, it noted that this is a first appeal. In the case of **“Kenya Ports Authority - Versus - Kuston (Kenya Limited, (2009) 2 EA 212”** this Court stated as follows regarding the duty of first appellate court:-

“This being a first appeal to this Court, the duty of the court, is to reconsider the evidence, evaluate and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect...”

88. Similarly, in the case of **“Peter -Versus - Sunday Post Limited 1958 E.A. 424”** Sir Kenneth O’Connor P. rendered the applicable principles as follows:-

“It is a strong thing for an appellate court to differ from the finding on a question of facts, of the judge who tried the case and who had the advantage of seeing and hearing the witnesses. An appellate court has indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a Jurisdiction which should be exercised

with caution. It is not enough that the appellate court might itself have come to a different conclusion....”

Brief Facts:

89. The background of the case is that the dispute arises from Kwale Land Case No. 51 of 2018, where the Appellant, Catherine Wavinya Mutuku, claimed ownership of a parcel of land known as Kwale/Shimoni Village Settlement Scheme/942.

90. The transaction of the case is that in 2015-2016, the 2nd and 3rd Respondents (Mwanaulu Ali Juma and Bakari Ali Juma) approached the Appellant for financial assistance to settle hospital bills for their father. The Appellant advanced them a sum of Kenya Shillings Sixty Thousand (Kshs. 60,000/=), and in return, they sold her a plot through a sale agreement dated 7th March 2016.

91. The Appellant took possession of the land. She was present during the picking process under the settlement scheme, and her ownership was corroborated by PW - 2, a village elder and Nyumba Kumi Chairman, who witnessed the transaction and boundary identification. Despite the sale, the 2nd Respondent allegedly procured registration of the land in her own name, without succession documents, and later sold the property to the 1st Respondent, Crisantus Soita Wasike. The Appellant alleged fraud and misrepresentation, pointing to the conviction

of the 3rd Respondent for obtaining money by false pretence in relation to the same transaction.

92. The Principal Magistrate dismissed the Appellant's claim, holding that she had not proved ownership. The Appellant challenged the decision, arguing that the trial court failed to consider her evidence, ignored corroborative testimony, disregarded fraud, and wrongly accepted the Respondents' defence of inheritance without proof.

93. In short, the Appellant claimed she lawfully purchased and occupied the suit property, but the Respondents fraudulently registered and sold it to a third party. The trial court dismissed her claim, leading to this appeal.

94. I would like to reiterate that the jurisdictional remit of the first appellate court has been considered in various decisions. Recently, the parameters underpinning the scope of the first appellate court's jurisdiction were expounded in the case of:- ***"Kenya Urban Roads Authority & another - Versus - Belgo Holdings Limited (Civil Appeal E011 of 2021) [2025] KECA 764 (KLR) (9th May 2025) (Judgment)"*** where the Court of Appeal held as hereunder:-

"37. We have considered the appeal and this being a first appeal, we are under a duty to subject the entire evidence and the Judgment to a fresh and exhaustive examination with a view to reaching our own conclusions in the matter. In

carrying out this duty, we have to remember that we had no opportunity of seeing and hearing the witnesses who testified during the trial and to make an allowance for the same. We have also to remember that it is a big thing to overturn the findings of a trial court which has had the singular opportunity of reaching its conclusions based on a combination of the evidence adduced and observation by the court of the demeanour of witnesses. In a nutshell, a first appellate court must of necessity proceed with caution in deciding whether or not to interfere with the findings of a trial court, but of course where such findings are not supported by the evidence on record or where they are founded on a misapprehension of the law, the axe must fall on the impugned judgement. This position is anchored in section 78

of the Civil Procedure Act, which requires a first appellate court to re - evaluate, reassess and re - analyse the extracts of the record and draw its own conclusions.

These provisions have been underscored in numerous decisions of the Superior Courts among them Peters - Versus - Sunday Post Limited [1958] EA 424, where the predecessor to this Court expressed itself as follows:

“Apart from the classes of case in which the powers of the Court of

Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide.

But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the

appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a Judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given...

Where a question of fact has been tried by a Judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question...It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed.

This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgment of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong.

