

**IN THE COURT OF
APPEAL AT NAIROBI**

(CORAM: MUSINGA (P), J. NGUGI & ODUNGA,

JJ.A.) CIVIL APPEAL NO 340 OF 2019

BETWEEN

PATRICIA MARY CLARK.....APPELLANT

AND

GODFREY NGATIA NJOROGE.....1ST RESPONDENT

**SAMUEL KUNTAI TUNAI.....2ND
RESPONDENT**

**THE LAND REGISTRAR 3RD
RESPONDENT THE HON. ATTORNEY GENERAL 4TH
RESPONDENT**

*(Being an appeal from the judgment of the Environment and Land Court at Thika (**G. M. Ong'ondo, J.**) dated and delivered on 14th June 2019 by (L. N. Gicheru, J.)*

in

**ELC No. 503 of 2017
(Formerly Nairobi ELCC No. 1313 of 2013))**

JUDGMENT OF THE COURT

1. The dispute that gave rise to this appeal concerns the ownership of a parcel of land known as **L.R. No. Kiambu Municipality/Block III/112** measuring approximately 0.2240 hectares (**the suit property**).

2. In the trial court, the appellant pleaded that she lawfully purchased the suit property in the year 1994 from a company known as Mumwe Investments Limited. A sale agreement dated 22nd February 1994 was executed between herself, as purchaser, and the company, as vendor, for a purchase price of Kshs. 750,000/-. She paid the entire purchase price; the property was transferred to her, and a certificate of lease for a term of 99 years was issued in her name on 23rd November 1994. She entrusted the original certificate of lease to her advocate for safe custody as she was residing out of the country.
3. Sometime in 2010, she became interested in developing the suit property and consequently sent her mother to inspect the land and advise on a viable development project. However, upon visiting the suit property, her mother discovered that building stones had been deposited on the land by another person, with the apparent intention of commencing construction. Upon making inquiries, the appellant established that the building stones had been deposited there by the 2nd respondent, Samuel Kuntai Tunai, who claimed to have

purchased the suit property from the 1st respondent, Godfrey Ngatia Njoroge. This prompted the appellant

to conduct an official search at the Kiambu Lands Registry in order to ascertain the status of the title to the suit property.

4. The official search revealed that although the property had originally been registered in the name of Mumwe Investments Limited and subsequently transferred to the appellant in 1994, the land records indicated that the property had later been transferred by the appellant to the 1st respondent on 6th June 1995, who subsequently transferred it to the 2nd respondent. The appellant contended that she had never sold, transferred, or otherwise disposed of the property to the 1st respondent or to any other person, and therefore challenged the alleged transfers as false, illegal, and fraudulent. She reported the matter to the Criminal Investigations Department in Gigiri, and investigations were commenced. Following the complaint, the Lands Registrar entered a restriction on the title to the suit property on 6th April 2010 to prevent further dealings, pending investigations into the suspected fraudulent transfers. However, the appellant averred that the Lands Registrar failed or neglected to conclude the investigations or take steps to rectify the register.

5. The appellant contended that the respondents had jointly and severally perpetrated fraud and misrepresentation in order to procure registration of the property in their names. The particulars of fraud pleaded against them included purporting to be the registered owner of the suit property; presenting false ownership and transfer documents to the Kiambu Lands Registry; causing or permitting registration of documents known to be false and fraudulent; procuring or facilitating the signing of such documents by the Lands Registrar; effecting transfer and procuring title despite knowledge that the 1st respondent was not the *bona fide* owner of the land; procuring Land Control Board consent on the basis of such false ownership; and procuring and presenting title documents and official search certificates in the names of the 1st and 2nd respondents while knowing that those documents had not been genuinely obtained.
6. The appellant also pleaded negligence and misrepresentation on the part of the respondents, including failure to ascertain the true ownership of the property before effecting the alleged transfer, failure to require the production of the certificate of

lease from the alleged transferor, failure by the Lands Registry
to exercise due

diligence in processing the transfer, failure to summon the relevant parties to explain the circumstances surrounding the title, and representing to the appellant that investigations into the matter were ongoing since 2010 without any concrete action being taken. She averred that as a result of the respondents' fraudulent acts and misrepresentations she had suffered loss and damage.

7. Consequently, the appellant sought judgment against the respondents for orders to compel the 1st and 2nd respondents, or any persons claiming through them, to surrender for cancellation any title or registration certificate relating to the suit property; an order directing the Lands Registrar to rectify the green card and all official records to reflect her as the registered proprietor of the property; a permanent injunction restraining the 1st and 2nd respondents from interfering with her quiet possession of the land; general damages for loss of bargain as well as costs of the suit and interest.
8. In opposing the suit, the 2nd respondent contended that he was the lawful and registered proprietor of the suit property, which he acquired lawfully and in good faith after purchasing it for

value

from the 1st respondent, whom he believed to be the registered owner of the property.

9. The 2nd respondent further asserted that prior to purchasing the suit property, his advocates conducted due diligence by carrying out an official search at the Kiambu Lands Registry on 20th November 2009. The search confirmed that the 1st respondent was the registered proprietor of the suit property. He also averred that the 1st respondent produced a copy of a certificate of lease dated 6th June 1995 issued in his name by the Government of Kenya, which further confirmed his ownership. On the basis of these documents and assurances, the 2nd respondent entered into a sale agreement with the 1st respondent on or about 26th November 2009 for the purchase of the suit property at a consideration of Kshs. 11,000,000/-.
10. Upon payment of the full purchase price, the 1st respondent executed a transfer of lease in his favour on or about 19th January 2010. His advocates thereafter applied for registration of the transfer and paid the requisite stamp duty, following which a certificate of lease in his name was issued on 19th February 2010.

