



Muiruri & 2 others v Mwangi alias Esther Gathoni Namasake & 3 others (Environment and Land Appeal E021 of 2023 & E009 of 2024 (Consolidated)) [2025] KEELC 1073 (KLR) (27 February 2025) (Judgment)

Neutral citation: [2025] KEELC 1073 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E021 OF 2023 & E009 OF 2024 (CONSOLIDATED)
LN GACHERU, J
FEBRUARY 27, 2025

BETWEEN

CHRISTOPHER MUNGAI MUIRURI 1ST APPELLANT
NDUMBI NJOROGE MURIGI 2ND APPELLANT
PETER MUIRURI KIARIE 3RD APPELLANT

AND

ESTHER GATHONI MWANGI ALIAS ESTHER GATHONI
NAMASAKE 1ST RESPONDENT
JAMES NJOROGE MACHARIA 2ND RESPONDENT
UNAITAS SACCO SOCIETY LIMITED 3RD RESPONDENT
THE LAND REGISTRAR, MURANG'A 4TH RESPONDENT

(Being Appeals from the entire Judgment of the Hon. S. Mwangi Senior Resident Magistrate Delivered On 18th October 2023 In Murang'a CMCELC.No. 274 Of 2018)

JUDGMENT

1. The 1st Respondent herein Esther Gathoni Mwangi alias Esther Gathoni Namasake(as the Plaintiff) filed Muranga CMELC No.274 of 2018, against the Appellants herein, and 2nd and 6th Respondents, and sought for judgement against them jointly and severally for various orders among them; a declaration that the Plaintiff(1st Respondent) is the legal and legitimate owner of all that parcel of land known as Makuyu/ Kimorori/ Block 111/315, measuring approx. 0.2049 Ha; a declaration that the title deed issued to the 1st Defendant(2nd Respondent) and subsequently to 2nd 3rd and 4th



- Defendants(Appellants in ELCA No.E021 of 2023), over land parcel No. Makuyu/ Kimorori/Block 111/315, is illegal, null and void ab initio, and should thereby be revoked.
2. It was the 1st Respondent's claim that being a paid-up member of Kagaa Farmers' Co-operative Society, since her youthful days in 1970s, she was allocated the suit land being; Makuyu/Kimorori/ Block 111/315(hereinafter referred to as the suit property), and was issued with a title deed to that effect on 1st July 1988.
 3. She further alleged that she has never resided on the suit land, but she has been in control and use of the said land. However, in January 2017, she learnt that the said land was being used by other persons, without her authority. After receiving this report, she reported the matter to Muranga DCIO, wherein after investigations, James Njoroge Macharia (1st Defendant before the trial court, and 2nd Respondent in the Appeals), was charged in a Criminal Court at Muranga Chief Magistrates Court, wherein various criminal counts were preferred against him.
 4. Further, that during investigations and trial before the Criminal Court, she learnt that the suit land was registered in the name of the 1st Defendant (2nd Respondent herein) on 25th June 2015, and the said suit land was later transferred to 2nd, 3rd and 4th Defendants (Appellants herein) on 7th September 2015.
 5. The 1st Respondent also alleged that she learnt that the 2nd, 3rd and 4th Defendants (Appellants), upon acquiring the ownership of the suit land charged it with the 5th Defendant (Appellant in ELCA No. E021 OF 2024), on 8th September 2015, for a loan of Ksh 2,500,000/=.
 6. The 1st Respondent's suit before the trial court was opposed by the Defendants thereon, some of whom are the Appellants herein. The 2nd Respondent (as 1st Defendant) filed his Statement of Defence dated 22nd June 2022, and denied all the allegations made by the Plaintiff (1st Respondent herein).
 7. The Appellants herein as 2nd, 3rd and 4th Defendants before the trial Court, filed their Amended Statement of Defence and Counter-Claim dated 20th January 2022, and denied all the allegations made against them by the 1st Respondent herein as the Plaintiff thereon. It was their claim that they were bona fide purchasers for value from James Njoroge Macharia (2nd Respondent herein).
 8. In their Counter-claim, the 2nd, 3rd and 4th Defendants (Appellants herein) urged the trial court to declare that the Plaintiff (1st Respondent herein) conspired with the 1st and 6th Defendants (2nd and 6th Respondents herein) to defraud them; Further the trial court was urged to declare that the said 2nd, 3rd and 4th Defendants (Appellants herein) were the bonafide registered owners of the suit land.
 9. The Appellants in ELCA No. E021/ 2023(2nd, 3rd and 4th Defendants thereon) also filed A Notice Of Indemnity To The Co-defendants(1st & 6th Defendants), wherein they sought to be fully indemnified in respect of any claim awarded to the Plaintiff together with costs of the suit, and for the full sum of ksh 3400,000/= paid to the 1st Defendant, by them as a result of the sale agreement between them and the 1st Defendant(2nd Respondent herein) dated 29th July 2015, which made them bona fide purchasers.
 10. The said Notice was to serve as a claim of Indemnity by the said cited parties to indemnify the 2nd to 4th Defendants (Appellants in ELCA E0021/ 2023), from any liability from the claim by the Plaintiff (1st Respondent herein), together with monies paid by the 2nd to 4th Defendants(Appellants) in the event of cancellation of their title deed, together with costs of the proceedings.
 11. The 5th Defendant, Unaitas Sacco Society Ltd (the Appellant in ELCA No. E009/2024) filed its Statement of Defence on 10th September 2019, and denied all the allegations made against it. Further, it averred that it was a stranger to the contents of the allegations made in the Plaint, and admitted having advanced to the 2nd, 3rd and 4th Defendants (Appellants in Appeal E021/2023), a loan by creating a



valid Charge over the suit land, after carrying out due diligence, and after confirming that the suit property was duly registered in the name of Porkswine Investment Group Ltd, wherein the 3rd, 4th and 5th Respondents (Appellants in ELCA E021/23, are registered trustees.

