



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Ongera & 14 others v Mwakwae (Civil Appeal E246 of 2022)
[2025] KECA 535 (KLR) (21 March 2025) (Judgment)**

Neutral citation: [2025] KECA 535 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL E246 OF 2022
MSA MAKHANDIA, P NYAMWEYA & LK KIMARU, JJA
MARCH 21, 2025**

BETWEEN

DAVID M. OMOGANDA ONGERA 1ST APPELLANT
BENEDICTO CHARANA ONGARO 2ND APPELLANT
BERESI OURO 3RD APPELLANT
OMANWA ATERA 4TH APPELLANT
SIRO NYAMBORI 5TH APPELLANT
OGECHI ISOE 6TH APPELLANT
OURO MOITAI 7TH APPELLANT
NAUMI GESARE OKINYI 8TH APPELLANT
HENRY NYAKUNDI MOSE 9TH APPELLANT
GRACE GILBERT 10TH APPELLANT
BENEDICT GICHANA OOKO 11TH APPELLANT
KENYATTA OOKO 12TH APPELLANT
MAISIBA OOKO 13TH APPELLANT
ROSANA OOKO 14TH APPELLANT
SIRO OMBORI 15TH APPELLANT

AND

SHADRACK NYABERI MWAKWAE RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at Nyamira
(Mugo Kamau, J.) dated 31st May 2022 in ELC Case No. 92 of 2021)*



JUDGMENT

1. This is an appeal arising from the judgment and decree of Mugo Kamau, J. dated 31st May 2022 in the Environment and Land Court (ELC) Case No. 92 of 2021. By the said judgment and decree, the ELC allowed the respondent's claim against the appellants, hence this appeal.
2. The background to this appeal is that the respondent, as the administrator of the estates of Ongubo Obare alias Makori Ongubo Obare ("Ongubo") and Nyakundi Obare, ("Obare"), sued the appellants jointly and severally seeking for a permanent injunction to restrain them from occupying, developing, alienating, wasting, and/or dealing in any way whatsoever with all those pieces or parcels of land known as West Mugirango/Bosamaro West/1468 and West Mugirango/ Bosamaro West/1469, respectively ("the suit properties"). He also sought an order directing the 1st and 2nd appellants to transfer the suit properties to the respondent, and in default, the Executive Officer of the court to execute the transfer documents in favour of the respondent. The respondent also sought eviction from the suit properties of the appellants and people deriving title from them, as well as costs of the suit.
3. The respondent averred that the deceased persons whose estates he was the Administrator, were the registered proprietors of the suit properties, respectively. That the 1st and 2nd appellants purported to purchase them and had them fraudulently transferred to themselves through forged documents, such as falsified and forged Land Control Board consents, transfer forms, national identification cards as well as signatures of both deceased; without any duly executed land sale agreements; and in one instance the sale occurred twenty years after the death of the alleged vendor.
4. It was also averred that the respondent raised the issue of the unlawful transfer of West Mugirango/ Bosamaro West/1468, ("the first suit property") to the 1st appellant with the local chief, who arbitrated on the issue with the result that the 1st appellant agreed to relinquish the title of the first suit property to the respondent, upon payment of Kshs. 40,000/= as a reward for taking care of the first suit property and keeping the title documents on behalf of the deceased. That the agreement was reduced into writing by a lawyer specifically brought in by 1st appellant for the purpose.
5. Pursuant to the agreement, the 1st appellant surrendered the original title deed to the respondent for the first suit property and promised to transfer it back to the respondent following a finding that he had not, in fact, purchased the property. Indeed, the 1st appellant left the first suit property in 2013 in fulfillment of the agreement. That, however, the 1st appellant reneged on his promise by not cooperating with the relevant Land Control Board. That though the respondent has the title to the first suit property, the same has yet to be transferred to the respondent in terms of the agreement.
6. On the other hand, in 2013, the 2nd appellant had West Mugirango/Bosamaro West/1469 ("the second suit property"), transferred to himself and thereafter subdivided it into various parcels, which, however, were never transferred.
7. The respondent claimed that the 3rd to 15th appellants all inclusive were strangers to him but appears to be the beneficiaries of the subsequent illegal subdivisions and transfers of the suit properties. Consequently, the respondent sought prayers already set out elsewhere in this judgment.
8. The 1st appellant, in his statement of defence dated 27th November 2017, categorically denied the respondent's claim. He averred that he had bought the first suit property from Ongubo and had it transferred to his name before he sold it to some of the co- appellants. He averred further that this transaction was on a willing seller-willing buyer basis at a consideration agreeable to both parties.