95. See also in the case of:- ***“Jabane - Versus - Olenja [1986] KLR 664 at p. 664”***, in which Hancox J.A. the Court added as follows:

“I accept this proposition, so far as it goes, and this court does have power examine and re - evaluate the evidence and findings of fact of the trial court in order to determine whether the conclusion reached on the evidence should stand - see (Peters vs. Sunday Post [1958] E.A. 424). More recently, this court has held that it will not likely differ from the findings of fact of a trial judge who had the benefit of seeing and hearing all the witnesses, and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did - see in particular Ephantus Mwangi - Versus - Duncan Mwangi Wambugu (1982-88) 1 KAR, 278 and Mwana Sokoni - Versus - Kenya Bus Service (1982-88)1 KAR 870.”

96. With the foregoing in mind, I am now well disposed to revert to the issues and to interrogate. I shall commence with the first issue, namely; whether the Appellant proved ownership of the suit property.

97. Under this sub - title, the Honourable Court decipheres that the main substratum in this matter is based on the claim of legal

ownership to the suit property. It is trite law that for a person to prove legal ownership of land they must bear a prima facie conclusive evidence in form of documentation for instance a Certificate of Title. In resolving this issue, the Court must weigh the Appellant's evidence against the Respondents' defence, guided by the Evidence Act, the Land Registration Act, and relevant case law. The provision of Sections 107 (1), 108 and 109 of the Evidence Act, Cap. 80 on "**the burden of Proof**" places the burden on the party asserting a fact to prove it. The Appellant therefore had the duty to establish ownership of the suit property on a balance of probabilities.

98. The proprietor and/or absolute owner ought to have it registered in his/her name, have a title for one to have acquired indefeasible title, interest and title on the land as vested in law. Ideally, the legal effect and efficacy of registration of the documentation is provided for under the provision of Sections 24, 25 & 26 of the Land Registration Act, No. 3 of 2012 which provides as follows:-

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

99. The provision of Section 25 (1) of the said Act further provides that:-

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

100. Further, a certificate of title is prima facie held to be evidence of ownership of the stated land. This is provided for in Section 26(1) of the Land Registration Act which provides:-

“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 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 grounds of fraud, or misrepresentation to which 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.”**

101. It will be seen from the provision of Section 26 above, that the certificate of title is to be taken as prima facie evidence that the person named therein is the proprietor of that land. Sections 24 and 25 above, in essence, do provide that it is the title holder who is entitled to the proprietary rights comprised in the subject land. A certificate of title is conclusive evidence of ownership

and is prima facie evidence that the registered proprietor is the owner. Whereas Section 24 of the Land Registration Act, 2010 gives the registered proprietor absolute rights over the registered land, Section 26 gives sanctity to title and makes provisions of when such title can be cancelled or revoked.

102. To cap it up, it is evident that the right to own and acquire property in Kenya is premised under the provision of Article 40 of the Constitution of Kenya, 2010. The said Article provides as follows:-

“(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—(a) of any description; and (b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person—

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation-

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that

(i)requires prompt payment in full, of just compensation to the person; and
(ii)allows any person who has an interest in, or right over, that property a right of access to a court of law.
...”

103. The Appellant produced a copy of the Sale agreement dated 7th March, 2016 showing she purchased the suit property for a sum of Kenya Shillings Sixty Thousand (Kshs. 60,000/=). Though a copy was tendered, there was no objection to its production, making it admissible under the provision of Sections 64 to 68 of the Evidence Act, Cap. 80. PW - 2 - Nassoro Kassim Ngimwa, a village elder corroborated the transaction, confirmed the Appellant was shown the land boundaries, and identified the land as the suit property. The Appellant testified she took possession, cultivated the land, and was present during the “picking process” under the settlement scheme. The Appellant produced a charge sheet and judgment showing the 3rd Respondent was convicted for obtaining money by false pretence, directly linked to the land transaction.

104. The Respondents’ defence in all this was that the 2nd Respondent claimed inheritance from her father. However, no succession documents (grant of representation or transmission records) were produced to substantiate this claim, contrary to Section 50 of the Land Act and the Law of Succession Act, Cap.