12. The 6th Defendant (now 6th Respondent) did not enter appearance nor file Defence. The suit before the trial court proceeded without its input, or participation.
13. After going through Pre- trials, the matter proceeded for hearing via viva voce evidence, wherein the Plaintiff, Esther Gathoni Mwangi alia Esther Gathoni Namasake (1st Respondent), gave evidence for herself and called no witness. The 1st Defendant (2nd Respondent) did not attend court during the hearing of the main suit, and thus did not give evidence to support his Defence. The 2nd 3rd and 4th Defendants(Appellants in ELCA E021/2023) gave their Defence through Peter Muiruri Kiarie, whereas the 5th Defendant (Appellant in E009/2024) gave its evidence through John Maina Chomba, its Legal Officer.
14. After the close of the case, the trial court delivered its Judgement on 18th October 2023, in favour of the Plaintiff thereon (1st Respondent herein), and awarded her Ksh 600,000/=, as compensatory damages for emotional, physical and financial damages, which amount of money was to be paid jointly and severally by all the Defendants. (the Appellants herein included).
15. The Appellants were aggrieved by the said Judgement of the trial Court, and they preferred the two Appeals; being ELCA No E0021/ 2023, and ELCA No E009/ 2024, which Appeals have been consolidated, as they emanate from the same Judgment.
16. Through a Memorandum of Appeal dated 16th November 2023, the Appellants in ELCA No. E021 of 2023, who were the 2nd 3rd and 4th Defendants before the trial court, filed their Appeal and sought for the Orders;
 1. The Appeal be allowed.
 2. The Judgment in the lower court in favour of the 1st and 2nd Respondents as against the Appellants on;
 - I. Liability for fraud.
 - II. Liability to pay Kshs.600,000/=, or any portion thereof.
 - III. Liability to pay costsbe all varied and/or set aside and reliefs be granted as herein below;
 3. Judgment be entered in favour of the Appellants as against the 2nd and 4th Respondents jointly and severally for payment of Kshs. 3,400,000=,- with special damages of 30 percent of the said amount from the date of the agreement on 29th July 2015, until payment in full with costs and interests.
 4. The costs in this Appeal and in the Court below be awarded to the Appellants as against the 2nd and 4th Respondents.
17. Further, the Appellant in ELCA No. E009/ 2024, filed its Memorandum of Appeal dated 10th February 2024, and sought for the following orders;
 - i. That the Appeal be allowed.
 - ii. That the Judgement of the subordinate court dated 18th October 2023, be set aside.



- iii. That the 1st Respondent's claim before the subordinate court as against the Appellant be dismissed with costs to the Appellant.
 - iv. That costs of the Appeal be awarded to the Appellant.
18. Since these two Appeals are in respect of the same Judgement, over the same parcel of land, and involving the same parties, the Court directed that the two Appeals be canvassed together, and thus the consolidation, and only one Judgment will be delivered.
19. The two Appeals are anchored on various grounds that have been enumerated in the two Memos of Appeal. For Appeal No ELCA No. E021/ of 2023, the Grounds of Appeal are;
1. The trial Court erred in law and in fact in failing to consider the proceedings in Muranga CM Criminal Case No. 185 of 2017 (R V James Njoroge Macharia), in which the appellants were complainants and witnesses so as to confirm that the Appellants herein, in CMELC Case No. 274 of 2018, were victims of the fraud perpetrated by the 2nd Respondents herein.
 2. The trial Court erred in law and in fact in finding that the Appellants did not prove to have brought the suit land from the 2nd Respondent, despite the fact being well admitted by the 2nd Respondent, who even had a copy of the sale agreement in his list of documents, and also unequivocally admitted the fact in the criminal proceedings.
 3. The trial Court erred in law and in fact in finding that the Appellants conspired with the 2nd, 3rd and 4th Respondents to charge land parcel no. Makuyu/kimorori/block III/315, despite there being no evidence to that effect.
 4. The trial Court erred in law and in fact in finding that the Appellants were part of the fraud against the 1st Respondent without evidence to that effect.
 5. The trial Court erred in law and in fact in declining to adjudicate the dispute between the Appellants and the 2nd Respondent, who bore the blame with respect to fraud.
 6. The trial Court wrongly dismissed the Counter-claim by the Appellant as against the 2nd Respondent, on the basis that there was no proof of the transaction between the Appellants and the 2nd Respondent and the Land Registrar, Murang'a requiring them to indemnify the Appellants against any award made to the 1st Respondent as against the Respondents.
 7. The trial Court erred in law and in fact in awarding the 1st Respondent Kshs.600,000/=, for emotional, physical and financial turmoil, in the absence of any evidence to support the same.
 8. The trial Court erred in law and in fact in finding that the Appellants were liable to pay all or any portion of the said sum of Kshs. 600,000/-, yet the loss if any should be attributed to the 2nd and 4th Respondents, while the Appellants were the biggest victims of the fraud.
 9. The trial Court erred in law and in fact in applying the case of Edward *Muriga vs Nathaniel D. Schulter, Civil Appeal No. 23 of 1997*, selectively in not treating the Appellants' case as proved in the absence of any testimony from the 2nd Respondent.
 10. The trial Court's judgment was against the weight of the evidence in regard to all the issues in the suit pertaining to the Appellants and the Judgment was unjust to the said Appellants.
20. For Appeal No ELCA No. E009/ 2024, the Grounds of Appeal are;



1. That the learned trial magistrate erred and misdirected herself in fact and in law in reaching the finding that the Appellant and the 3rd, 4th, 5th and 6th Respondents conspired through corrupt means to register a charge over Land Title Number Makuyu/Kimorori/Block 3/315 (hereinafter referred to as the “suit property”) in favour of the Appellant.
 2. That the learned trial magistrate erred in fact and in law in failing to correctly apprehend the preponderance of the evidence on record which was clear that the Appellant had advanced a loan facility to the 3rd, 4th and 5th Respondents, which was secured by a charge registered over the suit property and thus, the Appellant’s interest in the suit property was adequately proved and was not tainted with any irregularity and or illegality.
 3. That the learned trial magistrate erred in fact and in law by basing her finding that the Appellant and the 2nd, 3rd, 4th and 5th Respondents, had conspired through some corrupt scheme to register the charge over the suit property merely on the fact that the title and the charge instrument were registered on the same day which is common practice for bank/Sacco financed transactions, and is not by any stretch suggestive of corruption.
 4. That the learned trial magistrate erred in fact and in law in reaching the finding that the registration of the charge in favour of the Appellant over the suit property was fraudulent, and as a consequence of a corrupt scheme which the Appellant was party to.
 5. That the learned trial magistrate erred in fact and in law in reaching a decision and making the order that the charge registered over the suit property in favour of the Appellant be cancelled.
 6. That the learned trial magistrate erred in fact and in law in reaching a decision and making the order that the Appellant together with the 2nd, 3rd, 4th, 5th and 6th Respondents pay to the 1st Respondent damages in the sum of Kshs. 600,000/= as compensation for fraudulently depriving her of the title to the suit property.
21. After admission of the two Appeals under section 79B of the *Civil Procedure Act*, the Court directed that the said appeals be canvassed by way of written submissions. The parties complied with the above directions, and their rival written submissions are summarized as below;

The Appellants’ Submissions In ELCA No E021/2023

22. The Appellants in ELCA No. E021 of 2023, filed their written submissions dated 5th June 2024, through J.N Mbuthia & Co Advocates, and submitted on their ten grounds in support of the Appeal.
23. On Ground No1, the Appellants submitted that the trial Court failed to consider the decision in CM Criminal Case No. 185 of 2017 (R Vs James Njoroge Macharia) wherein, the Court held that the Appellants and the 1st Respondent were victims of the 2nd Respondent’s fraud.
24. For this submission, they relied on the evidence of the 1st Respondent appearing on page 98 of the Record of Appeal, page 100 of the said Record, which contains the 2nd Respondent’s Statement of Defence, and page 105 thereto containing the conviction of the 2nd Respondent. Further, the Appellants relied on the holding of the Court in the case of Captain Moses Kariuki Wachira vs Joseph Muriithi Kanyita & 3 others [2013] eKLR.
25. Relying too on the holding of the Court in the case of *Jilao Co. Ltd vs Fabari Trading Ltd & Another (Civil Suit No. 160 of 20150* [2024] KEHC 1455 (KLR) (15 February 2024) (Judgment), the Appellants submitted that the Judgment of the court in Muranga CM CR Case No. 185 of 2017 (R Vs James Njoroge Macharia) appearing on page 96 of the Record was produced by DW1 (Peter Muiruri



