

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT
KAKAMEGA
ELCLA CASE NO. E062 OF 2024

JACK ONYANGO ONYANGO..... 1ST

APPELLANT

TABITHA NYANGUTHI SOO.....2ND

APPELLANT

VERSUS

RACHEL NAFULA MAKOKHA.....

.....RESPONDENT

(Being an appeal against the judgment of Hon. V. Amboko, (SRM) delivered on 27th September 2024 in Kakamega MCELC Case No. 62 of 2019 (consolidated with Kakamega MCELC CASE NO. E21 OF 2019))

JUDGMENT

Introduction

1. This appeal arises from the judgment of Hon. V. Amboko (Senior Resident Magistrate) delivered on 27th September 2024 in Kakamega ELC Case No. 62 of 2019. In the impugned judgment, the learned trial Magistrate dismissed

the plaintiffs' claim and allowed the defendant's counterclaim, ordering cancellation of title number **Butsotso/ Indalagasia/6840**.

2. The trial court further awarded the defendant Kshs. 100,000/= as general damages for wasted construction materials, and issued a mandatory injunction compelling the 3rd plaintiff in the trial court matter to complete the land transfer process. Aggrieved by the trial court's decision, the 1st and 2nd plaintiffs before the lower court (appellants herein) lodged the present appeal seeking to have the judgment set aside.

Background

3. By a plaint dated 2nd May 2019, the plaintiffs instituted a suit against the defendant, on the basis that they were the registered proprietors of land parcel **No. Butsotso/Indangalasia/6840**, having purchased the same at a consideration of Kshs. 1,350,000/= from one Patrick Mbayaki Masinde, the registered owner of land parcel **No. Butsotso/ Indangalasia/4511**, which had been subdivided into various parcels, including the suit property.

4. They stated that prior to the purchase, they conducted due diligence and obtained all the necessary consents relating to the transaction, and that no claim, encumbrance, or interest in favor of the defendant was disclosed or brought to their attention. The plaintiffs further pleaded that the defendant unlawfully entered upon the suit property and commenced construction of permanent structures thereon, thereby interfering with their quiet possession. That despite demand and notice of intention to sue, the defendant allegedly persisted with the construction.
5. On the basis of the foregoing, the plaintiffs sought judgment against the defendant for a permanent injunction restraining her from trespassing upon, interfering with or constructing on land parcel **No. Butsotso/ Indangalasia/ 6840**; an order authorizing demolition of the permanent structures allegedly erected thereon; damages for trespass and costs of the suit.
6. In response to the plaint, the defendant filed defence and counterclaim dated 29th July 2019 wherein she denied the plaintiffs' claim in *toto* and stated that by a sale agreement dated 29th June 2009, she had purchased a portion of land

measuring 50 feet by 100 feet hived off from land parcel **No. Butsotso/Indangalasia/4511** from Patrick Masinde Mbayaki at a consideration of Kshs. 340,000/=, which was later revised to Kshs. 380,000/= pursuant to an addendum dated 31st May 2010.

7. Further that she paid the full purchase price, took possession of the land, and remained in peaceful and uninterrupted occupation thereof. Further, that at the time of the transaction, the vendor informed her succession proceedings were pending confirmation of grant in Kakamega High Court Succession Cause No. 246 of 2008, and that completion of transfer would be effected upon confirmation of the grant and transmission of the property into the vendor's name.

8. She contended that the subsequent sale and transfer of the suit property to the plaintiffs was fraudulent, unlawful, null and void, and incapable of conferring valid title, as she was a bona fide purchaser for value without notice of any competing interest and had acquired an equitable proprietary interest in the portion purchased. She particularized fraud and illegality on the part of the

plaintiffs and the said vendor, Patrick Masinde Mbayaki for failing to disclose to the court the existence of Kakamega MCLE Case No. 21 of 2019 concerning the same subject matter.

9. That the plaintiffs also failed to disclose that she was already in possession and occupation of the suit property at the time of their alleged purchase and procured registration and issuance of title to land parcel **No. Butso/Indangalasia/6860** through false pretences and misrepresentation of material facts.

10. The defendant further pleaded that the said Patrick Masinde Mbayaki misrepresented to her the true status of the succession proceedings, concealing material facts relating to confirmation of grant and transmission of the estate property. That he failed to disclose to the plaintiffs the prior sale of the portion of land to her and his receipt of full purchase price. That he fraudulently engaged in double allocation and sale of the same portion of land to two different purchasers with the intention of benefiting from multiple transactions over the same property.