11. The 2nd respondent further pleaded that upon completion of the transaction and transfer of the suit property, he took vacant possession of the property and commenced steps towards its development, but in April 2010 the appellant laid claim to the property. He denied the allegations that the transfer of the property to him was fraudulent or irregular and averred that he acquired the property legally and in good faith. He maintained that he was a bona fide purchaser for value without notice of any alleged fraud or defect in the title, and that he had exercised due diligence prior to completing the transaction.
12. He further relied on the protection accorded to registered proprietors under section 25 of the Land Registration Act, contending that the law protects his title as a bona fide purchaser who acquired the property after conducting due diligence and paying valuable consideration. He denied the allegations of fraud, negligence and misrepresentation made in the plaint and put the appellant to strict proof thereof.
13. Additionally, the 2nd respondent asserted that at no point during the transaction did he deal directly with the appellant,

and contended that he had been wrongly joined in the suit.

According

to him, if any wrongdoing had occurred, the appellant's claim lay against the 1st respondent and the Lands Registrar. He therefore maintained that the appellant had no valid cause of action against him in respect of the alleged fraud or irregularities relating to the suit property.

14. Consequently, the 2nd respondent prayed that the appellant's suit against him be dismissed with costs.
15. The 3rd and 4th respondents, vide a Statement of Defence dated 5th May 2014 denied each and every allegation contained in the plaint and put the appellant to strict proof thereof.
16. It is important to point out that despite being served by way of substituted service on 21st July 2014, the 1st respondent did not enter appearance and/or file defence.
17. The matter proceeded to full hearing during which several witnesses testified on behalf of the respective parties. The appellant testified but did not call any other witness. Her evidence was in line with her witness statement, which we have already summarized.
18. The 2nd respondent testified as **DW1** and adopted his witness

statement and documents as summarized hereabove.
Regarding

his relationship with the 1st respondent, DW1 said that he met him during the transaction and communicated with him several times by telephone; that the 1st respondent confirmed that the suit property belonged to him; that he met the 1st respondent after the dispute over the property had arisen; and that he later provided the 1st respondent's telephone number to the police during investigations, believing that the 1st respondent subsequently recorded a statement at the police station.

19. The defence also called **Joakim Kiarie Kamere**, an advocate who testified as **DW2**. He stated that he acted for the 1st respondent in the sale transaction between the 1st and 2nd respondents and received the entire purchase price from the 2nd respondent, which he subsequently remitted to the 1st respondent. He further testified that he knew the 1st respondent personally as they hailed from the same home area, adding that the 1st respondent resides in Karen and operates Karen Auto Bazaar, and had in fact visited his offices about a week prior to his testimony before the trial court.
20. The final witness was **Titus Masaba Kakewa**, a Land

Registrar at the Kiambu Lands Registry, who testified as **DW3**. He produced

the land records relating to the suit property and testified that although the register reflected the 1st respondent and subsequently the 2nd respondent as proprietors of the suit property, the registry file did not contain any transfer instrument evidencing a transfer of the property from the appellant to the 1st respondent. He further confirmed that suspicion of fraud had been recorded in the register, although the official search conducted in 2009 showed the 1st respondent as the registered proprietor thereof.

21. After the full hearing, the trial court identified several issues for determination namely, whether the 1st respondent acquired ownership of the suit property legally; whether the 2nd respondent consequently obtained a good title as a *bona fide* purchaser for value without notice; what orders the court ought to make in light of the findings on ownership and title; and who should bear the costs of the suit.
22. On the first issue, the trial court examined the root of title to the suit property. It noted that the land was initially owned by Mumwe Investments Limited before it was transferred to the appellant in 1994. However, the court observed that the

land register

subsequently reflected a transfer to the 1st respondent and later to the 2nd respondent. In addressing the allegations of fraud raised by the appellant, the court emphasized that fraud must be specifically pleaded and strictly proved, on a standard of proof higher than a mere balance of probabilities. The trial court held that the allegations of fraud against the respondents had not been proved to the required standard.

23. Turning to the second issue, the court considered whether the 2nd respondent qualified as a *bona fide* purchaser for value without notice. The court evaluated the evidence presented by the 2nd respondent, including the official search conducted prior to purchase, the sale agreement, proof of payment of the purchase price and the transfer documents. The court found that the 2nd respondent had relied on the land register which showed the 1st respondent as the registered proprietor at the time of purchase and that he had paid valuable consideration for the property. On that basis, the court concluded that the 2nd respondent had established that he was a *bona fide* purchaser for value without notice, and that his title to the property was valid in law.