- Kiarie), as his evidence before the trial Court, and it demonstrated the existence of the transaction of disposition of the suit property as between the 2nd Respondent and the Appellants herein.
26. On Ground No 2, the Appellants argued that the trial Court misdirected itself in holding that the Appellants failed to tender any evidence concerning the purchase of the suit land from the 2nd Respondent, whereas the first charge facing the 2nd Respondent in Muranga CM Criminal Case No. 185 of 2017 (R Vs James Njoroge Macharia), was one of “intent to defraud” the sum of Ksh.3,400,00/- from the Appellants, and which offence the 2nd Respondent was found guilty of.
 27. On Grounds Nos 3 & 4, it was submitted that the trial Court without any reasonable cause transmuted the Appellants from the position of victims of the 2nd Respondent’s fraud into Co-conspirators, disregarding the fact that the charging of the suit land with the 3rd Respondent by the Appellants was not fraudulent as the Appellants had obtained an apparently good title which, however, turned out to have been illegally procured by the 2nd Respondent.
 28. It was their further submissions that the findings of the trial Court on the issue of fraud as set out in its Judgment appearing on pages 190 to 191 of the Record of Appeal is limited to the finding that the 2nd Respondent obtained title to the suit property through fraudulent activities together with members of staff at the Land Registrar’s Office(4th Respondent herein).
 29. Further, the trial Court wrongly concluded that the Appellants participated in the said fraud, merely because they charged the title to the suit property on the same day that they obtained it in their name.
 30. On Grounds Nos 5 & 6, the Appellants argued that the trial Court failed to adjudicate on their Counter-claim appearing on pages 86 and 87 of the Record, and also failed to rule on the Appellants’ Notice of Indemnity to Co-Defendants appearing on pages 90 and 91 of the said Record of Appeal.
 31. On Grounds Nos 7 & 8, the Appellants submitted that the trial Court awarded special damages to the 1st Respondent (then Plaintiff), without there being any particulars related to special damages in the Plaintiff’s Claim, hence it is unclear how the trial Court arrived at the said damages as well as the basis of the quantum.
 32. Further, that the award of Kshs. 600,000/=, being Special damages was not supported by either evidence, or case law. For this submission, the Appellants relied on the holding of the Court in the case of Jogoo Kimakia Bus Services Ltd Vs Electrocom International Ltd [1992] eKLR, on the question of computation of nominal damages.
 33. On Ground No. 9, the Appellants submitted that the trial Court applied the holding in the case of Edward *Muriga vs Nathaniel D. Schulter, Civil Appeal No. 23 of 1997* selectively to the disadvantage of the Appellants.
 34. On Ground No.10, the Appellants cited the Judgment of the Court in the case of Alica Wanjiru Ruhui Vs Messianic Assembly of Yahweh [2021] eKLR, and submitted that the weight of the evidence adduced before the trial Court tilted towards the conclusion that the Appellants were victims of the 2nd Respondent’s fraud, hence the trial Court valiantly misapplied evidence unjustly by holding that the Appellants were liable for fraud.

The Appellant’s Submissions In Elca No E009/ 2024

35. On its part, the Appellant in ELCA No. E009 OF 2024, filed its submissions dated 18th July 2024, through Mutua Waweru & Co Advocates, and urged the court to allow its Appeal, and dismiss the 1st Respondent suit before the trial court.



36. It was its submissions that it was aggrieved by the trial court's findings that the charge registered between the Appellant and the 3rd, 4th and 5th Respondents in its Appeal and Appellants in ELCA No. E021/2023, was fraudulently registered, pursuant to a corrupt scheme, which the Appellant was a party to.
37. Further, the Appellant faulted the trial court's holding that the Charge was fraudulently registered due to the fact that the Appellant could not have conducted due diligence on the 3rd, 4th and 5th Respondents' title since the charge was registered on the same day that the title was issued; that the Appellant processed the loan in less than 24 hours on the same day that the charge was registered.
38. It was its further submissions that the said findings were grave and made out of error on the part of the trial court, for failure to understand the nature and practice of banks financial transactions, as was the case with the 3rd, 4th and 5th Respondents herein.
39. The Appellant further submitted that the perfection of security in favour of a financier and transfer of title in favour of the borrower/ purchaser is usually done simultaneously, resulting in simultaneous registration of the title deed, in the name of the borrower, and the charge in favour of the financier. Therefore, there was nothing untoward with the title deed in favour of 3rd, 4th and 5th Respondents and the charge in favour of the Appellant registered on the same day.
40. Further, the Appellant submitted that the fact that the loan was processed the same day the suit property was charged was not indicative of fraud, but it was clear from the letter of offer that the borrowers were taking money to purchase land, and security of repayment was a charge over the suit property.
41. The Appellant further submitted that in reaching its findings, the trial court ignored pertinent evidence on record that clearly established that the 2nd Respondent perpetrated fraud against the 3rd, 4th and 5th Respondents. For this the Appellant relied on the Judgement of the court in Muranga CMC Cr Case No. 185 of 2017: R vs James Njoroge Macharia, wherein, the 2nd Respondent was charged and convicted of an offence of Obtaining Money by false pretenses against the 3rd, 4th and 5th Respondents herein.
42. Further, the Appellant submitted that no particulars of fraud were pleaded against it, and therefore the allegations of fraud against it remained unsubstantiated and unproved. Reliance was sought in the case of Kinyanjui Kamau vs George Kamau (2015) eKLR, where the court held: -

“It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo vs Ndolo [2008] 1KLR (G & F) 742 wherein the court stated that “...we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove the allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than the required in ordinary civil cases, namely; proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal case...”
In case where fraud is alleged it is not enough to simply infer fraud from the facts.”
43. In conclusion, the Appellant submitted that its Appeal is merited, and it urged the court to allow the said Appeal, by setting aside the Judgement of the trial court, and then dismiss the 1st Respondent's case before the lower court.