11. In the counterclaim, the defendant sought dismissal of the plaintiffs' suit and prayed for cancellation of title **No. Butsotso/Indangalasia/6860**, costs of the dismissed suit and the counterclaim, and interest thereon.
12. The plaintiffs filed a reply to the defence and counterclaim, stating that they were strangers to the 29th June 2009 sale agreement relied upon by the respondent, which related to L.R. No. Butsotso/Indangalasia/4511 and not the suit property, L.R. No. 6840. They further submitted that the subdivision of L.R. No. 6470 created ten titles, including L.R. No. 6840, which they had validly purchased from the 3rd plaintiff and that the defendant had subsequently trespassed on.
13. Vide the order of the court made on 23rd August 2019, the trial court consolidated Kakamega CM ELC CASE NO. 62 OF 2019 with Kakamega CM ELC CASE NO. E21 OF 2019. In the latter, Patrick Masinde Mbayaki sued the respondent herein seeking orders for revocation of the sale agreement dated 29th June 2009 and all consequential activities together with costs of the suit.

14. On the other hand, the respondent herein counterclaimed for a mandatory injunction directing him to complete the transaction between them by executing all relevant transfer documents, compensation for general damages for destruction of construction materials, cancellation of title and costs of the suit and the counterclaim.

15. The suit proceeded to hearing through *viva voce* evidence. Both the plaintiffs and defendant called two witnesses each in support of their respective cases.

Plaintiffs' evidence.

16. PW1 was Jack Onyango Onyango. He adopted his witness statement dated 2nd May 2019 as his evidence in chief and produced documents in his list of documents filed thereon. He testified that on 18th February 2019 he and the co-plaintiff entered into a land sale agreement with Patrick Mbayaki Masinde for **L.R. Butso/Indangalasia/6840**, a subdivision of **L.R. Butso/Indangalasia/6470**, at a consideration of Kshs. 1,350,000/= which was fully paid and title deed was issued, in their names on 12th April 2019 after consent from the Land Control Board was obtained.

17. It was his evidence that at the time of purchase, the land was vacant and free of any competing claims but he later discovered the defendant had trespassed and was constructing permanent structures on the suit land without consent.

18. On cross-examination, PW1 stated that he became aware of the land in December 2018 through a broker. That he visited the land in 2018 and found it vacant and demarcated by adjoining plots. That he then carried out due diligence including conducting a pre-purchase search, perusing the green card, and obtaining a copy of the mutation form, though he did not file the said documents in court. He admitted that he did not issue any prior notice to the defendant and alleged not being aware of any prior dealings between the vendor and the defendant. He also stated that he found trees around the fence of the suit property. He confirmed that no consideration was stated in his title deed. Further that he had no evidence of payment of stamp duty, application of consent and consent from the Land Control Board. That on 15th March 2019 construction going on, on the suit property and that the same was

before he obtained title. Further that PW2 filed suit on 19th February 2019, which is a day after selling him the suit property.

19. On re-examination, PW1 reiterated that he had no knowledge of the defendant holding any interest in the land and that the vendor was the registered proprietor. He maintained that his title was valid, no restrictions were registered, and failure to take immediate possession did not affect his ownership.

20. PW2 was Patrick Mbayaki Masinde, the 3rd plaintiff in the trial court. He adopted his witness statement filed in court on 19th February 2019 as his evidence in chief and produced a copy of the land sale agreement dated 29th June 2009, the acknowledgment of payment dated 1st October 2009, and a certificate of official search. He testified that he sold a portion of land measuring 50 feet by 100 feet to the defendant at a consideration of Kshs 340,000/=, of which various sums were paid, but the land was at the time still registered in the name of his late father and succession had not been concluded. That no Land Control Board consent

had been obtained and no mutation had been prepared at the time of the agreement.

21. On cross-examination, PW2 admitted that he caused the subdivision of the original parcel. That he later transferred the resultant parcel to the 1st and 2nd plaintiffs in 2019 without disclosing to them the prior transaction with the defendant. He conceded that he had neither refunded any monies paid by the defendant, nor issued any notice rescinding the 2009 agreement, and had not disclosed the earlier transaction when he first filed suit describing the defendant as a trespasser. He stated that at the time of sale to the 1st and 2nd plaintiffs, the defendant was already constructing on the suit property. According to him, it was not fair for him to sell the to two different parties. That marked the close of the plaintiffs' case.