160. Without proof of transmission, the Respondent's claim of inheritance remained unsubstantiated.

105. As a starting point, it is important to recall what the Court of Appeal stated in the case of:- **"Samuel Kamere - Versus - Lands Registrar, Kajiado [2015] eKLR"**:

"It is evident that there are two competing claims over the suit property, and we have said that the Plaintiff's proprietary interest is already established. Since the appellant's title is under challenge, in order to be considered a bona fide purchaser for value, he must prove that he had acquired a valid and legal title, secondly, that he carried out the necessary due diligence to determine the lawful owner from whom he acquired a legitimate title, and thirdly that he paid valuable consideration for the purchase of the suit property."

106. I need to reiterate the provision of Section 26(1)(b) of the Land Registration Act which states that a Title is indefeasible except where obtained through fraud, misrepresentation, or illegal/unprocedural means. On the issue of the burden of the proof, the court in the case of:- **"Evans Nyakwana - Versus - Cleophas Bwana Ongaro (2015) eKLR"** held that:

"As a general preposition, 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(i) of the Evidence Act, chapter 80 Laws of Kenya. Furthermore, the evidential burden...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 section 109 and 112 of law that proof of that fact shall lie on any

particular person...The appellant did not discharge that burden and as section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side."

107. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in ***"William Kabogo Gitau - Versus - George Thuo & 2 others [2010] 1 KLR 526"*** stated that:

"In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

108. In the case of:- ***"Palace Investment Limited - Versus - Geoffrey Kariuki Mwenda & another (2015) eKLR"***, the Court of Appeal held that:

"Denning J in Miller - Versus - Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say;- "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will

loose, because the requisite standard will not have been attained.”

109. The Appellant demonstrated purchase through a sale agreement, corroborated by PW - 2, and evidence of possession. The Respondents failed to rebut this by producing succession documents or proof of lawful transmission. While a certificate of title shows that the holder of the same is the indefeasible owner of land in question, it is not in doubt that the Respondents had acquired the property while the Appellant was in occupation and the legal owner of the same.

110. The trial court dismissed this evidence largely on the basis that only a copy of the agreement was produced. However, under provision of Sections 64-68 of the Evidence Act, Cap. 80, secondary evidence is admissible where not objected to, and indeed the Respondents did not object. For these reasons, I discern that the trial court erred in disregarding this evidence.

ISSUE No. (b). Whether the 2nd Respondent lawfully acquired title to the suit property.

111. Under this sub-heading the Court has already noted that the 2nd Respondent's claim to ownership of the suit property rests on the assertion that she inherited the land from her late father. The Court must therefore interrogate whether such acquisition was lawful, procedurally sound, and supported by evidence.

112. Under the provision of Section 50 of the Land Act, 2012, when a sole proprietor dies, their personal representative must apply to the Registrar with a Grant of representation (either Probate or Grant Letters of Administration) to be registered as proprietor in place of the deceased. This process is governed by the Law of Succession Act (Cap. 160), which mandates that no interest in land can pass to a beneficiary unless a confirmed grant is issued. Further, the record demonstrates that the suit property was part of a settlement scheme allocation, not ancestral land. The Appellant's evidence, corroborated by PW - 2, confirmed that she was present during the picking process and identified as the bona fide purchaser. The land register entries (Plaintiff Exhibit 2) also indicated that the property emanated from a settlement scheme rather than succession.

113. In the absence of such a Grant, and has been admitted by the Respondents, any purported transfer or registration of land to a beneficiary is null and void. This legal principle was affirmed in ***"Isaac Njoroge Kamau - Versus - John Gichohi Mwangi [2016] eKLR"***, where the court held that a person claiming land through inheritance must demonstrate compliance with succession procedures as founded in the Laws of Succession, Cap. 160.

114. The suit property, Kwale/Shimoni Village Settlement Scheme/942, falls under a settlement scheme administered by the government. According to the provision of Section 134 of the Land Act, 2012, land in settlement schemes is allocated by the National Land Commission (NLC) or relevant authorities to eligible beneficiaries through a formal picking and verification process. The law requires that beneficiaries be physically present during the picking process, and their names must be recorded. The Appellant testified—and this was corroborated by PW - 2—that she was present during this process and identified as the rightful allottee. On the contrary, the 2nd Respondent did not provide any evidence of her participation in the picking process or any official allocation letter from the NLC or Ministry of Lands.