The 1st Respondent's Submissions

44. The 1st Respondent herein Esther Gathoni Mwangi alias Esther Gathoni Namasake filed her written submissions dated 24th May 2024, through Mwae & Associates Advocates and urged the court to dismiss the two Appeals with costs to herself and further submitted as follows;
45. The 1st Respondent set out the background of the case before the trial court, and set out the one issue for determination being; whether the trial court erred in its judgement which was dated and delivered on 18th March 2023?
46. For this submission, the 1st Respondent relied on Article 40 of *the Constitution* on the right to own property of any description and in any part of Kenya. Further, that no one should be deprived ownership of his property, where there is no fraud.
47. The 1st Respondent also submitted that the trial court's Judgement was sound, when it declared the 1st Respondent as the legitimate owner of the said parcel of land. Reliance was placed on Section 24 of the *Land Registration Act*, which states:
- “Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”
48. Further, it was her submissions that the Appellants in ELCA E021/2023, or 3rd, 4th and 5th Respondents in ELCA E009/2024, did not acquire good title to the suit land, as the person who purportedly sold the said land to them was convicted of a criminal offence. For this, the 1st Respondent relied on the definition of caveat emptor as stated in the Black's Law Dictionary 10th Edition as follows: -
- “let the buyer beware. A doctrine holding that a purchaser buys at his or her own risk.
49. The 1st Respondent also relied on the Maxims of equity that it is trite that equity will not suffer a wrong without remedy, and equity will not allow a wrongdoer to profit from a wrong. Therefore, it was her submissions that the award of ksh 600,000/= as remedy for emotional, physical and financial turmoil that she went through was deserving.
50. She also submitted that the Appellants (in ELCA E021/2023), did not produce evidence before the trial court to prove how they paid ksh 3,400,000/= the alleged purchase price; they did not prove when the money was paid, and they did not produce the sale agreement if any.
51. Further, it was submitted that the 2nd Respondent fraudulently transferred the suit land to the Appellants herein, and thus the trial court was correct when it held that the register ought to be rectified to reflect the 1st Respondent as the owner of the suit land. Reliance was placed on Section 80 of the *Land Registration Act*.
52. The 1st Respondent argued that since the Appellants did not demonstrate that they were victims of the 2nd Respondent's fraudulent scheme, then the two Appeals herein should be dismissed with costs to her.
53. The above are the Grounds set out in the two Appeals as contained in the two Memos of Appeal, which this Court has considered. The court has also re- considered the evidence adduced before the trial court as contained in the Record of Appeal, the rival written submissions, cited authorities, and finds the issues for determination are; -



- i. Whether the Appellants in ELCA No. E021/ 2023, are bona fide purchasers of the suit land.
 - ii. whether the Appellant in ELCA No E009/ 2024, rightly Charged the suit property/ and or whether there was fraud in registration of the said Charge.
 - iii. Whether trial court misdirected itself in arriving at the finding it arrived at in its Judgement of 18th March 2023.
 - iv. Whether the trial Court misdirected itself by awarding special damages in the sum of Kshs. 600,000/=, to the 1st Respondent.
 - v. Whether the two Appeals are merited?
 - vi. Who shall bear the costs of these appeals.
54. This being a first Appeal, the Court is bound to re-evaluate the entirety of the evidence placed before the trial Court and arrive at its own independent conclusion, while bearing in mind that it never saw nor heard the witnesses or observed their demeanors of the witnesses, as the trial court did. This was the holding made by the Court in the case of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, where the court held as follows:
- “...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses, and should make due allowance in this respect...”
55. Further, in the case of *Mbogo & Another vs. Shah* [1968] E.A. 93, the Court proclaimed as follows:
- “ [A] Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been injustice.”
56. This court being guided as above, will now re-evaluate and re-consider the available evidence before the trial court, juxtapose it with the Grounds of Appeal, while bearing in mind that as first Appeal, the court is allowed to consider both facts and law as provided by section 65 of the [Civil Procedure Act](#).
57. Indeed, there was no doubt that the 1st Respondent in both Appeals, Esther Gathoni Mwangi, is also known as Esther Gathoni Namasake, after contracting a marriage. The trial court held and found that Esther Gathoni Mwangi is also known as Esther Gathoni Namasake, and the said cannot be faulted for arriving at that finding.
58. There is also no doubt that the suit land Makuyu/ Kimorori/ Block111/ 315, was registered in the name of Esther Gathoni Mwangi on 1st July 1988. Esther remained as the proprietor of the suit land until 17th July 2015, when the said land was transferred and registered in the name of James Njoroge Macharia, the 2nd Respondent herein. Eventually the suit land was transferred to the Appellants herein (in ELCA E021/2023), as trustees of Porkswine Investment Group on 7th September 2015, and a title deed was issued in their joint names, after allegedly purchasing the said land from James Njoroge Macharia. (2nd Respondent).



59. The Green Card for this parcel of land is very clear on its history. The 1st Respondent alleged that she never sold this suit land to James Njoroge Macharia, nor anybody else and she further claimed that she was still in possession of the original title deed. After learning that someone was using the suit land without her permission and without having disposed to him/them, she reported the matter to DCIO, Muranga.
60. Further, there is no doubt that after this report was made to the DCIO, the 2nd Respondent was arrested and charged in Muranga CMC in Criminal Case No 185 of 2017, with various criminal Counts; among them Obtaining money by false pretenses from Porkswine Investment Group, and also Obtaining Land Registration of the suit land to himself and later to Porkswine Investment Group, by false pretenses.
61. In the above referred Criminal case, the Appellants (in ELCA E021/2023) herein and 1st Respondent were complainants and witnesses against the 2nd Respondent herein (James Njoroge Macharia). After trial of the 2nd Respondent, he was convicted of all the Counts, under Section 215 of the Criminal Procedure Act.
62. There was no evidence availed on whether the 2nd Respondent appealed against that conviction, and whether the said conviction was upset and or set aside. Without any evidence that the conviction was upset, then this Court finds and holds that indeed the 2nd Respondent did obtain money falsely from the Appellants, (in ELCA E021/2023), by pretending that he would sell the suit land to them.
63. Section 47A of the Evidence Act provides; “A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.”
64. Bearing the above provisions of law in mind, the trial court ought to have considered that the Appellants (in ELCA E021/2023), and 1st Respondent who were complainants and witnesses in the criminal case that led to the conviction of the 2nd Respondent, could certainly not have conspired with him, and later complain against him. From the said proceedings in the Criminal case, it is evident that the Appellants (ELCA E021/2023) paid monies to 2nd Respondent, and that the 1st Respondent’s land was initially transferred from her name to 2nd Respondent’s name, after an alleged Notice to the Kenya Gazette was issued that the 1st Respondent had lost the original title.
65. The 2nd Respondent was charged with forgery of the said Kenya Gazette Notice No. 1351, and was convicted. Therefore, the 2nd Respondent sold the suit property to Appellants (in ELCA E021/2023), having obtained the title deed to the suit land through corrupt scheme. The 1st Respondent was still in possession of her original title deed, and thus, the 2nd Respondent, must have colluded with other persons, maybe employees or staff of 6th Respondent to commit the said fraud. Therefore, the Appellants (in ELCA E021/2023) and 1st Respondent were victims of the 2nd Respondent’s criminal activities or fraudulent actions, and were not conspirators.
66. Though the 2nd Respondent had advanced a Defence that he indeed bought the suit land from the Plaintiff (1st Respondent) and later sold it to Porkswine Investment Group, he did not attend court on the date of the hearing of the main suit. Therefore, his allegation that he bought the suit land from 1st Respondent remained mere allegations. It is trite that Pleading do not prove an allegation which can lead to the entry of judgment unless the allegation/the claim is undefended, and is a claim for liquidated demand. The claim by 2nd Respondent was neither undefended nor a liquidated claim, and failure to



call evidence, then the said claim is just but mere allegations. (See the case of Aurtar Singh Bahra & Another vs Raju Govindji HCCC No. 548 of 1998).