Defence evidence

22. DW1 was Rachel Nafula Makokha. She adopted her witness statement dated 9th June 2021 as her evidence in chief and produced copies of the agreement dated 29th June 2009 between herself and the 3rd plaintiff, acknowledgment

of payment dated 1st October 2009, a further acknowledgment/addendum dated 31st May 2010, and photographs of the suit property.

23. She testified that she purchased a portion of land measuring initially 50 x 100 feet, later enlarged to 80 x 100 feet, from the 3rd plaintiff in 2009, paid the full purchase price together with survey fees, and took possession. That she cultivated the land from 2009 to 2019, planted trees around it, and commenced construction in February 2019 after informing the 3rd plaintiff, who later stopped the construction upon obtaining court orders.

24. On cross-examination, DW1 confirmed that the original parcel was registered in the name of the 3rd plaintiff's deceased father and formed part of succession proceedings. She conceded that she did not attend the Land Control Board, had no documentary proof of payment of survey fees or of planting trees. She stated that she conducted a search which showed the land in the deceased's name and that she relied on the 3rd plaintiff as administrator. She maintained that the portion later transferred to the 1st and 2nd plaintiffs was the same land she had purchased and occupied.

25. On re-examination, DW1 reiterated that she had paid the full purchase price, that the 3rd plaintiff had acknowledged her occupation and cultivation of the land, and that no claim of forgery had been raised against her documents.
26. DW2 was Charles Samson Mmasi, the husband to DW1. He adopted his witness statement dated 9th June 2021 as his evidence in chief. He testified that his wife purchased land from the 3rd plaintiff in 2009 and that he has since been utilizing and managing the suit property. That he supervised cultivation and subsequent construction on the land and that the 3rd plaintiff acknowledged having sold the portion to his wife and receiving survey fees.
27. On cross-examination, he conceded that the land was under succession at the time of purchase, that neither he nor his wife attended the Land Control Board, and that he had no documentary proof of payment of survey fees or a sketch map of the portion. He further stated that they relied on the 3rd plaintiff to complete the transfer. On re-examination, he maintained that the court visit confirmed the portion sold and that the 3rd plaintiff admitted receipt of Kshs. 10,000/= for survey.

28. DW3 was Douglas Nangabo Sisimo, a mason. He adopted his witness statement dated 9th June 2021 and testified that he was engaged by DW1 to construct on the suit property and that construction commenced on 13th February 2019. He stated that there were no prior structures on the land and that construction stopped upon service of a court order dated 22nd February 2019. On cross-examination, he confirmed he was not a witness to the sale agreement, had no documentary proof regarding the building materials, and had not filed construction approvals in court. On re-examination, he stated that he was not aware of any requirement for approval of a semi-permanent structure and had not been cited for disobedience of any court order. That marked the close of the defence case.

29. Upon consideration of the pleadings, the oral and documentary evidence adduced at trial, and the submissions filed by the parties, the trial court held that the defendant had proved her counterclaim on a balance of probabilities. The court held that the defendant had purchased the disputed portion from the 3rd plaintiff, paid the full purchase price, and taken possession thereof. That the subsequent

subdivision and transfer of land parcel **No. Butsotso/Indangalasia/6860** to the 1st and 2nd plaintiffs was undertaken without disclosure of the prior transaction and while the defendant was in occupation, circumstances the court considered indicative of fraud and misrepresentation.

30. It concluded that the plaintiffs' title was impeachable and liable to cancellation. Consequently, the court dismissed the plaintiffs' suit, allowed the counterclaim, ordered cancellation of title No. Butsotso/ Indangalasia/6860, awarded the defendant Kshs. 100,000/= as general damages for wasted construction materials, and issued a mandatory injunction compelling the 3rd plaintiff to complete the transfer process in favor of the defendant.

31. Having been dissatisfied with the trial court's decision, the appellants lodged the present appeal vide a Memorandum of appeal dated 4th October 2024, citing the following thirteen grounds of appeal:

a) THAT the trial Magistrate erred in law and fact when she delivered a judgement that was manifestly ambiguous.