115. Further this Court notes that there was evidentiary gaps in the 2nd Respondent's case in that, the 2nd Respondent failed to produce any succession documents to prove that the land was lawfully transmitted to her from her father. The 2nd Respondent did not present any allocation records from the settlement scheme authorities confirming her as the rightful allottee. Plaintiff's Exhibit 2 showed that the land was first registered in the 2nd Respondent's name without any prior entry indicating

succession or allocation, raising suspicion of irregular registration.

116. The Court is guided by the principle in case of:- **“Munyu Maina - Versus - Hiram Gathiha Maina (2013) eKLR”**, which holds that when a registered proprietor’s title is challenged, they must go beyond the instrument of title and prove the legality of acquisition. In this case, the 2nd Respondent failed to discharge that burden. This principle applies squarely here. The 2nd Respondent’s title was challenged, yet she failed to demonstrate any lawful process of acquisition.

117. Accordingly, the Court finds that the 2nd Respondent’s registration as proprietor of the suit property was not supported by law. Her claim of inheritance lacked the necessary legal foundation, and the land’s status as part of a government settlement scheme required formal allocation, which she did not prove. Her title is therefore impeachable under the provision of Section 26 (1)(a) and (b) of the Land Registration Act, No. 3 of 2012 having been acquired through fraud, misrepresentation, or unprocedural means.

ISSUE No. (c) Whether fraud or misrepresentation was established against the Respondents.

118. Under this sub title, the Honourable Court shall examine whether the Suit Property was fraudulently registered solely in the names of the Respondents. The provision of Section 26(1) of the Land Registration Act, 2012 provides that:

“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... 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.”

119. Section 26(1) of the Land Registration Act, 2012 provides that a certificate of title issued by the Registrar is to be taken as prima facie evidence of proprietorship. However, it may be challenged on two grounds:

- a. Fraud or misrepresentation to which the registered proprietor is proved to be a party; or**
- b. Where the title has been acquired illegally, unprocedurally, or through a corrupt scheme**

120. Fraud is defined and set out in the Black’s Law Dictionary, 9th Edition at page 131 as:

“a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”

121. The provision of Section 80 of the Land Registration Act, No. 3 of 2012 empowers the Court to order rectification of the register by

cancelling or amending any registration obtained by fraud or mistake.

122. The Court of Appeal in the case of **“Kuria Kiarie - Versus - Sammy Magera (2017)eKLR”**, where the it was stated and held as hereunder: -

25. The next and only other issue is fraud. The law is clear and we take it from the case of Vijay Morjaria - Versus - Nansingh Madhusingh Darbar & Another [2000] eKLR, where Tunoi, JA (as he then was) stated as follows:

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

123. Furthermore, the position as pertains to a claim of fraud as well as the requisite standard of proof attendant thereto, was also adverted to and succinctly illuminated upon in the case of **“Kinyanjui Kamau - Versus - George Kamau [2015] eKLR”**, where the Honourable Court expressed itself as follows;-

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

124. On the legal principles and the elements of actionable fraud or misrepresentation, a false representation or concealment; knowledge (or reckless indifference) of its falsity by the person making it; intention that the representation be acted upon; actual reliance by the claimant; and resulting loss or damage. As I have previously stated in this judgment, a registered title is prima facie indefeasible but is impeachable where it was obtained by fraud or misrepresentation. When a registered proprietor's title is challenged the proprietor must go beyond the certificate and prove the legality of acquisition. On the bona fide purchase rule, a subsequent purchaser for value without notice of the prior equitable interest may take free of that interest; proof of notice or bad faith is therefore material when a third party acquires the land after the alleged fraud.

125. Premised on the certificate of title, it is imperative to state and observe that the issuance of such certificate of title, is prima facies evidence of ownership, unless there is Evidence of Fraud, Illegality or impropriety, to defeat the same. In this

regard, the provision of Sections 24 and 25 of The Land Registration Act, 2012, are imperative.