67. Since the claim by the 2nd Respondent, as a 1st Defendant before the trial court was not undefended, and was not a liquidated claim, and he needed to adduce evidence to support it, without such evidence, the said allegation ought to have been dismissed. In the case CMC Aviation Ltd Vs. Crusair Ltd (no.1) (1987) KLR 103, the court observed as follows:-

“The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents.”

68. Failure by the 2nd Respondent to attend court to support his claim that he had purchased the suit land from the original owner, and the fact that he was charged and convicted of criminal offences relating to the acquisition and disposal of the suit land to the Appellants (ELCA E0021/2023), meant that the Appellants were victims of the 2nd Respondent’s fraudulent activities, and they ought not or should not have been linked to the 2nd Respondent.

69. Having laid the above background, this Court will turn to the Grounds of Appeal as set out by the Appellants, then re-consider the available evidence; the trial court’s judgement, and eventually come to its own independent decision. In so doing, the court will also determine the issues identified earlier for determination.

70. On Ground No1, as advanced by the Appellants in ELA N0. E021/2023, they lamented that the trial court failed to consider the conviction of 2nd Respondent in Criminal Case No.185 of 2017. Indeed, the 1st Respondent had produced as her exhibits the Charge Sheet in the said criminal case, and the Appellants had produced the Judgement in the said criminal case, wherein the 2nd Respondent was charged with various counts, and after trial, he was convicted of all the counts. As provided by section 47A of the Evidence Act, the said Judgement was a conclusive evidence that the 2nd Respondent committed the said offences. The Court has considered the said Judgement of the trial court, in relation to the Appellants herein, who were victims of fraudulent activities of the 2nd Respondent, and finds that the trial court treated them as Conspirators, instead of victims.

71. Therefore, on Ground No1 of ELCA No. E021/ 2023 succeeds.

72. On Ground No 2, the Appellants averred that the trial court erred in law and fact in holding that the Appellants did not prove that they had purchased the suit land from the 2nd Respondent, for failure to produce a sale agreement, and proof of payment of the purchase price. This court has considered the impugned Judgement on page 17, wherein the trial court cited the provisions of sections 3(3) of the Law of Contract Act, which provides that all contracts over disposition of land, must be in writing.

73. Further, this court notes that the trial court held that the Appellants failed to produce any sale agreement, evidence of payment of Ksh.3,400,000/= and proof of having attended the local Land Control Board. However, it is evident that in his Defence, the 2nd Respondent admitted to having sold the suit land to the Appellants, and the Criminal Judgement was to the effect that the 2nd Respondent was convicted of having obtained money falsely by pretending that he would sell the said suit land to the Appellants.

74. Therefore, the said Judgement and conviction was sufficient evidence that the Appellants did pay the stated amount as purchase price to the 2nd Respondent. Further, from the 2nd Respondent’s list of



documents, and the exhibits produced in the criminal court, there was a copy of the sale agreement between James Njoroge Macharia, and Porkswine Investment Group, dated 29th July, 2015, which sale agreement was never controverted by the 2nd Respondent. Indeed, it was among the documentary evidence that he had attached to his Defence.

75. In determining the suit before the trial court, the said court had a duty to consider the evidence in totality, whether produced by the Appellants and / or other parties. The fact that there was a copy on record of the sale agreement between the 2nd Respondent and the Appellants, whether produced by the Appellants or the other parties was enough proof that the Appellants purchased the suit land from 2nd Respondent, and they paid him Ksh 3,400,000/= . The 2nd Respondent admitted in his Defence that he did sell the said suit land to the Appellants, and this Court wonders what other evidence was required to confirm the said purchase and payment of purchase price by Appellants to the 2nd Respondent.
76. For the above reasons, Ground No2 succeeds too.
77. On Grounds No 3 and 4, the Appellants had averred that the trial court erred in law, when it found and held that the Appellants conspired with 2nd 3rd and 4th Respondents to charge the suit land. Further that the trial court erred in finding that the Appellants were parties to the fraud perpetuated against the 1st Respondent.
78. In the impugned Judgement, the trial court held on page of the said Judgement that “the 2nd Respondent after conspiring with the 6th Defendant (4th Respondent) to get a title, the 4th Respondent conspired to have the said title registered in the names of the 2nd ,3rd and 4th Defendants (Appellants in ELCA E021/2023), and the said Defendants(Appellants) conspired with the 5th Defendant (Appellant in ELCA E009/2024), to have the suit land charged the same day the title was issued.
79. The trial court found as above on the basis that there was no evidence of due diligence on the part of the Appellants; that Appellants Charged the suit property the same day they got the title. However, it is evident that allegations of fraud are serious allegations, which must be proved on the standard higher than balance of probabilities, see the case of Terer vs State Law & 2 others [2025] KEELC 22 (KLR) (Nakuru), where the Court held: -

“ This court finds that the learned magistrate correctly found that fraud was not proved by the appellant because there was sufficient evidence that the mother title to the suit property was registered in the names of the deceased and that he applied to subdivide the same, obtained consent to subdivide, engaged a surveyor and sub-divided the land and ultimately transferred the resultant Elbugon/Arimi Ndoshwa Block 5/290 to the 1st respondent. It is trite law that whoever alleges fraud in civil cases has the burden of proof and the standard of proof is beyond balance of probabilities but below shadow of doubt. In this case the person who could have answered to the appellants concern, who was the registered owner passed on after the transactions had been done. The parcel file is missing and the same cannot be visited upon the 1st respondent. However, the burden of proof remains with the appellant and the standard remains higher than the ordinary civil cases. The first principle is that an allegation of fraud must be specifically pleaded and proved. In Vijay Morjaria v Nansingh Madhusingh Darbar & Another [2000] eKLR, Tunoi, JA (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It



is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from facts.”

In *R.G Patel v Lalji Makanji* [1957] EA 314 the former Court of Appeal for East Africa stated as follows:

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

In *Belmont Finance Corporation Ltd v Williams Furniture Ltd* Buckley L.J said:

“An allegation of dishonesty must be pleaded clearly and with particularity. That is laid down by the rules and it is a well-recognized rule of practice. This does not import that the word ‘fraud’ or the word ‘dishonesty’ must be necessarily used. The facts alleged may sufficiently demonstrate that dishonesty is allegedly involved, but where the facts are complicated this may not be very clear, and in such a case, it is incumbent upon the pleader to make it clear when dishonest is alleged. If he uses language which is equivocal, rendering it doubtful whether he is in fact relying on the alleged dishonesty of the transaction, this will be fatal; the allegations of its dishonest nature will not have been pleaded with sufficient clarity.”

The second principle is that the burden of proof of an allegation of fraud is on the person alleging. In *Ndolo v Ndolo* [2008] 1KLR (G &F) 742 the court stated that:

“We start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

In *Christopher Ndaru Kagina v Esther Mbandi Kagina & Another* [2016] eKLR, the court pronounced itself as follows:

“It is trite law that he who alleges fraud must prove fraud. Allegations of fraud must strictly be proved. Great care must be taken in pleading allegations of fraud or dishonesty. In particular, the pleader needs to be sure that there is sufficient evidence to justify the allegations.....”