- b) THAT the trial Magistrate erred in law and fact when she dismissed the appellants' case against the respondent and allowed the respondent's counterclaim against the appellants without any proof of fraud on the part of the appellants.**
- c) THAT the trial Magistrate erred in law and fact when she ordered for specific performance of the agreement dated 26/6/2009 which was illegal, null and void for contravening clear provisions Sections 45, 55 of the Law of Succession Act which prohibits sale of a property of a deceased person before confirmation of grant and which also makes it a criminal offence and Section 6(1) (a)(b) of the Land Control Act which voids transactions undertaken without the consent of the Land Control Board**
- d) THAT the trial Magistrate erred in law and fact when she amended the respondent's pleadings through her judgement.**
- e) THAT the trial Magistrate erred in law and fact when she directed the 3rd plaintiff in the Lower Court or the Executive Officer of the Court to sign documents for subdivisions and transfer of undisclosed land thereby giving an ambiguous judgement and Orders likely to be enforced against the appellants title.**

- f) THAT the trial Magistrate erred in law and fact when she directed the 3rd plaintiff in the Lower Court or the Executive Officer of the Court to apply for consent to the Land Control Board outside the period provided for in the Land Control Act and without disclosing such land thereby giving an ambiguous judgement and Orders likely to be enforced against the appellants title.**
- g) THAT the trial Magistrate erred in law and fact when she imputed fraud on the part of the appellants with proof.**
- h) THAT the trial Magistrate erred in law and fact when she ordered the applicants to pay the respondent an amount of Kshs 100,000/- as special damages which was neither pleaded nor proved as required.**
- i) THAT the trial Magistrate erred in law and fact when she gave a judgement based on the prayers made by the Respondent in KAK MCELC NO 21 OF 2019 to which the Appellants were not parties and which related to LR BUTSOTSO/ INDANGALASIA/ 4511 which was non-existent.**
- j) THAT the Hon. Magistrate imported the doctrine of constructive trust in an agreement that was a nullity ab initio.**

k) THAT the trial Magistrate erred in law and fact when she totally ignored the relevant provisions of law, the appellants evidence and submissions and wholly relied on the respondent's submissions to arrive at the impugned judgement.

l) THAT the trial Magistrate erred in law and fact when she failed to adequately evaluate the evidence of the parties as against the applicable statute law as well as case law before arriving at the impugned judgement.

m) THAT the trial Magistrate erred in law and fact when she delivered an ambiguous judgement.

32. Consequently, the appellant prayed that:

- i. The Appeal be allowed**
- ii. The judgment delivered by Hon. V. Amboko (SRM) on 27th September 2024 in Kakamega MCELC No. E062 of 2019 and all consequential orders be set aside entirely.**
- iii. Judgment to be entered in favor of the appellants allowing their prayers in the lower court and dismissing the respondent's counterclaim.**

iv. The respondent be ordered to pay the costs of this appeal as well as costs of the suit in the lower court.

v. Any other relief that this Honorable court may deem fit to grant.

33. The appeal was canvassed by way of written submissions. On record are submissions dated 26th June 2025, filed by the appellants and submissions dated 31st May 2025, filed by the respondent; both of which this court has carefully considered.

Appellants' submissions.

34. Counsel for the appellants submitted that the trial court's judgment was manifestly ambiguous and incapable of enforcement. It was argued that the learned Magistrate failed to properly evaluate the evidence presented in the two consolidated suits and instead focused largely on the respondent's case in **Kakamega MCELC No. 21 of 2019**, without making specific findings on the issues raised in **Kakamega MCELC No. 62 of 2019**. She contended that the appellants' claim, which was anchored on their registered ownership of **LR Butsotso/Indangalasia/6840**, was

dismissed without any substantive analysis of their evidence or the statutory protection accorded to a registered proprietor under **Section 24(a) of the Land Registration Act** and **Article 40 of the Constitution**.

35. The appellants further submitted that the cancellation order relating to **LR Butso/Indangalasia/6860** was issued without evidence establishing ownership of that title or its nexus to the appellants' registered land. It was contended that the learned Magistrate gave no reasons for cancelling the said title as required **under Order 21 Rules 4 and 5 of the Civil Procedure Rules**, thereby rendering the order legally untenable.