He denied having received the sum of Kshs. 40,000/= from the respondent and claimed that he had subdivided the parcel in 2014, giving possession of the resultant parcels to some of the co-appellants. He questioned the validity of the grant of letters of administration issued to the respondent and concluded his defence by stating that there was no privity of contract between him and the respondent. He accordingly asked the court to dismiss the suit for being frivolous, vexatious, bad in law, premature, and an abuse of the court process.

9. The 2nd appellant also denied the respondent's claim and stated that he had bought the second suit property from Obare on a willing seller-willing buyer basis. He averred that the transaction was above board and procedural. He had thereafter subdivided it in 2013, with the new buyers being some of the co-appellants occupying their respective parcels. He asserted that there was no privity of contract between himself and the respondent, that the respondent lacked the capacity to bring the suit on behalf of the deceased, and that the suit was frivolous, vexatious, premature, bad in law, and an abuse of the court process.
10. The 3rd, 4th, 6th, 10th, 11th, 12th, 13th, and 14th appellants filed a joint statement of defence dated 27th November 2017, generally denying the respondent's claim. They averred that they had never owned any of the suit properties and had, therefore, been mistakenly sued. They, therefore, prayed for the dismissal of the suit with costs, as they had been dragged to court without any reason.
11. The 8th appellant, through her statement of defence dated 27th November 2017, also denied the respondent's claim. She stated that she was the registered proprietor of the second suit property, which she bought from Ouro Moitai ("the 7th respondent"), who had in turn bought it from Obare before its subdivision. She doubted the authenticity of the death certificates of Ongubo and Obare, terming them forgeries. She also averred that in the circumstances, the locus standi of the respondent in bringing the suit, was questionable.
12. The 9th appellant also filed a defence on 30th November 2017. He denied ever entering into any agreement with the respondent. He claimed to be the registered owner of the second suit property, which he bought from 7th respondent, who had in turn bought it from Obare before its subdivision.
13. From the record, the 5th and 7th appellants neither entered appearance nor filed their defences.
14. At the hearing of the suit, the respondent testified that he was the son of Ongubo, the registered proprietor of the first suit property, and the nephew of Obare, the registered owner of the second suit property. He tendered in evidence copies of the Grant of Letters of Administration and the death certificates of both Ongubo and Obare. He stated that the suit properties were adjacent to each other and were inherited from his late grandfather. He stated that the identity card numbers used in the transactions were not those of Ongubo and Obare. He stated that Ongubo died in 1975, making it impossible for him to have sold the first suit property in 1990 or signed the transfer form in 1994. He testified that the original title deed for the first suit property was issued by the Lands Office in Kisii and was later surrendered to him by the 1st appellant. The respondent said that the 1st appellant had volunteered information that he had custody of Ongubo's documents, including the title deed in respect of the first suit property. He further explained that he used his uncle and aunt's names when applying for an identity card because he was raised by them. He stated that he obtained his father's death certificate from government offices in Nyamira. He concluded his testimony by stating that as the transfer of the suit properties was laced with malfeasance on the part of the first and second appellants, the court ought to grant the orders sought in the plaint.
15. PW2, Mr. Henry Kamau Wambuga, testified that his identity card number 1752267 was used to transfer the second suit property to the 2nd appellant, falsely representing him as Obare. He maintained