In the case of *Urmila w/o Mahendra Shah v Barclays Bank International Ltd & Another* [1979] eKLR, the Court of Appeal took the view that the onus to prove fraud in a matter is on the party who alleges it.

In *Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) v Stephen Njoroge Macharia* [2020] eKLR, the Court of Appeal observed as follows:

“In the instant case, the appellants needed to not only plead and particularize the fraud, but also lay a basis by way of credible evidence upon which the Court would make a finding that indeed there was fraud in the transaction leading to the transfer and registration of the suit land in the name of Janet all the way to the respondent.....”

The third principle is that the burden of proof of allegation of fraud is higher than that required in civil cases that of proof on a balance of probabilities; and lower than that required in criminal case that is beyond reasonable doubt. In *Ndolo v Ndolo* [2008] 1KLR(G &F) 742 the Court stated that: “...Since the Respondent was making serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that



required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases.....”

In *Central Bank of Kenya Limited v Trust bank Limited & 4 Others* [1996] eKLR, the court rendered itself as follows:

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

80. The findings of the trial court were arrived at without any evidence that the Appellants did participate in fraud. This holding was arrived at out of mere suspicion that there was no due diligence and that the suit property was Charged on the same day that it was registered in favour of the Appellants. It is trite that suspicion, no matter how strong it is, is not evidence, as the court cannot base its decision on mere suspicion, even if it appears compelling. Further, it is trite that a civil claim has to be proved on the required standard, and the burden of proof lies with the person alleging. This standard is on a balance of probabilities but not on a beyond reasonable doubt, like in Criminal cases. (See the case of *Miller vs Minister of Pension* [1947] ALL ER 373).
81. In its submissions, the Appellant in ELCA No. E009/ 2024, argued that in practice, perfection of security in favour of a financier and the transfer of title in favour of the borrower /purchaser in bank financed transactions usually proceed simultaneously, resulting to simultaneous registration of title deed in the name of borrower/ purchaser, and the Charge in favour of the financier. If that is the practice, then there was nothing wrong in the Charge, in favour of the Appellant in ELCA E009/2024, being registered the same day that the title was registered in the names of the Appellants, in ELCAE021/2023. Therefore, the trial court erred in holding that fraud was perpetuated due the above simultaneous registration of the title and Charge.
82. Therefore, Grounds Nos 3&4 of Appeal No E021/ 2023, and Ground No1 of Appeal No E009/ 2024, succeed.
83. On Ground Nos 5 & 6, the Appellants (ELCA E021/2023), faulted the trial court for failure to adjudicate the dispute between the Appellants and 2nd Respondent(James Njoroge Macharia), who was to blame for the fraud, that was committed against 1st Respondent, and later against the said Appellants. Further, that the trial court dismissed the Appellants’ Counter-claim, and failed to address the Notice of indemnity.
84. This Court has considered the Appellants’ (in ELCAE021/2023,) Counter-claim as contained in their Amended Defence dated 28th January2022, seeking for various prayers among them; that if their title to the suit land was to be found to be illegal, then the court should direct that the 1st Defendant, now 2nd Respondent to refund them Ksh 3,400,000/= with an interest of 30% per annum from date of agreement to payment in full.
85. In the impugned Judgement, the trial court on page 19 held that “... the said title of the suit land was registered in the names of 2nd ,3rd and 4th Defendants (Appellants in ELCAE021/2023), who in turn conspired with the 5th Defendant (Appellant in ELCA E009/2024), to have the suit land charged on the same day the title deed was issued in their names’.
86. This Court has found that the finding and holding of the trial Court that that the Charge was registered the same day that the title was registered in the name of the Appellants, was arrived at, out of mere



suspicion; without any basis, because in Charges, Mortgages and later conveyancing of the Charged properties, that is the normal practice, and there was nothing wrong with the registration of the Charge on the same day that the suit property is registered in the name of the borrower, unless evidence was adduced of such wrong doing or fraud.

87. Due to the above misapprehension of normal banking and conveyance practice, and also by failing to appreciate that the 2nd, 3rd and 4th Defendants (Appellants in ELCA E021/2023) were victims of fraud perpetrated by the 2nd Respondent, the trial court failed to make any determination on the Appellants' Counter-claim. Instead, the trial court went ahead to find and hold "... although the 2nd, 3rd and 4th Defendants are the registered proprietors of the suit land, it is evident that the title they hold was acquired fraudulently and they are part of the fraud."
88. Having found as above, the trial court failed to address itself to the Notice of indemnity as filed by the Appellants (in ELCAE021/2023). Order 1, Rule 24 of the Civil Procedure Rules provides: -
1. Where a defendant desires to claim against another person who is already a party to the suit—
 - a. that he is entitled to contribution or indemnity; or
 - b. that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the action which is substantially the same as some relief or remedy claimed by the plaintiff; or
 - c. that any question or issue relating to or connected with the said subject-matter is substantially the same as some question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and the defendant and such other person or between any or either of them, the defendant may without leave issue and serve on such other person a notice making such claim or specifying such question or issue.
 2. No appearance to such notice shall be necessary but there shall be adopted for the determination of such claim, question or issue the same procedure as if such other person were a third party under this Order.
 3. Nothing contained in this rule shall operate or be construed so as to prejudice the rights of the plaintiff against any defendant to the action."
89. The above provision of law grants a defendant discretion to issue Notice of Indemnity to such a person who is already a party to the suit, without leave of the court. The Appellants in ELCA E021/2023, issued such Notice to the 1st and 6th Defendants in the suit before the trial court. As provided by sub rule 2 above, even if no appearance was necessary, the trial court had a duty to adopt for determination of the said claim, such question or issue the same procedure as if the other person was a third party. It is clear from the proceedings and the impugned Judgement, that the trial court did not adopt for determination any such issue, and thus did not address the Notice of indemnity.
90. Therefore, Grounds Nos 5 and 6 succeed.
91. On Grounds Nos 7 and 8, the Appellants averred that the trial court erred in awarding the 1st Respondent Ksh 600,000/= as compensatory damages without evidence; Further, that the trial court erred in finding that the Appellants were liable to pay the sum of Ksh 600,000/=, yet it was the 2nd and 4th Respondents who were to blame.
92. The Appellants argued that in her Complaint, the 1st Respondent had not quantified her damages. However, this court has considered the Complaint, and indeed the 1st Respondent sought an award of



compensatory damages against the Defendants thereon for emotional, physical and financial turmoil occasioned to her. Therefore, it is clear that the 1st Respondent, as a Plaintiff had pleaded for compensatory damages for emotional, physical and financial turmoil, and since this was not a claim for special damages, she did not need to plead it specifically.