36. On the award of Kshs. 100,000/= as general damages for wasted construction materials, counsel submitted that the same was neither specifically pleaded nor strictly proved. Placing reliance in ***Kenya Power & Lighting Co. Ltd. & Another -vs- Ringera & 2 Others***, counsel submitted that compensatory damages should be commensurate to the loss of use suffered by the respondents and in accordance with the laid down principles on calculation of appropriate damages. She argued that no documentary or other cogent

evidence was tendered to demonstrate the nature, quantity, value, or extent of the alleged wasted materials, and that the trial court did not explain how it arrived at the said figure or against whom the award was enforceable.

37. With respect to the mandatory injunction issued by the trial court, the appellants submitted that the same was granted without due regard to the established principles governing the grant of such relief. Reliance was placed on ***Giella v Cassman Brown & Co. Ltd*** for the general principles applicable to injunctive relief, and on ***Shepherd Homes Ltd v Sandham*** for the proposition that a mandatory injunction requires proof of special circumstances and a higher threshold. It was contended that no such special circumstances were demonstrated in the present case.

38. Counsel further submitted that the agreement dated 29th June 2009, which formed the basis of the respondent's counterclaim, was illegal and void *ab initio* for contravening **Sections 45 and 82 of the Law of Succession Act**, as well as **Section 6(1) of the Land Control Act**. It was argued that at the time of execution of the agreement, the

property formed part of the estate of a deceased person and no confirmed grant had been issued. Consequently, the transaction was unlawful and incapable of conferring any enforceable legal or equitable interest. She referred the court to the case of ***Trans Mara Sugar Co Ltd & another v Ben Kangwaya Ajiemba & another*** for the principle that courts ought not to enforce contracts that are illegal at formation.

39. Counsel argued that although allegations of fraud were pleaded by the respondent, the same were not strictly proved to the required standard. It was argued that the learned Magistrate failed to analyze the pleaded particulars of fraud or to make specific findings thereon, yet proceeded to dismiss the appellants' claim. Counsel cited ***Vijay Morjaria v Nansingh Madhusingh Darbar & Another***, for the proposition that fraud must not only be specifically pleaded but must also be strictly proved.

Respondent's submissions.

40. Counsel for the respondent highlighted the aspect of procedural propriety, submitting that a plaintiff must testify

in support of their claim. That 2nd appellant did not testify at the trial and no written authority was produced authorizing the 1st appellant to testify on her behalf. It was submitted that evidence is personal in nature and cannot be delegated.

41. Reliance was placed on ***Soin Sugar Company Limited v Kipsigis Traders Limited***, which adopted the reasoning in ***Joseph Murangi & Another v Beatrice Kainda Kaibira, Nyeri CACA No. 175 of 1997***, for the proposition that evidence must be adduced in accordance with Section 107 of the Evidence Act, and that a party who fails to adduce evidence in support of their claim cannot succeed and therefore the 2nd appellant's claim in the appeal ought to fail on this limb.

42. It was further submitted for the respondent that the appellants failed to conduct due diligence prior to their purported acquisition of title to **LR No. Butso/Indangalasia/6840**. It was argued that at the material time, the respondent was already in open, continuous and uninterrupted possession of the suit property, having purchased the same in 2009 and taken possession upon payment of the purchase price.

43. Counsel contended that had the appellants undertaken reasonable inquiries, including a physical inspection of the land, they would have discovered the respondent's occupation and interest. Reliance was placed on ***Yako Supermarket (K) Limited & another v National Land Commission & 4 others*** on the requirement that a *bona fide* purchaser must demonstrate due diligence and absence of notice.

44. On the validity of the respondent's purchase, counsel submitted that although the initial agreement dated 29th June 2009 preceded confirmation of grant in Kakamega HC Succession Cause No. 246 of 2008, the grant was confirmed on 24th March 2010 and the addendum dated 31st May 2010, which revised both the acreage and consideration, was executed after confirmation. It was argued that the transaction was never challenged in the succession proceedings nor set aside by any competent court, and that the issue of its illegality was neither pleaded nor canvassed before the trial court.

45. The Respondent contended that by virtue of full payment of the purchase price and delivery of possession, a

constructive trust arose in her favor, rendering the vendor (the 3rd plaintiff) a trustee of the suit property. Reliance was placed on *Aliaza v Saul, Willy Kimutai Kitilit v Michael Kibet*, and *Maina & 87 others v Kagiri*, for the proposition that equitable doctrines of constructive trust and proprietary estoppel may apply notwithstanding want of Land Control Board consent, particularly where a purchaser has paid the consideration and taken possession.