- that he had never bought any parcel of land from Obare. He did not even know him or where the subject property was situated.
16. PW3, Mr. Julius Asiago Obare, the respondent's maternal cousin, testified that the suit properties belonged to Ongubo and Obare, respectively. He assisted the respondent in obtaining the certificate of death for Ongubo due to his limited education. Otherwise, he confirmed that Ongubo was buried on the first suit property.
 17. PW4, Mr. Robert Onsongo Obare, a first cousin to the respondent, confirmed that Obare died without a family and that the respondent was the late Ongubo's first-born son and a nephew to Obare.
 18. PW5, Ms. Yunes Kerubo Achonti, testified that Ongubo and Obare were her brothers and that the respondent was Ongubo's son. PW6, Teresa Nyaboke Ongubo, the respondent's mother, confirmed the familial relationships and that both Ongubo and Obare were brothers and had all passed on.
 19. PW7, Mr. Fredrick Ondigo, an Advocate of the High Court of Kenya, testified that he drew an agreement in respect of the first suit property for the 1st appellant to surrender the title deed to the respondent in exchange for Kshs. 40,000/=, which was witnessed by the Chief of Bosamara Chache Location, Justus Okenye PW8. He confirmed that he did so at the invitation of the 1st appellant.
 20. PW8 corroborated the evidence of PW7 and confirmed that he had indeed witnessed the agreement and that PW7 had been brought into the picture by the 1st appellant. He also confirmed being involved in the arbitration involving the first suit property, the 1st appellant, and the respondent, leading to the agreement.
 21. In a nutshell, all these testimonies collectively supported the respondent's claim to the disputed suit properties.
 22. The 1st appellant, in response, testified that in 1986, he bought the first suit property from Ongubo and was issued with a title deed in his name on 18th January 1990. He later subdivided and transferred some portions thereof to some of the co-appellants. The 1st appellant categorically denied signing any agreement to surrender the title deed in respect of the first suit property to the respondent or knowing PW7. He also denied receiving Kshs. 40,000/= from the respondent to surrender the title.
 23. On his part, the 2nd appellant stated that in 1990, he bought the second suit property from Obare. He processed the transaction and eventually obtained a title deed on 18th May 1994. In 2011, he subdivided the parcel and sold some of the subdivisions thereof to some of the co-appellants whilst retaining some portions for himself. He doubted the validity of the grant of letters of administration issued to the respondent, although he was unsure of the date of Obare's death. He admitted executing a sale agreement with Obare but had misplaced his copy. It was his evidence that he purchased the parcel during Obare's lifetime and had lived on it for over 30 years.
 24. After careful consideration of the evidence, respective submissions, and authorities cited, the ELC found favour with the respondent's case. Consequently, it declared the entries and subsequent transfers of the suit properties to the 1st and 2nd appellants fraudulent and unlawful. The said appellants were ordered to transfer the suit properties back to the respondent, to hold in trust for the estates of Ongubo and Obare. The Land Registrar was directed to rectify the registers accordingly. Additionally, an order for the eviction of all the appellants was issued, and a permanent injunction granted to restrain them from occupying or dealing with the suit properties. The respondent was also awarded the costs of the suit as against the 1st and 2nd appellants.



25. Dissatisfied with the ELC decision, the appellants are now before this Court courtesy of their memorandum of appeal dated 25th October 2022. The appellants have proffered fourteen grounds of appeal, which can be safely condensed into eight; that the ELC erred in law and fact when it: relied on uncorroborated and inconsistent evidence from the respondent and his witnesses in reaching its determination; delivered the judgment against the weight of the evidence presented; relied on forged death certificates; gave orders not sought for; held that the 1st appellant received Kshs 40,000/= as appreciation fees; failed to capture inconsistencies in the respondents' witnesses' testimonies; ignored community customs regarding marriage and burial ceremonies; failed to acknowledge the respondent's lack of consent from his other siblings in prosecuting the suit.
26. The appeal was canvassed by way of written submissions with limited oral highlights. At the plenary hearing of the appeal, Mr. Osoro, learned counsel, appeared for the appellants, whilst Mr. Kimaiyo, holding brief for Mr. Ogari, learned counsel, appeared for the respondent.
27. Counsel for the appellants submitted that the evidence, primarily from PW1 to PW5, was inconsistent and unreliable, pointing out contradictions and errors in their testimonies, including false statements and unverified death certificates. Counsel submitted that the ELC failed to consider crucial evidence, such as the subdivisions and the ensuing titles thereof, failed to appreciate customs related to burial and marriage among the Abagusii, and in particular the respondent and his mother's absence at Ongubo's funeral, and false statements made to the Registrar of Persons regarding details of his national identity card. He argued that the ELC relied on uncorroborated evidence and omitted important details that could have altered the decision.
28. Counsel further submitted that PW7 admitted that he didn't have a valid practicing certificate in 2013 but went on to draft the agreement at the request of PW8. To that extent, the agreement was invalid. According to counsel, the 1st appellant had denied surrendering the title deed in respect of the first suit property, instead, stating that it was returned to the Land Registrar after subdivision. The ELC, therefore, failed to properly weigh the credibility of witnesses and the evidence presented. Counsel also submitted that the respondent lacked consent from other siblings to commence the suit, making the suit legally fatally defective. That it was also doubtful whether the respondent was really a legal representative of the estate of the two deceased persons in view of his failure to categorically state so in his pleadings. It was submitted that the ELC introduced issues not pleaded and granted reliefs not sought for in the plaint. That the ELC showed open bias and hostility towards the defence and in particular, the 1st appellant, whom he threatened to report to the USA Embassy for his repatriation whilst he was nursing his ailing wife in the USA, leading to an unfair trial. Counsel in the ultimate prayed that the appeal be allowed with costs.
29. In opposing the appeal, Mr. Kimaiyo contended that the ELC rightly found in the respondent's favour, as he had furnished sufficient evidence proving that the appellants were unlawfully in occupation of the suit properties having fraudulently transferred them to themselves. Though the appellants claimed to have purchased the suit properties, they failed to produce sale agreements or witnesses to support their claims. That the respondent was however, able to prove that the transfers were fraudulent and provided evidence, including a report from the Registrar of Persons showing that Ongubo did not have a national identity card. Accordingly, the transfer forms purportedly signed with Ongubo's national identity card indicated thereon could only have been fraudulent. The trial court, therefore, rightly held that the transactions purported to have been effected by Ongubo were fraudulent.
30. Moreover, counsel submitted that the respondent demonstrated that Obare died long before the purported land transfer forms signed by him. He had produced a death certificate in proof of this fact. This was proof enough that the transfer was fraudulent, as a deceased person could not have