24. Having reached those findings, the trial court held that the appellant had failed to prove her case against the respondents, and that the 2nd respondent had demonstrated lawful acquisition of the property. Consequently, the court declined to grant the orders sought by the appellant and instead held that the 2nd respondent was the lawful owner of the suit property. The court further declared the appellant's title to the property illegal, null and void and ordered the land registrar to cancel the title in the appellant's name. Additionally, the court issued a permanent injunction restraining the appellant from interfering with, dealing with, or entering upon the suit property.
25. Being aggrieved by the decision, the appellant lodged this appeal, contending that the learned judge erred both in law and in fact by, *inter alia*, failing to find that the appellant remained the lawful proprietor of the suit property despite evidence that she retained the original title and remained in possession of the property; failing to appreciate the testimony of the Land Registrar that there was no instrument of transfer transferring the suit property from the appellant to the 1st

respondent, and that the issuance of title to the 1st respondent was therefore irregular and fraudulent. The

appellant further faulted the trial court for failing to find that the alleged transfer of the title to the 1st respondent and the subsequent transfer to the 2nd respondent was procured through fraud, trickery and deception, particularly in light of the absence of evidence showing receipt of the purchase price by the 1st respondent and the inconsistencies surrounding the sale agreement and transfer documents.

26. The appellant additionally contended that the learned judge failed to consider the possibility that the 1st respondent was a fictitious person, used as a vehicle to facilitate a fraudulent transfer of the suit property to the 2nd respondent; failed to properly evaluate the evidence suggesting collusion between the 1st and 2nd respondents; and misdirected himself in law by treating the 2nd respondent as a bona fide purchaser for value despite the irregularities surrounding the transaction.
27. At the hearing of the appeal, learned counsel, **Mr. Njanja**, appeared for the appellant, while learned counsel, **Mr. Olembo**, appeared for the 1st respondent. Learned counsel, **Mr. Kemboi**, appeared alongside learned counsel, **Ms. Okina**, for the 2nd respondent, while the 3rd and 4th

respondents were represented

by the Chief State Counsel, **Mr. Eredi**. All counsel extensively highlighted their respective clients' written submissions.

28. Highlighting the appellant's written submissions dated 14th May 2020, Mr. Njanja contended that the learned trial judge erred in law and fact in finding that the 2nd respondent had acquired a valid title to the suit property despite the evidence demonstrating that the appellant was the original registered proprietor and had never transferred the property to the 1st respondent. He contended that the evidence before the trial court, particularly the testimony of the Land Registrar, established that there was no instrument of transfer in the parcel file transferring the suit property from the appellant to the 1st respondent. The appellant maintained that the absence of a transfer instrument meant that the entry in the land register showing the property as having been transferred to the 1st respondent was irregular and fraudulent. It was further submitted that the appellant remained in possession of the original certificate of lease and had never executed any sale agreement or transfer in favour of the 1st respondent. In the appellant's view, the title held by the 1st respondent was

therefore

rooted in illegality and could not lawfully confer any proprietary interest capable of being transferred to the 2nd respondent.

29. It was further contended that the trial court failed to apply the settled legal principle that a title founded on fraud or illegality cannot confer a valid interest upon a subsequent purchaser. Reliance was placed on the decision of this Court in **Arthi Highway Developers Limited v West End Butchery Limited & 6 Others** [2015] eKLR, to the effect that where a title originates from a fraudulent transaction, it cannot be sanitized by subsequent transfers, and, therefore, cannot confer valid title upon later purchasers. The appellant also relied on **Elijah Makeri Nyangw'ra v Stephen Mungai Njuguna & Another** [2013] eKLR, where the court interpreted **section 26(1)** of the **Land Registration Act** and held that a registered title may be impeached where it is shown to have been obtained illegally, unprocedurally or through a corrupt scheme, even where the registered proprietor was not personally involved in the fraud. On the strength of these authorities, the appellant asserted that the trial court ought to

have interrogated the root of the 1st

respondent's title before recognizing the subsequent transfer to the 2nd respondent as valid.

30. The appellant further submitted that the learned trial judge erred in law in finding that the 2nd respondent was a *bona fide* purchaser for value without notice because the circumstances surrounding the alleged sale between the 1st and 2nd respondents raised serious doubts as to the authenticity of the transaction. It was pointed out that the 1st respondent never entered appearance, never testified, and was never traced during investigations, despite being the alleged vendor of the suit property. This, the appellant argued, was particularly significant in light of the 2nd respondent's own testimony that he knew the 1st respondent well and had met him several times, both at the time of the transaction and even after the institution of the suit, just as the 1st respondent's advocate had testified. Despite this, the 2nd respondent admitted that he did not inform the 1st respondent about the proceedings and did not find it necessary to file a claim for indemnity against him to recover the purchase price.

31. It was further submitted that the evidence on record contained

significant inconsistencies which undermined the credibility
of

the alleged transaction. In particular, the advocate who testified in court as having acted in the transaction was Joakim Kiarie Kamere, yet both the sale agreement dated 26th November 2009 and the transfer dated 19th January 2010 indicate that they were witnessed by a different advocate, Patrick Onyango Ogola, who was never called to testify. The appellant contended that this discrepancy left critical gaps in the evidentiary chain required to establish a legitimate transfer. The appellant also questioned the alleged payment of the purchase price, noting that no receipts from the 1st respondent were produced, and that the payments were said to have been made through an advocate rather than directly to the purported vendor. In the appellant's view, the absence of direct evidence confirming receipt of the purchase price by the 1st respondent undermined the credibility of the transaction and should have led the trial court to conclude that the defence of *bona fide* purchaser for value without notice had not been established.

32. The appellant maintained that from the evidence before the trial court, the 1st respondent was merely a vehicle used to

facilitate a fraudulent transfer of the suit property. It was surprising that the

1st respondent could not be traced by investigators, and never participated in the proceedings despite being served by substituted service, yet both the 2nd respondent and the 1st respondent's advocate testified that they had been in contact with him severally even during the trial.