46. Counsel further submitted that the appellants' title was defeasible under **Section 26 of the Land Registration Act**, having been procured in circumstances tainted by fraud, illegality, and want of due process. That the transfer to the appellants was effected while litigation over the same property was pending and in disregard of the respondent's existing interest, having already purchased the suit land from the 3rd plaintiff. They cited *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* and *Alberta Mae Gacie v Attorney General & 4 others* for the principle that a title founded on fraud or illegality cannot be shielded by the doctrine of

indefeasibility. They therefore prayed that the appeal be dismissed with costs.

Analysis and determination.

47. The court has carefully considered the appeal, parties' rival submissions and the entire record. This being a first appeal, the duty of this court is to re-evaluate, re-analyze and re-assess the evidence tendered before the trial court and make its own independent conclusions bearing in mind that it had no advantage of seeing or hearing witnesses and therefore make due allowance for that.

48. The duty of the first appellate court was discussed in the case of ***Gitobu Imanyara & 2 Others v. Attorney General [2016] eKLR***, where the Court of Appeal stated as follows; s

“An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must consider the evidence, evaluate it itself and draw its own conclusions, although it should always bear in mind that it

has neither seen nor heard the witnesses and should make due allowance in this respect.”

49. Having considered the grounds of appeal raised in the Memorandum of appeal, my view is that the core issue is whether the trial court was right in dismissing the appellants’ claim and allowing the respondent’s counterclaim.

50. The identity of the suit property being Butsotso/Indangalasia/6840, which property PW2 confirmed to have sold to both the respondent and the appellants is not in doubt. It is not disputed that the suit property is registered in the name of the appellants. It is also a fact that the respondent by sale agreement with Patrick Mbayaki Masinde dated 29th June 2009 purchased land measuring 100 feet by 50 feet at a consideration of Kshs. 340, 000/=, but enhanced the purchase price to Kshs. 380, 000/= upon confirmation that the sold portion was 80 feet by 100 feet and not 50 feet by 100 feet as earlier thought by parties. To effect these changes, the parties to the agreement signed an addendum dated 31st May 2010. The entire purchase price was paid. As Patrick Masinde Mbayaki had already obtained

confirmed grant on 24th March 2010 with the entire suit property vested in him, the appellants contention that he lacked capacity to sell the suit property to the respondent, is unjustified.

51. It was also confirmed from the appellants' evidence that the respondent took possession of the suit property upon purchase and at the time of the agreement between Patrick Masinde Mbayaki and the appellants herein, the respondent had begun constructing on the suit property.

52. Therefore, the issue is whether the title by the appellants was obtained lawfully and whether the respondent was entitled to the suit property.

53. Article 40 (6) of the Constitution of Kenya protects the right to own and acquire property in respect only of lawfully acquired property.

54. Section 26 of the Land Registration Act provide for indefeasibility of title as follows;

“Certificate of title to be held as conclusive evidence of proprietorship

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

55. Therefore, registration vests in a proprietor of land, absolute and indefeasible ownership rights, unless there is proof that the acquisition of title was by fraud, misrepresentation, want of procedure, illegality or corruption. Hence, an innocent purchaser is not protected in circumstances where the land sold to them was sold by a fraudster or was unlawfully acquired before sale.

56. In the case of **Munyu Maina v Hiram Gathiha Maina, Civil Appeal No.239 of 2009**, the Court of Appeal held that:-

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

57. Similarly, in the case of **Dina Management Ltd v County Government of Mombasa & 5 Others [2023] e KLR** the Supreme Court of Kenya held that for a title to be held to be valid, it ought to arise from a process that is lawful and procedural and a title obtained unlawfully or unprocedurally is invalid, even if the registered owner obtained it in good faith.

58. Where fraud is alleged, it ought to be specifically pleaded and strictly proved on a standard that slightly higher than

the standard of proof required in ordinary civil cases of the balance of probability, but slightly lower than the standard of proof in criminal cases of beyond reasonable doubt. (See *Kinyanjui Kamau -vs George Kamau [2015] e KLR*)

59. Therefore, the appellants herein were obligated to demonstrate that they obtained title to the suit property lawfully. A title is the end product of a process. For a title to be legally protected, the process of its acquisition must be lawful and procedural. Thus, a registered proprietor of land ought to have documents supporting title showing lawful acquisition. In the instant case, while the appellant pleaded that he complied with all procedures in the acquisition of title, apart from the sale agreement, no document demonstrating the process of acquisition of title was presented in evidence.