126. The Court of Appeal in the case of **“Munyu Maina - Versus - Hiram Gathiha Maina (2013) eKLR”** pronounced itself as thus:-

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is challenged and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances.”

127. Further in the case of **“Kassim Ahmed Omar & another - Versus - Anwar Ahmed Abed & others, Malindi ELC No 18 of 2015”** the court held that;

“A certificate of title is an end process. If the process that followed in issuing the title did not comply with the law, then such a title can be cancelled by the court.”

128. On the evidence of record and its appraisal, the Appellant produced a sale agreement dated 7th March, 2016 and an independent witness (village elder) who corroborated that the Appellant was shown the land, that a sale took place and that she was present during the picking/allocation process. This evidence supports the Appellant’s assertion of an antecedent sale and possession.

129. The Appellant gave evidence of taking possession and undertaking elaborate improvements; such acts, if accepted,

support reliance and proprietary interest. The Appellant produced a charge sheet and a conviction of the 3rd Respondent for obtaining money by false pretence in relation to the same transaction. A criminal conviction for obtaining money by false pretence is strong corroborative evidence of dishonest conduct in the underlying transaction.

130. The 2nd Respondent asserted inheritance but produced no Grant of representation or allocation records; absence of lawful transmission documentation weakens the Respondent's account and supports the inference of irregularity. The trial court treated some of the Appellant's evidence as unreliable or immaterial; on appeal the Court must re-examine whether the totality of evidence establishes fraud on the balance of probabilities.

131. The conviction of the 3rd Respondent for obtaining money by false pretence, together with the sale agreement and PW - 2's corroboration, establishes that a misrepresentation was made and that at least the 3rd Respondent acted dishonestly in the transaction. The circumstances permit an inference that the 2nd Respondent participated in or benefited from the scheme to register and alienate the land contrary to the Appellant's prior purchase. The Appellant relied on the sale by paying a sum of

Kenya Shillings Sixty Thousand (Kshs. 60,000/=) and taking possession; she suffered loss when the property was registered and later sold to a third party.

132. Because the 2nd Respondent's registration was not supported by succession or allocation documents and because there is evidence of dishonest conduct by the 3rd Respondent (and a plausible nexus to the 2nd Respondent), the registration is open to challenge as having been procured by misrepresentation/fraud. The record shows the 1st Respondent acquired the property from the 2nd Respondent after the contested registration. To impute fraud to the 1st Respondent the Appellant must show that the 1st Respondent had actual or constructive notice of the Appellant's prior equitable interest or that the 1st Respondent participated in the fraudulent scheme. The material before the Court does not positively establish that the 1st Respondent had notice or was a party to the fraud; the Appellant's case as to the 1st Respondent therefore depends on proof of notice which is not clearly made out on the record.

133. This Court under this sub - title makes the finding that fraud and misrepresentation has been established against the 3rd Respondent by virtue of the criminal conviction for obtaining

money by false pretence and the corroborative civil evidence. Fraud and misrepresentation is established against the 2nd Respondent on the balance of probabilities: she failed to prove lawful transmission or allocation, and the surrounding facts (sale agreement, witness corroboration, and the 3rd Respondent's conviction) support the inference that the 2nd Respondent's registration was procured by unprocedural means and misrepresentation.

134. As to the 1st Respondent, the Court finds that the record does not sufficiently prove that the 1st Respondent had actual or constructive notice of the Appellant's prior purchase or that the 1st Respondent participated in the fraud. Accordingly, I hold that the Appellant has not established fraud or misrepresentation against the 1st Respondent on the present record; whether the 1st Respondent's title is defeasible will depend on further proof of notice or bad faith.

135. In conclusion, on the evidence before the Court, fraud and misrepresentation have been established against the 2nd and 3rd Respondents, rendering the 2nd Respondent's registered title impeachable. The Appellant has not, however, proved fraud against the 1st Respondent because there is no clear

evidence that the 1st Respondent purchased with notice of the prior sale or participated in the fraudulent scheme.