33. The appellant also submitted that the trial court misdirected itself in its interpretation and application of the law governing impeachment of title. It was contended that section 26(1) of the Land Registration Act permits a registered title to be challenged where it is shown that it was obtained through fraud, misrepresentation, illegality or a corrupt scheme. In support of this argument, the appellant relied on the decision of this Court in **Munyua Maina v Hiram Gathiha Maina** [2013] eKLR, where the Court held that a party who asserts ownership of land must demonstrate the legality of the process through which the title was obtained, and that it is not sufficient merely to produce the instrument of title as proof of ownership. The appellant also relied on **Esther Ndegi Njiru & Another v Leonard Gatei** [2014] eKLR, where the court held that a purchaser cannot acquire a valid title from a vendor

who himself has no lawful title to pass. Further

reliance was placed on the decision of the Court of Appeal of Uganda in **Veronica Nakiyingi v Michael Nsobani, Court of Appeal of Uganda No. 44 of 2008**, where the court emphasized that courts of law cannot sanction transactions founded on illegality. Additional reliance was placed on **Alice Chemutai Too v Nickson Kipkurui Korir & 2 Others** [2015] eKLR, where the court reiterated that a title obtained through fraud or illegality may be impeached notwithstanding registration.

34. In sum, the appellant contended that the learned judge failed to properly evaluate the evidence and wrongly elevated the doctrine of bona fide purchaser above the statutory provisions allowing impeachment of title obtained through illegality. The appellant therefore urged this Court to allow the appeal, set aside the judgment of the trial court, rectify the land register by cancelling the impugned entries and restoring her as the registered proprietor of the suit property, and award her the costs of the appeal and of the proceedings before the trial court.
35. The 3rd and 4th respondents supported the appeal. Although

counsel Mr. Eredi had not filed written submissions on behalf of his clients, he nonetheless made brief oral submissions at the

hearing hereof. He referred this Court to the testimony of DW3, the Land Registrar at the Kiambu Land Registry, who testified that he had no document in the registry records evidencing a transfer of the suit property from the appellant to the 1st respondent; that the entries appearing in the green card, particularly entries relating to the transfer to the 1st respondent, were unsupported by any documentation, and therefore raised suspicion of fraud. In that regard, counsel submitted that the absence of supporting documents created a break in the chain of title from the appellant to the 1st respondent.

36. Counsel further submitted that it was incumbent upon the 1st respondent, who had been duly served, to appear before the trial court and explain how he had acquired the property from the appellant. However, despite proper service, the 1st respondent failed to enter appearance or testify, thereby leaving the alleged transfer unexplained. Counsel also faulted the 2nd respondent for failing to undertake proper due diligence prior to purchasing the property. In his view, had the 2nd respondent exercised due diligence, he would have demanded

supporting documents from the 1st respondent demonstrating how the latter had acquired title

to the property. Since no such documentation was produced, the 1st respondent lacked a valid title capable of being passed to the 2nd respondent.

37. On the basis of these arguments, counsel urged the Court to find that there was a break in the root of title and that the 2nd respondent could not therefore claim a valid title through purchase from the 1st respondent. In support of this position, counsel relied on **Sehmi & another v Tarabana Company Limited & 5 others** [2025] KESC 21 (KLR) as well as **Dina Management Ltd v County Government of Mombasa & 5 others** on the principle that the legality of title must be traced to its root. Counsel therefore urged the Court to allow the appeal, set aside the judgment of the trial court, declare the appellant the lawful registered proprietor of the suit property, and direct that the impugned entries in the land register be expunged.

38. On his part, Mr. Olemba, highlighting the 1st respondent's written submissions, pointed out at the outset that this was the first time his client was participating in the proceedings since he had not previously been aware of or participated in the trial

before the trial court. It was therefore contended that some of the issues now

raised on appeal could not fairly be attributed to him. Counsel further contended that the appellant had not demonstrated that service of the pleadings and proceedings upon the 1st respondent was properly effected. Although the appellant relied on substituted service through a newspaper advertisement dated 21st July 2014 in the Standard newspaper, counsel submitted that the extract appearing in the record did not show the full page of the advertisement and it was therefore not possible to conclusively ascertain that proper service had been effected. Counsel however acknowledged that during the pendency of the appeal this Court directed that the 1st respondent be served and that it was at that stage that the 1st respondent became aware of the dispute through a friend.

39. When questioned by the Court regarding the evidence on record that the 2nd respondent and advocate Joakim Kiarie Kamere knew the 1st respondent and had been in contact with him for a long time, counsel conceded that Mr. Kamere's testimony to that effect appeared in the record. Counsel however maintained that, based on the instructions he had

received, the 1st respondent had not been aware of the proceedings before the trial court and only

became aware of the matter during the proceedings before this Court.

40. On the merits of the appeal, the 1st respondent contended that the appellant bore the legal burden of proving fraud and that this burden had not been discharged. Reliance was placed on **Vijay Morjaria v Nansingh Madhusingh Darbar & Another** [2000] eKLR, where this Court held that allegations of fraud must not only be specifically pleaded but must also be strictly proved. Counsel further invoked section 107 of the Evidence Act, Cap 80, which places the burden of proof on the party asserting a fact. It was therefore contended that the appellant failed to produce sufficient evidence demonstrating that the respondents participated in any fraudulent scheme in relation to the transfer of the property.
41. The 1st respondent also challenged the appellant's assertion that she had always retained possession of the original title and had never transferred the property. Counsel pointed to inconsistencies in the appellant's evidence concerning the custody of the title, noting that while the appellant stated that she had given the original title to her advocate for safe

custody shortly after issuance

in 1994, another part of her evidence indicated that she handed the original title to her advocate in March or April 2010. These contradictions were said to undermine the credibility of the appellant's claim that the title had never been transferred to the 1st respondent. Counsel further submitted that the evidence showed that the 1st respondent was registered as proprietor following a transfer reflected in the green card entries and that the Land Registry subsequently issued a certificate of lease confirming that registration.