60. In my considered assessment of the evidence, the chronology of events in regard to the transaction between Patrick Masinde Mbayaki and the appellants points to a scheme between them to defraud the suit property from the respondent. Their sale agreement was made on 18th

February 2019 where a deposit is said to have been paid, leaving a balance of Kshs. 350, 000/= to be paid within 60 days. There was no mention of payment of the balance and no evidence of actual payment of consideration or any part thereof was presented in evidence. No consideration was stated in the title. The appellants did not produce pre-purchase official search certificate, application for Land Control Board consent, consent, transfer instrument and payment of stamp duty.

61. PW2 filed a suit against the respondent on 19th February 2019, a day after the sale agreement with the appellants. On 10th April 2019, the appellants were registered as proprietors of the suit property, and on 12th May 2019 they had filed suit against the respondent herein, listing the seller Patrick Masinde Mbayaki as their witness. It was the appellants' evidence as per PW2 that at the time of signing the land sale agreement between the appellants and Patrick Masinde Mbayaka, the respondent was not only in possession of the suit property, but was constructing a permanent building thereon. Therefore, the appellants averments in the plaint and evidence that at the time of

purchase they were not aware of the respondent's possession or claim over the suit property is incorrect. The fact that the appellants failed both in their pleadings and evidence to state when the alleged trespass by the respondent began, clearly demonstrate that they were economical with the truth.

62. In view of the above evidence, it is clear that the appellants' alleged purchase was not in good faith, there was no demonstration of due diligence on their part and they did not meet the threshold of being innocent purchasers for value without notice of defect in title set out in the case of **Katende v Haridar & Company Limited (2008) 2 E.A 173**. They knew that the suit property had already been purchased by the respondent, but colluded with Patrick Masinde Mbayaki to enter into a second agreement for purposes of their unjust enrichment. If indeed they had been innocent purchasers as alleged, it would be expected that they would have sought accountability from the seller by filing suit against him and not merely making him a witness, well aware that he is a fraudster. They were knowingly aiding and abetting PW2 to

evade his obligations under the agreement between him and the respondent.

63. Because collusion is an agreement between parties with intention to deceive and gain an unfair advantage over others, it is a manifestation of fraud. Therefore, the respondent demonstrated fraud as against the appellants.

64. Patrick Masinde Mbayaki confirmed that it was wrong for him to purport to sell the suit property to the appellants when he had already sold it to the respondent in 2009. Therefore, the second sale was a fraudulent sale. The fact that Patrick Masinde Mbayaki acted fraudulently in purporting to sell the suit property to the appellants, the provisions of section 26 (1) (a) and (b) of the Land Registration Act are applicable to the appellants whether or not they were party to the fraud by the seller.

65. As Patrick Masinde Mbayaki had already sold the suit property to respondent and given her possession, he had no capacity to sell it to the appellants as per the doctrine of *nemo dat quod non habet*, hence even if they had proved that they were innocent purchasers for value without notice,

which they did not, their innocence would not have been sufficient ground to vest the suit property in them, because the seller had no good title to pass to them. In the premises, I find and hold that the acquisition of the suit property by the appellants was unlawful and fraudulent and the trial court was right in arriving at the conclusions made in dismissing the appellants' claim.

66. Regarding the counterclaim, Patrick Masinde Mbayaki (PW2) confirmed having received the entire consideration for the suit property from the respondent and having granted her possession. That means that although he held title to the suit property, it did not belong to him. He held it in trust for the respondent. His obligation therefore was to complete the transaction by transferring title to the respondent.

67. On general damages, the evidence on record shows that construction on the suit property was ongoing and was stopped in 2019 by an order of court. The photographs produced in evidence show that there were construction materials on site. Between the time of filing suit and judgment, the same had been wasted and ought to be

compensated, hence the trial court in exercising its discretion was right in awarding damages for the same.

68. The upshot is that I find no merit in this appeal which I dismiss with costs to the respondent.

69. It is so ordered

DATED, SIGNED AND DELIVERED AT KAKAMEGA IN OPEN COURT/VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM THIS 4TH DAY OF MARCH 2026

A. NYUKURI
JUDGE

In the presence of;

Ms. Kadenyi for the appellants

Mr. Shifwoka for the respondent

Court Assistant: Delphine