ISSUE No. (d). Whether the trial court erred in evaluation of evidence

136. Under this sub - title, the Honourable Court is tasked with the examination of the trial court's approach to the evidence — both documentary and oral — and whether the learned Magistrate applied the correct legal tests, weighed the evidence fairly, and reached a conclusion open on the record. The Court must determine

- (a) whether the trial court misdirected itself in law when assessing admissibility and weight;
- (b) whether material findings of fact were unsupported by the evidence; and
- (c) whether any such errors were material to the outcome.

137. An appellate court does not lightly interfere with findings of fact made by a trial court that had the advantage of seeing and hearing witnesses. However, interference is justified where the trial court misapplies legal principles, fails to consider material evidence, relies on irrelevant matters, or makes findings that are plainly wrong or unsupported by the record.

138. The party asserting ownership bears the burden of proof on the balance of probabilities. The trial court must evaluate whether that burden was discharged by the totality of admissible evidence.

139. The Appellant tendered a copy of a sale agreement. The trial court treated the fact that the original was not produced as fatal and suggested possible alteration without expert examination. The correct approach is to determine admissibility under the Evidence Act provisions on primary and secondary evidence and, where admissible, to assess weight.

140. The trial court erred by treating non - production of the original as determinative of the document's probative value without first

(i) enquiring why the original was not produced,

(ii) considering whether secondary evidence was admissible,
and

(iii) assessing the document's weight in light of corroborative testimony. Where no objection was raised and the document met the statutory conditions for secondary evidence, the trial court should have admitted it and then evaluated its credibility in context.

141. PW - 2 (the village elder) corroborated the Appellant's account of the sale and identification of the plot. The Appellant also gave evidence of possession and acts of ownership. These facts, taken together, are relevant to proving purchase and possession. The trial court gave disproportionate weight to aspects of cross-examination while discounting the evidence given in chief and the independent corroboration. A proper evaluation requires the court to consider the whole of each witness's evidence — the account in chief, the demeanour and consistency, and whether independent witnesses corroborate material facts. The trial court's selective reliance on cross - examination answers to the exclusion of unchallenged or corroborated evidence amounted to misdirection.

142. The 2nd Respondent claimed acquisition by bequest but produced no grant of representation or succession documents. Where a registered proprietor's title is challenged, the proprietor must show legality of acquisition. The trial court accepted the 2nd Respondent's assertion without requiring documentary proof of transmission or allocation. This was a legal error: the court should have required the Respondent to produce the statutory proof of succession or allocation before treating the registration as unassailable.

143. The Appellant produced a charge sheet and a conviction for obtaining money by false pretence connected to the transaction. A criminal conviction is strong corroborative evidence of dishonest conduct relevant to civil claims of fraud. The trial court dismissed the relevance of the conviction as immaterial to the civil dispute. That approach was incorrect: while conviction does not automatically determine civil liability, it is admissible and relevant to the question of whether the transaction was tainted by fraud and should have been weighed accordingly.

144. The Appellant gave evidence that she was present during the picking process and was recorded as an allottee; PW - 2 corroborated this. Presence during allocation and acts of possession are important indicia of proprietary interest in settlement scheme land. The trial court failed to make a clear finding on whether the Appellant was present and recorded during the picking process, and did not reconcile that evidence with the Respondent's claim of inheritance. The omission to evaluate these facts materially affected the court's conclusion on ownership.

145. I dare state further that the Appellant and her witnesses had filed and adopted witness statements. The trial court relied

heavily on answers given in cross-examination while discounting the content of adopted statements. Adopted statements are evidence and must be considered in full. Cross-examination may expose inconsistencies, but it does not automatically negate the entirety of a witness's evidence. The trial court's approach amounted to an improper method of weighing evidence.

146. Each of the errors identified — improper treatment of secondary documentary evidence, failure to require proof of lawful transmission, disregard of corroborative witness testimony and conviction, and selective reliance on cross-examination — are not minor. Taken together they go to the heart of the dispute: who owned the land and whether the registered title was obtained lawfully. The misdirection and omissions were material and likely affected the outcome. They therefore justify appellate intervention.

147. The Court finds that the trial court erred in its evaluation of the evidence in several material respects: it misapplied the law on admissibility and weight of documentary evidence; it failed to require proof of lawful transmission by the 2nd Respondent; it improperly discounted corroborative oral testimony and a relevant criminal conviction; and it relied selectively on

cross-examination to the exclusion of adopted statements. Those errors were material to the determination of ownership and therefore vitiate the trial court's conclusion that the Appellant had not proved her case.