42. It was also contended that the appellant's claim that there was no instrument of transfer on record between herself and the 1st respondent did not necessarily establish fraud. Counsel submitted that the Land Registrar had testified that he could not confirm fraud in entries numbered 7 to 10 appearing on the green card. According to counsel, the fact that the registrar effected those entries and issued a certificate of lease demonstrated that the registrar must have been satisfied that the necessary documents had been presented. Counsel therefore argued that the absence of documents in the parcel file did not prove that the

transfer had not occurred since documents could easily have been misplaced and/or misfiled while in the custody of the registry.

43. When questioned by the Court regarding the absence of any accompanying transfer instrument or sale agreement in the record, counsel acknowledged that no such documents appeared in the record of appeal, arguing that the 1st respondent had not participated in the proceedings before the trial court and therefore did not produce them. Counsel further stated that although he had been shown such documents by the 1st respondent, he had not placed them before the Court as additional evidence, which he conceded ought to have been the right thing to do in the circumstances.
44. On the issue whether the 1st respondent was fictitious, counsel submitted that the appellant's claim was not supported by any credible evidence, particularly in light of the testimony of advocate Joakim Kiarie Kamere that the 1st respondent was well known to him as they hailed from the same home area in Gatundu, that the 1st respondent lived in Karen and operated Karen Auto Bazaar, and that he had instructed him in the

transaction.

45. When questioned by the Court whether it was not unusual for an advocate who had been summoned to testify in proceedings involving his client to fail to inform that client about the case, counsel stated that he could not speak on behalf of Mr. Kamere regarding what communication may have occurred between him and the 1st respondent, although he acknowledged that such a situation appeared unusual.
46. Counsel further submitted that although the appellant claimed to have reported the alleged fraud to the Directorate of Criminal Investigations many years earlier, no criminal charges had ever been brought against any of the respondents. It was emphasized that more than fifteen years had elapsed since the alleged fraud was reported and no prosecution had been initiated which, according to counsel, supported the conclusion that no fraud had been established.
47. According to counsel, the trial court properly evaluated the evidence and correctly concluded that the appellant had not proved fraud. It was argued that the green card entries demonstrated that the property was transferred to the 1st respondent and subsequently to the 2nd respondent, who

then

obtained a certificate of lease. Counsel maintained that the trial court correctly found that the 2nd respondent had acquired title lawfully and was a *bona fide* purchaser for value without notice.

48. In sum, the 1st respondent maintained that the appellant had failed to establish fraud, illegality or misrepresentation in the transfer of the suit property, and had not demonstrated any error in the reasoning of the trial court. Counsel therefore urged us to uphold the findings of the trial court and dismiss the appeal with costs.

49. On behalf of the 2nd respondent, it was submitted by Mr. Kemboi that this Court should not interfere with the findings of the trial court because the learned judge properly evaluated the evidence and reached a sound conclusion. At the outset, counsel emphasized the limited scope of an appellate court's interference with findings of fact. Reliance was placed on **Ephantus Mwangi v Duncan Mwangi Wambugu** [1984] eKLR, where this Court held that an appellate court should be slow to depart from the factual findings of a trial judge who had the advantage of seeing and hearing the witnesses testify.

Counsel also relied on **Mohamed Mahmoud Jabane v Highstone Butty Tongoi Olenja** [1986]

eKLR, where this Court stated that it will not lightly interfere with findings of fact unless it is shown that the trial court acted on no evidence, misapprehended the evidence, or applied the wrong legal principles.

50. Counsel further submitted that the burden of proving fraud lay squarely on the appellant, but she failed to discharge the burden. Counsel contended that the appellant merely speculated that the 1st respondent did not hold valid title without producing credible evidence to support that allegation. Counsel also relied on **Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others** [2014] eKLR, where this Court held that a court is bound by the pleadings of the parties and must confine itself to the issues raised therein. According to counsel, the appellant had invited this Court to embark on inquiries outside the pleadings and evidence placed before the trial court, which would be contrary to settled legal principles.
51. On the question whether the title held by the 1st respondent and subsequently transferred to the 2nd respondent was obtained through fraud, counsel submitted that the appellant

had failed to

discharge the evidentiary burden required by law. He observed that the appellant sought to rely on the fact that the 1st respondent did not appear before the trial court to defend the suit as proof of fraud. However, counsel contended that the absence of a party from proceedings does not relieve the claimant of the obligation to prove the case. In support of this argument, reliance was placed on **Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & Another** [2016] eKLR, where the court held that even where evidence is uncontroverted, a plaintiff must still prove the claim on a balance of probabilities. Counsel also relied on **Gichinga Kibutha v Caroline Nduku** [2018] eKLR, where the court held that the fact that evidence is not controverted does not automatically entitle the claimant to judgment, unless the burden of proof has been satisfied.