93. In awarding the above damages, the trial court relied on the case of Abdulhamid Ebrahim Ahmed vs Municipal Council of Mombasa (2004) eKLR, which case explained what exemplary damages are; and instances when such exemplary damages are awarded. Further, the trial court held that the Plaintiff (1st Respondent) was unable to enjoy the fruits of her hard work while in her youth, and even though she was unable to avail evidence of damage caused to the land, the court still awarded her the above stated amount.
94. The Court of Appeal in the case of Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47; held that:
- “In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.”
95. There is no doubt that the 1st Respondent did incur expenses while pursuing the criminal case, and indeed suffered emotionally, physically and financially. The trial court was not wrong in granting this award of Ksh 600,000/= to the Plaintiff thereon (1st Respondent), and therefore the trial court did not err, in so finding and holding. This court finds no reasons to interfere with the said award of ksh 600,000/=, a compensatory damages for emotional, physical and financial turmoil.
96. However, the finding and holding by this court that the 2nd, 3rd and 4th Defendants, before the trial court now Appellants in ELCA E021/2023, were victims of fraudulent activities perpetuated by the 2nd Respondent, then it was improper for the trial court to direct that the Appellants herein, including Unaita Sacco Society Ltd (Appellant in ELCA E009/2024), were liable to pay this amount of compensatory damages to 1st Respondent.
97. Consequently, this court finds that Ground No 7 fails, but Ground No 8 as contained in ELCA No. E021/ 2023, and Ground No 6 in ELCA E009/ 2024 succeed.
98. On Ground 9, the Appellants faulted the trial court in applying the case of Edward [Muriga vs Nathaniel D. Schulte, Civil Appeal No 23 of 1997](#), selectively, and failing to find that since the 2nd Respondent did not appear in court, then their case had been proved. This court has considered the impugned judgement and on page 17, the trial court held; “in the case of Edward Muriga through Stanley Muriga vs Nathaniel D.Schulter , Civil Appeal No 23 of 1977, where a defendant does not adduce evidence ,the plaintiff’s evidence is to be believed as allegations by the defence is not evidence”
99. The Appellants had filed a Counter-claim, wherein they had sought for a declaration that the Plaintiff had conspired with 1st and 6th Defendants to defraud them. Though the 2nd Respondent, had filed a Defence and denied allegations of fraud, he failed to turn up in Court to give evidence and support his allegations as contained in the said Defence. The 2nd Respondent did not turn up in Court to adduce evidence, and / or advance his defence; and using the holding of the Court quoted above, then the evidence of the Appellants against the said 2nd Respondent ought to have been believed. The trial court should have applied the same principles in Edward Murigas case that it applied in respect of the



- Plaintiff's case (1st Respondent) to the Appellants' Counter-claim against the 2nd and 6th Respondents herein. Grounds No9 succeeds too.
100. On Ground No 10, the Appellants faulted the trial court for going against the weight of the evidence in regard to the Appellants' case, and thus, the said judgement was unfair to them. Upon re-evaluation of the available evidence and the impugned Judgment, this Court finds that the trial court concluded that the Appellants herein conspired with the other Defendants to acquire the suit land, which was acquired fraudulently, and thus they were not bona fide purchasers for value.
102. However, from the criminal case No 185/ 2017, wherein the 2nd Respondent; James Njoroge Macharia was convicted, it is evident that he acquired the suit land fraudulently, as the 1st Respondent did not sell the suit land to him, and she still retained the original title deed. The 2nd Respondent, with others not before court, conspired and forged the Kenya Gazette Notice No 1351 to the effect that the 1st Respondent had lost her original title, and sought for issuance of a new title deed. With the issuance of the new title deed, the 2nd Respondent, fraudulently caused the suit land to be registered in his name, and later through false pretenses, sold the said land to the Appellants herein.
103. Therefore, the 2nd Respondent did not obtain a good title which he could pass to anyone. The 2nd Respondent sold the suit land to the Appellants herein who were 2nd, 3rd and 4th Defendants before the trial court. There was evidence through a sale agreement that indeed, the 2nd Respondent sold the suit land to the Appellants. The 2nd Respondent had admitted in his Defence that he indeed sold the suit land to the Appellants; he was also convicted for obtaining by false pretenses from the Appellants.
104. With the availability of the above evidence, there was no other evidence to prove that the Appellants conspired with the 2nd Respondent. In fact, they were victims of fraud. Since the 2nd Respondent did not have good title, he could not pass any good title to the Appellants. This is the Nemo dat principle; which states: - "A person who does not have adequate ownership of goods or property cannot transfer the ownership of those goods or that property to someone else."
105. In the case of Daniel Kiprugut Maiywa vs Rebecca Chepkurgat Maina (2019) eKLR, the Court pronounced itself as follows:
- "The nemo dat principle means one cannot give what he does not have. This principle is intended to protect the title of the true owner. The rationale behind this principle is that whoever owns the legal title to property holds the title thereto until he or she decides to transfer it to someone else. Accordingly, an unauthorized transfer of the title by any person other than the owner generally has no legal effect, which means the owner continues to hold the title to the property while the person who received the invalid title owns nothing."
106. Even if the Appellants (ELCA E021/2023), were innocent purchasers, they did not acquire a good title, since the person who sold the suit land to them did not have good title to pass to them. See also the case of: - Peter Kaguny Kiragu vs Anne H. G. Muchunku (2021) eKLR.
107. Though the trial court rightly found that the Appellants had not acquired a good title, and invoked the provisions of Section 80 of the [Land Registration Act](#), by revoking their title, the trial court erred in holding that the Appellants herein(in ELCA E021/2023), participated in fraud together with the 2nd Respondent.
108. On Ground No10, this court finds and holds that the trial court did not err in revoking and / or cancelling the Appellants' title, but erred in finding and holding that the said Appellants conspired



to defraud the 1st Respondent, and also conspired with 5th Defendant (Appellant) to Charge the suit land. Ground No 10 succeeds on one limb only.

109. In Appeal No ELCA E009 OF 2024, the Appellant therein who had been sued as 5th Defendant, before the trial court, based its Appeal on 6 Grounds, which grounds are founded on the fact that the trial court found and held that the 5th Defendant(Appellant) conspired with the other Defendants to defraud the Plaintiff (1st Respondent).
110. There was no doubt that the Appellant as a financier did advance money to 2nd, 3rd and 4th Defendants, (3rd 4th and 5th Respondents), in its Appeal. The title of the suit property was Charged as security for the advanced loan.
111. The trial Court took issues with the Appellant on the fact that the Charge was registered the same day the title was registered in the names of 3rd 4th and 5th Respondents. The trial court on page 19 of the Judgment held that the 3rd, 4th and 5th Respondents herein had conspired with the Appellant herein to have the suit land Charged on the same day the title was issued in their names.
112. The Appellant submitted that the said holding of the trial court emanated from lack of the court to understand the nature and practice of banks financed transactions, since to perfect security in favour of the financier, the title in favour of the borrower is processed simultaneously with the registration of the Charge. The Appellant submitted that is what happened in this case, and there was nothing wrong with that.
112. During the trial before the said court, the Appellant (5th Defendant) produced documents to show that the membership of Porkswine Investments Group had approved borrowing of money from the 5th Defendant (Appellant) to buy land at Kenol area. After the usual application, the loan application was approved, and the process of financing and charging the suit land kicked off. A Charge document was produced as exhibit before the trial court, and there was no evidence to confirm that it was not a valid Charge.
113. There was no evidence of fraud adduced by the Plaintiff (1st Respondent) to prove fraud on the part of the Appellant, in fact, the 3rd, 4th and 5th Respondents had adduced evidence before the trial court to confirm that they applied for a loan from the Appellant, which loan assisted them in purchase of the suit land, and in return they Charged the said land.
114. The trial court found that the Appellant conspired to defraud the 1st Respondent. However, no particulars of fraud were pleaded against the Appellant herein; therefore, allegations of fraud against the Appellant remained unsubstantiated. The Plaintiff (1st Respondent) had a duty to plead and prove fraud on the part of the Appellant herein (5th Defendant). See the case of Christopher Ndaru Kagina v Esther Mbandi Kagina & Another [2016] eKLR where the court pronounced itself as follows: -