ISSUE No. (e) What orders should be issue

148. Under this sub - title, the Honourable Court shall examine the orders to be issues. This Court allows this appeal because the trial Court's decision was vitiated by material legal and factual errors that affected the outcome. The Appellant discharged the burden of proof on the balance of probabilities by adducing documentary and oral evidence that the trial court either ignored or mis-evaluated. The errors identified justify reversal and the grant of substantive relief to correct the injustice.

149. I say this because the trial court treated the non - production of an original document as determinative without first applying the statutory tests for admissibility and weight of secondary evidence. There was independent, credible corroboration of the Appellant's purchase and possession was discounted or overlooked. The 2nd Respondent's assertion of inheritance was accepted despite absence of any grant of representation or allocation records.

150. Further the conviction of the 3rd Respondent for obtaining money by false pretence was wrongly deemed immaterial to the civil claim. The trial court gave undue weight to answers in cross-examination while disregarding adopted statements and consistent evidence in chief.

151. The Appellant produced a sale agreement, credible witness testimony identifying the plot, and evidence of possession and improvements; these facts, taken together, established a prior equitable interest. The 2nd Respondent failed to produce any statutory proof of transmission or allocation; her claim of inheritance was unsubstantiated. The conviction of the 3rd Respondent for obtaining money by false pretence materially corroborates the Appellant's allegation that the original transaction was tainted by dishonest conduct. The cumulative effect of the trial court's misdirections was to deny the Appellant a fair assessment of her case; had the evidence been properly weighed, the Appellant's claim would have succeeded.

152. This Honourable Court is alive to the fact that the consequences of allowing the appeal will also mean that the trial court's judgment is set aside and replaced with a

declaration that the Appellant is the lawful owner of the suit property, subject to the Court's decretal orders.

153. Further, on the rectification of the register, the tarring point is examining Section 79 of the Land Registration Act which governs rectification of land register by the Registrar. It provides, inter alia, that the Registrar may rectify the register or instrument presented for registration in formal matters and in the case of errors or mistakes and for purposes of updating the register. Sub-sections 2, 3A and 4 of the said Section read:

(2) No alteration affecting the title of a proprietor may be made pursuant to sub-section (i) without the proprietor's consent unless;

a) The proprietor has by fraud or lack of proper care caused or substantially contributed to the error, mistake or omission; or

b) It would for any other reason be unjust for the alteration not to be made.

provided that a written notice of ninety days shall be given to the proprietor of such intention to make the alteration.

(3A) A person aggrieved by the decision of the Registrar under this section may apply to the court for any necessary orders.

(4) The Cabinet Secretary may by regulations prescribe the guidelines that the Registrar shall follow before rectifying or directing rectification under this Section and without prejudice to the generality of the foregoing, the regulations may provide for:-

- a) **The process of investigation including notification of affected parties.**
- b) **Hearing of the matters raised; and**
- c) **The criteria to be followed in coming up with the decision**

154. In addition, **Rule 92 (2) and (3)** as pointed out at paragraph 12 hereinabove, stipulates that;

- a) **The Registrar shall issue a notice of intention to rectify the register under 79(2) of the Act, in Form LRA 91 set out in the Sixth schedule.**
- b) **An order by a Registrar issued under section 79 of the Act shall be in Form LRA 92 set out in the Sixth Schedule. (Emphasis added)**

155. These provisions clearly establish that the power of the Registrar to rectify the register is administrative and limited. The Registrar may correct typographical errors, misdescriptions, or non-material discrepancies. However, where the rectification would affect the ownership or title of a registered proprietor, such action cannot be taken administratively and requires the intervention of the Court under Section 80 of the Land Registration Act, 2012. The provision of Section 80 (1) of the same Act provides that:-

“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.”

156. The provision further limits rectification affecting a registered proprietor's title unless it is shown that the proprietor had knowledge of or substantially contributed to the omission, fraud, or mistake. It therefore follows that the distinction between Sections 79 and 80 is crucial: Section 79 governs administrative corrections by the Registrar, while Section 80 vests the judicial power to cancel or amend a title in the Court upon proof of fraud or mistake.