52. Counsel also submitted that the appellant had wrongly attempted to shift the burden of proof to the 2nd respondent by arguing that the latter should have produced the 1st respondent in court, whereas the law does not impose such an obligation on his client. Counsel emphasized that the 2nd

respondent had cooperated with investigations and even provided the contact details of the 1st

respondent to the police. He further pointed out that advocate Joakim Kiarie Kamere testified before the trial court and confirmed that he acted for the 1st respondent in the sale transaction and received banker's cheques representing payment of the purchase price, which he remitted to the 1st respondent. Counsel therefore maintained that the failure of the 1st respondent to participate in the proceedings could not be attributed to the 2nd respondent. In response to questions from the Court, counsel reiterated that although the 2nd respondent would have preferred the 1st respondent to testify, the latter had been independently sued and served and it was therefore not the 2nd respondent's responsibility to procure his attendance in court.

53. On whether the 2nd respondent was a *bona fide* purchaser for value without notice, counsel relied on **Arthi Highway Developers Limited v West End Butchery Limited & 6 Others** (supra), where this Court adopted the definition of a bona fide purchaser for value without notice as a person who buys property in good faith, for valuable consideration and without notice of any defect in the vendor's title. Counsel

further relied on **Katende v Haridar & Company Limited**
[2008] 2 E.A. 173, where the Court

of Appeal of Uganda set out the elements required to establish that a purchaser is bona fide, namely that the purchaser must hold a certificate of title, purchase the property in good faith, pay valuable consideration, and have no knowledge of fraud. It was therefore contended that before purchasing the suit property, the 2nd respondent conducted an official search at the Kiambu Land Registry, which confirmed that the 1st respondent was the registered proprietor of the suit property. On the strength of that search, the 2nd respondent entered into a sale agreement, paid the purchase price through advocates, paid stamp duty and obtained a certificate of lease after registration.

54. Counsel further asserted that the Kenyan system of land registration is informed by the Torrens system which recognizes the principle of indefeasibility of title. In that regard, reliance was placed on **Shimoni Resort v Registrar of Titles & 5 Others** [2016] eKLR, where the court, relying on earlier decisions including **Charles Karathe Kiarie & 2 Others v Administrators of the Estate of John Wallace Mathare (Deceased) & 5 Others** [2013] eKLR, explained

that under the Torrens system, the register is intended to mirror the true state of title, and that an

innocent purchaser who relies on the register is entitled to protection. Counsel further referred to the reasoning in **David Peterson Kiengo & 2 Others v Kariuki Thuo** [2012] eKLR, where, he contended, the court held that a defrauder who had acquired title fraudulently could pass a good title to a *bona fide* purchaser, and that such a purchaser is not required to go beyond the official register to investigate the history of the title.

55. Counsel also addressed the evidence of the Land Registrar and rejected the suggestion that the Registrar had confirmed that no transfer existed between the appellant and the 1st respondent. According to counsel, the Registrar merely testified that the documents relating to the transfer could not be traced. Counsel emphasized that he personally summoned and cross examined the Registrar during the trial and he did not state that the documents did not exist. Counsel further submitted that the restriction placed on the title arose only after the appellant lodged a complaint with the lands office and therefore reflected a suspicion of fraud rather than a confirmed finding of illegality.

56. Regarding the allegation that the 1st respondent was a fictitious person used to facilitate fraud, counsel submitted that the

appellant had produced no evidence to support that claim. Counsel relied on **Arthi Highway Developers Limited v**

West

End Butchery Limited & 6 Others (supra) where this Court explained that fraud involves deliberate and intentional deception designed to deprive another of property. Counsel also cited **Kuria Kiarie & 2 Others v Sammy Magera** [2018] eKLR, where this Court held that allegations of fraud must be specifically pleaded and strictly proved. Counsel contended that the appellant had failed to particularize or prove the alleged fraud, especially in light of Mr. Kamere's testimony before the trial court that he knew and acted for the 1st respondent in the transaction and had received payment on his behalf which he transmitted to him.

57. Responding to a question from the Court regarding investigations related to the root of the title, counsel asserted that requiring a purchaser to investigate historical transactions preceding the registered proprietor would undermine the land registration system. According to counsel, once the lands registry confirms through an official search that the vendor is

the registered proprietor, a purchaser is entitled to rely on that information. Counsel maintained that a purchaser cannot be expected to trace

the chain of ownership indefinitely and that the purpose of maintaining the land register is to provide certainty in land transactions.

58. Counsel also contended that if there were any irregularities in the earlier transfer between the appellant and the 1st respondent, responsibility should lie with the land registry rather than the 2nd respondent, who relied on the official records. Counsel submitted that if the land registry facilitated or allowed an improper registration, then the appropriate remedy available to the appellant would lie against the government by way of indemnity rather than by impeaching the title of an innocent purchaser.
59. Counsel also rejected the appellant's allegation that the trial judge was biased or prejudiced against her. It was submitted that the trial court gave the appellant ample opportunity to present her case but correctly concluded that she had not demonstrated that the transfers were fraudulent or unlawful.
60. In sum, counsel submitted that the evidence before the trial court clearly demonstrated that the 2nd respondent acquired the property lawfully and that no fraud had been proved

against him.

Counsel therefore urged this Court to uphold the judgment of the trial court and dismiss the appeal with costs.