“It is trite law that he who alleges fraud must prove fraud. Allegations of fraud must strictly be proved. Great care must be taken in pleading allegations of fraud or dishonesty. In particular, the pleader needs to be sure that there is sufficient evidence to justify the allegations.....”
115. The Appellant took issue with the fact that the trial court directed in the impugned Judgment that the Charge registered over the suit property be cancelled, and the title to revert to the name of the 1st Respondent. The 3rd 4th and 5th Respondents did not obtain a good title, and thus without a good title, the Charge over the said suit land was unlawful.
116. The 3rd 4th and 5th Respondents before the trial court testified that they had completed payment of the loan advanced to them. If that is the case, then the Appellant herein has nothing to lose over the



said cancellation of the Charge over the suit land. This is because as provided by Section 24 of the Land Registration Act, if the said land reverts to the 1st Respondent, she has all rights and privileges appurtenant thereto, which rights she needs to enjoy.

117. A Charge is an encumbrance, and in the case herein, that encumbrance was not incurred by the 1st Respondent. She can only enjoy the rights and privileges of an absolute and indefeasible owner, if the land does not bear a Charge. The said enjoyment can only be achieved by having the Charge over the suit land cancelled and/ or revoked. Therefore, this court finds that the trial court did not err in so finding that the Charge over the suit land should be cancelled. See the case of *Kimani v Njeri & 3 others* (Environment & Land Case 10 of 2022) [2023] KEELC 17771 (KLR) (8 June 2023) (Judgment) where the court held;

“Rectification by Court may include cancellation or amendments of title, and the circumstances that may lead to such rectification are provided above. In *Kisumu Misc No 80 of 2008 Republic V Kisumu District Lands Officer & another* [2010] eKLR, the Court held; -

it is clear that it is only the Court that can cancel or amend where the Court is of the view that registration has been obtained, made or omitted through fraud or mistake and only where it is not a first registration”.

118. However, there was no evidence that the Appellant(in ELCA E009/2024), conspired with the 3rd 4th and 5th Respondents and/ or any other parties herein. The trial court erred in finding and holding that by registering the Charge the same day the title was registered in the name of the borrowers, then there was conspiracy, and in condemning the appellant to jointly and severally pay ksh 600,000/= to the 1st Respondent.

119. The Appellant in Appeal ELCA E009/2024, succeeds to the extent of allowing the said Appeal in terms of prayer No 3, as contained in the Memo of Appeal dated 13th February 2024, wherein the 1st Respondent’s claim against the Appellant is dismissed.

120. From the analysis given above, it is evident that almost all the Grounds contained in the Memo of Appeal for ELCA No, E021/2023, have succeeded, and the court will proceed to determine whether the prayers sought in the said Memorandum of Appeal are merited.

121. In the Appellants’ Counter-claim, they had sought for a declaration that the Plaintiff (1st Respondent herein), and the 1st and 6th Defendants conspired to defraud them. However, it is evident that the Plaintiff(1st Respondent) was a victim of fraud perpetuated by 2nd Respondent, just like the Appellants herein.

122. There is no evidence that the said Plaintiff conspired to defraud the Appellants. However, as against the 2nd and 6th Respondents, just like the trial court invoked the findings in *Edward Murigas* case, (supra), this Court finds that since they failed to appear in court, the evidence of the Appellants as the Plaintiffs in the Counter- claim, was not controverted, and is believable; thus this court allows the said evidence. Consequently, this Court allows prayer No (a), of the Counter-claim as against the 1st and 6th Defendants before the trial court, now 1st and 6th Respondents herein.

123. On prayer No (b), the Court found and held that the Appellants as purchasers of the suit land, from a party who had no good title, did not acquire good title as well; thus the Court declines to declare the Appellants as bona-fide registered owners of the suit land. Further, this Court upholds the trial court finding and holding that the title to the suit property should be cancelled, and the Land Registrar, Muranga, should have the suit land registered in the name of the 1st Respondent.



124. With regard to prayer No (c), of the said Counter- claim, it is evident that the Appellants had filed a Notice of Indemnity which Notice, was not defended by the 2nd and 6th Respondents herein. The said claim in the Notice of Indemnity remains uncontroverted, and this Court allows the whole claim as stated in the Notice of indemnity dated 28th January 2022.
125. Having allowed the Notice of Indemnity, this court finds and holds that the Appellants are entitled to prayer No(c), of their Counter-claim dated 28th January 2022.
126. On General damages, the Appellants are entitled to ksh 500,000/=, payable by the 2nd and 6th Respondents herein. Further, the Appellants are entitled to costs of the Counter-claim before the trial court, with interests at court's rate, payable by 2nd and 6th Respondents herein.
127. In a nutshell, this Court finds and holds that Appeal No. ELCA E021/2023, is merited, and the same is allowed wholly in terms of prayers Nos 1, 2,3 and 4, as contained in the Memo of Appeal dated 16th November 2023.
128. Further in Appeal ELCA No E009/ 2024, the same is found partially merited and is allowed in terms of prayers Nos 1 and 3. However, some portions of the trial court's Judgement are upheld; such as an order for cancellation of the title deed held by 3rd ,4th and 5th Respondents, in ELCA E009/2024, who had been sued as 2nd , 3rd and 4th Defendants before the trial court. Further, the court upholds the trial court's finding and holding that the Land Registrar, Muranga is directed to register the suit property in the name of the 1st Respondent herein (Esther Gathoni Mwangi alias Esther Gathoni Namasake.)
129. In regard to costs, the court is guided by the provisions of Section 27 of the *Civil Procedure Act*, wherein costs are awarded at the discretion of the Court, and ordinarily costs follow the event. Thus the Court awards costs of this Appeal to the Appellants in both Appeals (ELCA E021/2023 & ELCA E009/2024), as Only against the 2nd and 6th Respondents herein.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 27TH DAY OF FEBRUARY, 2025.

L. GACHERU

JUDGE

27/2/2025

Delivered online in the presence of:

Joel Njonjo – Court Assistant

Mr. J. N. Mbutia for Appellants in ELCA E021/2023/ 3rd, 4th & 5th Respondents in ELCA E009/ 2024.

Mr. Mwangi for the Appellant in ELCA E009/2024/3RD Respondent in ELCA E021/2023.

Mr. Onyango holding brief for M/s Mwae for the 1st Respondent in both Appeals

N/A for 2nd Respondent in both Appeals.

N/A for 6th Respondent in ELCA E009/2024/ 4th Respondent in ELCAE021/2023