157. The term **“rectification of register”** is defined in Black's Law Dictionary, 10th Edition, page 1467 as **“a process by which a person whose name was wrongly entered in or omitted from the record can compel the recorder to correct the error.”** This definition reinforces the legal principle that rectification may involve correcting clerical or administrative errors but does not extend to substantive alteration of ownership unless by judicial sanction.

158. The Court is also guided by the constitutional protection of property under Article 40 of the Constitution of Kenya, 2010, which guarantees every person the right to acquire and own property individually or in association with others. However, the protection of property rights must be balanced with the due process of law governing land registration and

rectification. The Land Registrar is directed to correct the register to reflect the Appellant's proprietary interest, and any registration procured by misrepresentation is declared impeachable.

159. Therefore, I conclude that allowing the appeal corrects a substantive injustice caused by procedural and evidential missteps at trial. The Appellant proved purchase, possession and corroboration; the Respondents failed to prove lawful transmission; and there is credible evidence of misrepresentation. For these reasons the appeal is allowed and the Court grants the consequential orders necessary to restore the Appellant's rights and to vindicate the rule of law.

ISSUE No. (f) Who will bear the costs of the Appeal?

160. The issue of Costs is at the discretion of Courts. Costs mean the award that a party is granted at the conclusion of any process, legal action or proceeding in any litigation. The Proviso of the provision of Section 27 (1) of the Civil procedure Act, Cap. 21 provides that Costs follow the event whereby by events it means the result of the said process, legal action or proceedings.

161. In the instant case, I find that the Appeal has merit and is hereby allowed as prayed with costs of the appeal to the Appellant. She is entitled to costs.

V. Conclusion and Disposition.

162. The upshot of the foregoing, and having conducted an in-depth analysis of the framed issues herein, the Honorable Court finds that the Appeal by the Appellant has merit and is hereby succeed. Accordingly, and for avoidance of any doubts, the Honorable Court makes the following orders for disposal thereof:-

(a) **THAT Judgement be and is hereby entered in favour of the Appellant to wit that the appeal filed through a Memorandum of Appeal dated 24th May, 2024 and a 163 pages Record of Appeal dated 16th October, 2024 be and are hereby found to have merit and is allowed with costs.**

(b) **THAT the Judgment delivered by Hon. L.T. Lewa, Principal Magistrate, on 20th December, 2023 in Kwale Land Case No. 51 of 2018 be and is hereby set aside and substituted with an order allowing the Plaintiff's claim as prayed in the Plaint dated 25th September, 2018.**

(c) **THAT a declaration be and is hereby made that the Appellant, Catherine Wavinya Mutuku, is the absolute and lawful registered owner of all that parcel of land known as Land reference Numbers**

Kwale/Shimoni Village Settlement Scheme/942 with all indefeasible rights, interest and title vested on her by law, and the registration of the 2nd Respondent as proprietor thereof is cancelled.

(d) THAT an order directing the Land Registrar, Kwale, to forthwith rectify the register by registering the Appellant as proprietor of the suit property and to remove any entries inconsistent with this Judgment.

(e) THAT an order of permanent injunction be and is hereby issued restraining the Respondents, their agents or assigns, from interfering with the Appellant's quiet possession and enjoyment of the suit property.

(f) THAT the costs of both the suit in the trial court and of this appeal shall be borne by the Respondents jointly and severally to be awarded to the Appellant.

IT IS SO ORDERED ACCORDINGLY

**JUDGEMENT DELIVERED THROUGH MICROSOFT TEAMS
VIRTUAL MEANS, SIGNED AND DATED AT KWALE THIS.....10TH
.....DAY OFMARCH.....2026.**

.....
**HON. MR. JUSTICE L.L. NAIKUNI
ENVIRONMENT AND LAND COURT
AT
KWALE**

Judgment delivered in the Presence of:-

- a) Mr. Daniel Disii, the Court Assistant.
- b) Mr. Rono Advocate for the Appellant.
- c) No appearance for the Respondents.

Judge's Copy