61. This being a first appeal, it is well settled that the Court is not bound to accept the findings of fact made by the trial court. A first appeal proceeds by way of a rehearing and the duty of this Court is to reconsider the evidence on record, evaluate it independently, and draw its own conclusions. In doing so, however, the Court must bear in mind that it neither saw nor heard the witnesses testify and must therefore make due allowance for that limitation. See **Selle and Another v Associated Motor Boat Company Limited and others** [1968] EA 123 and **Williamson Diamonds Ltd. V. Brown** [1970] E.A.L.
62. We have considered the grounds of appeal, the written submissions by the parties, and the authorities cited. In our view, this appeal turns on two closely connected questions. First, whether the alleged transfer of the suit property from the appellant to the 1st respondent was proved and, if not, whether the absence of a transfer instrument and the surrounding circumstances demonstrated that the 1st respondent's title was

obtained fraudulently, illegally, or unprocedurally, thereby

vitiating the root of title. Second, if the 1st respondent's title was defective, whether the 2nd respondent could nonetheless sustain his title as a bona fide purchaser for value without notice.

63. As regards the first issue, the appellant's title to the suit property way back in 1994 was not disputed as the genesis of her claim. The real contest concerns the alleged transfer of the suit property to the 1st respondent on 6th June 1995. Before the trial court, the appellant consistently maintained that she never sold or transferred the suit property to the 1st respondent and that the original certificate of lease remained in her custody through her advocate. Significantly, the Land Registrar who testified as DW3 produced the registry records and confirmed that although the green card reflected a transfer from the appellant to the 1st respondent, the parcel file did not contain any transfer instrument evidencing such transfer. In our view, that evidence was of considerable probative value as it emanated from the legal custodian of land records and went directly to the question of how the property was allegedly divested from the appellant.

64. The appellant alleged that the purported transfer to the 1st respondent was fraudulent. It is common ground that allegations

of fraud must be specifically pleaded and strictly proved. In **Vijay Morjaria v Nansingh Madhusingh Darbar & Another** (supra), this Court held thus:

“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. See Davy v Garrett (1878) 7 Ch. D 473 at 489.”

65. In the present case, the appellant’s claim did not, in our view, rest on mere suspicion. She gave direct evidence that she never executed any transfer in favour of the 1st respondent. That assertion was reinforced by the Land Registrar’s testimony that the registry file contained no transfer instrument supporting the alleged transfer from the appellant to the 1st respondent. Compounding this difficulty for the respondents is the fact that the 1st respondent neither entered appearance nor testified in the trial court to explain how he allegedly acquired the property from the appellant.
66. In our view, the absence of the primary transfer instrument is not

a mere technical omission but a matter going to the very root
of

title. In addition, we take the view that where the immediate transfer from the original proprietor is directly challenged, and the registry file contains no instrument evidencing that transfer, it cannot suffice to rely solely on the entries appearing on the green card. The law on this question is now settled. In **Dina Management Limited v County Government of Mombasa & 5 Others** (supra), the Supreme Court held that where the root of title is under challenge, it is not sufficient for a registered proprietor to rely merely on the title instrument. The proprietor must go beyond the instrument and demonstrate the legality of the acquisition and that the title was obtained through a lawful process.

67. The Supreme Court reaffirmed this approach in **Janmohammed (SC) (Suing as the Executrix of the Estate of the Late HE Daniel Toroitich Arap Moi) & another v Lagat & 4 others** (Petition No.17(E021) of 2023 and 24(E027) of 2022 (Consolidated) [2024] KESC 39 (KLR) thus:

“As regards the principle of indefeasibility of title, and bona fide purchaser for value without notice of the defect in title, this court set guiding principles in the cases of Dina Management

***Limited v County Government of Mombasa & 5
others SC Petition No 8 (E010) of 2021; [2023]
KESC 30 (KLR) and Torino***

Enterprises Limited v Attorney General SC Petition No 5 (E006) of 2022; [2023] KESC 79 (KLR). The Court

stated that where the registered proprietor's root title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. The registered proprietor must go beyond the instrument of title and show that the acquisition was legal, formal and free from encumbrance. However, the responsibility to prove legitimacy of title is not only limited to the party whose title is being challenged. It also extends to the party claiming infringement of his property rights, to prove his entitlement warranting the attendant constitutional protection sought."

68. Applying those principles to the evidence before us, once the appellant challenged the alleged transfer to the 1st respondent and the Land Registrar confirmed that no transfer instrument from the appellant to the 1st respondent existed in the parcel file, the evidentiary burden shifted to the respondents to demonstrate the legality of that transfer. That burden was not, in our view, discharged at all. In stating so, we note that counsel for the 1st respondent candidly conceded during the hearing that no sale agreement or transfer instrument between the appellant and the 1st respondent appeared in the record. Counsel further indicated that he had been shown such documents by the 1st respondent but did not place them before

this Court as additional evidence. When the Court specifically inquired why those documents had

not been produced, particularly when their existence lay at the heart of the dispute, no satisfactory explanation was offered. The failure to place the alleged sale agreement or transfer instrument before this Court leaves the purported transfer from the appellant to the 1st respondent wholly unsupported by any evidence whatsoever.

69. The respondents suggested that the absence of the documents might be explained by either misplacement or misfiling within the land registry. That suggestion, however, remains speculative. The Court must determine the dispute on the evidence actually before it. On the record before us, the appellant denied having ever sold and transferred the property; the Land Registrar confirmed that no transfer instrument existed in the parcel file, and the 1st respondent offered no explanation as he did not testify. In the circumstances, we conclude that the 1st respondent's title was not lawfully acquired.

70. The next issue is whether the 2nd respondent can nonetheless rely on the doctrine of a *bona fide* purchaser for value without notice. The 2nd respondent maintained that before purchasing

the property, he conducted an official search which showed
that the

1st respondent was the registered proprietor. He then entered into a sale agreement, paid the purchase price through advocates, and upon registration was issued with a certificate of lease in his name. These steps, in ordinary circumstances, reflect the typical indicators relied upon by a purchaser claiming protection as an innocent buyer. In support of that position, counsel for the 2nd respondent relied heavily on the decisions of **Arthi Highway**

Developers Limited v West End Butchery Limited & 6

Others and **Katende v Haridar & Company Limited**, which set out the elements that must be satisfied for a purchaser to be regarded as a bona fide purchaser for value without notice.

71. However, the doctrine of *bona fide* purchaser cannot be considered in isolation from the legality of the vendor's title. Section 26(1) of the Land Registration Act provides that a certificate of title may be impeached where it is shown that it was obtained through fraud or misrepresentation, or where it was acquired illegally, unprocedurally or through a corrupt scheme. In **Elijah Makeri Nyangw'ra v Stephen Mungai Njuguna & Another** (supra), the court held that a title may

be impeached even in the hands of an innocent third party if it
is shown that it

was obtained illegally, unprocedurally or through a corrupt scheme. In other words, the absence of personal fraud on the part of the registered proprietor does not shield a title that is derived from an unlawful or defective root.

72. During the hearing of this appeal, the Court raised several questions concerning the 2nd respondent's claim to be an innocent purchaser. The Court questioned whether the 2nd respondent had taken steps to involve the 1st respondent in the proceedings, given that his own title depended entirely on the validity of the 1st respondent's title. The Court also asked whether reliance on the register alone could suffice where the root of title was under challenge and whether the absence of supporting documents for the alleged transfer from the appellant to the 1st respondent ought to have raised concern.
73. In our view, those concerns were justified. Once the transfer from the appellant to the 1st respondent was challenged and found to be unsupported by any transfer instrument in the registry file, the 2nd respondent could not rely solely on the register without further inquiry. As held in **Dina Management Limited v County Government of Mombasa & 5 Others**,

where the root of title is

placed in issue, the court must examine the legality of the acquisition and not merely the fact of registration.

74. There were also aspects of the evidence that raised legitimate questions about the transaction. The advocate who testified as DW2, Joakim Kiarie Kamere, stated that he acted for the 1st respondent and received bankers' cheques representing the purchase price which he remitted to his client. However, the sale agreement dated 26th November 2009 and the transfer dated 19th January 2010 indicate that they were witnessed by a different advocate, Patrick Onyango Ogola. The Court queried this inconsistency as well as the absence of a clear documentary trail showing remittance of the purchase price to the 1st respondent. While that inconsistency may not by itself prove fraud, it illustrates the lack of clarity surrounding the transaction.
75. Equally troubling was the conduct of the 1st respondent. Despite being the alleged purchaser from the appellant and the vendor to the 2nd respondent, he neither entered appearance nor testified in the trial court. On appeal, counsel for the 1st respondent stated that his client was unaware of the

proceedings until the appellate stage. The Court however noted that both the 2nd respondent and

DW2 indicated that they knew the 1st respondent and had communicated with him at different stages, including during the pendency of the suit before the trial court. When questioned whether it was not unusual that an advocate who knew the 1st respondent and testified in the proceedings did not inform him of the dispute, counsel conceded that such a situation was indeed unusual.

76. In light of these circumstances, we are unable to accept the argument that the 2nd respondent's reliance on the register alone sufficed to establish that he was a bona fide purchaser for value. Where the very root of the vendor's title remains unexplained, the doctrine of innocent purchaser cannot operate to validate an otherwise defective chain of title.
77. The respondents further contended that if any irregularity occurred, the appellant's remedy lay against the government or the lands registry rather than against the 2nd respondent. While the Torrens system does allow for indemnity in appropriate cases, that possibility does not take away the court's power under section 80 of the Land Registration Act to rectify the register where a title is shown to have been

obtained illegally or through an

unprocedural process. The starting point, in our view, must always be to determine whether the title itself is valid.

78. We do not find it necessary to determine whether the 1st respondent was a fictitious person as alleged by the appellant. The decisive question, in our view, is not whether the 1st respondent existed, but whether he lawfully acquired the property from the appellant. On the evidence before us, that was not proved.

79. We are therefore satisfied that the learned trial judge erred in law in concluding that the 2nd respondent had acquired a valid title, while simultaneously declaring the appellant's title illegal and null. The only title whose lawful origin was proved on the record was the appellant's title issued in 1994. The alleged transfer from the appellant to the 1st respondent which formed the foundation of the subsequent transfer to the 2nd respondent remained unsupported by primary evidence.

80. For the foregoing reasons, we are satisfied that the appeal has merit and is accordingly allowed. Consequently, the judgment and decree of the trial court are hereby set aside in their entirety. The appellant's costs, both before the trial court

and of this appeal

shall be borne by the 1st and 2nd respondents, jointly and severally.

Dated and delivered at Nairobi this 10th day of April 2026.

D. K. MUSINGA (PRESIDENT)

.....
JUDGE OF APPEAL

JOEL NGUGI

.....
JUDGE OF APPEAL

G. V. ODUNGA

.....
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.