effected it. The respondent also presented a report showing that the national identity card number used for the transfer in respect of the second suit property belonged to Henry Kamau Wambuga and not Obare. Henry Kamau Wambuga himself testified, denying any knowledge of the 2nd appellant or any land transactions involving him in Nyamira County. This evidence confirmed that the identity card used in the transfer was but a forgery. Counsel relied on the case of *Arthi Highway Developers Limited vs. West End Butchery Limited & 6 Others* [2015] eKLR to buttress the submission that fraud must be specifically pleaded and proved. That the evidence presented by the respondent met the legal threshold, as it showed that the transfers were fraudulent. Accordingly, counsel prayed that the appeal be dismissed with costs to the respondent.

31. This is a first appeal. Our mandate in such an appeal has been settled in long line of decisions of this Court. It was put more appropriately and succinctly in the case of *Selle vs. Associated Motor Boat Co.* [1968] EA 123, thus:

“An appeal to this Court from a trial by the High 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. In particular this Court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif vs. Ali Mohamed Sholan*(1955), 22 E. A. C. A. 270).”

32. This Court further stated in *Jabane vs. Olenja* [1986] KLR 664, thus:

“More recently, however, this Court has held that it will not lightly differ from the findings of fact of a trial judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did - see in particular *Ephantus Mwangi vs. Duncan Mwangi Wambugu* (1982-88) 1 KAR 278 and *Mwanasokoni vs. Kenya Bus Services* (1982-88) 1 KAR 870.”

33. We appreciate that the reasoning behind this duty is to ensure that the appellate court provides a fair and just review of the trial court’s decision. By analyzing the evidence afresh, the appellate court can identify any errors or misinterpretations made by the trial court and correct them. This process helps maintain the integrity of the judicial system and ensures that justice is best served.
34. Having reviewed the evidence that was before the ELC, the grounds of appeal, the submissions by respective counsel and the applicable law, we surmise that the issues that fall for our consideration are whether: the respondent was the rightful heir of the deceased’s persons’ estates; the suit properties were fraudulently transferred and registered in the 1st and 2nd appellants’ names respectively; and whether the judgment and decree was against the weight of the evidence.
35. On the first issue, the respondent presented copies of the Grant of Letters of Administration in respect of both estates and the death certificates of both Ongubo and Obare, which were not challenged nor controverted by the appellants. He also demonstrated his relationship with the deceased persons. Though the appellants asserted that they doubted the grants issued to the respondent, they never brought forth any evidence to impugn the respective grants, nor prove that there were other grants issued in respect of the two estates. Further, there was no evidence that the said grants had been revoked for one reason or other. To conclude on this aspect, the appellants did not indicate or suggest which



- of the respondent's siblings, if any, did not consent to the respondent obtaining the grant and or instituting the suit. There was no evidence adduced by the appellants to suggest that the said grants of letters of administration were not issued by the courts in question.
36. From the record, multiple witnesses testified in support of the respondent's claim to the suit properties, establishing his lineage and relationship to both deceased. These witnesses were PW3, PW4, PW5, and PW6. The witnesses collectively and individually supported the respondent's claim to the suit properties as the rightful heir, emphasizing his direct descent from Ongubo and Obare. This evidence was not countered at all by the appellants. The appellants did not suggest who other than the respondent was better entitled to the said estates. We have no reason to doubt the said witnesses, who corroborated each other and stood their ground even under intense cross-examination. In the end, we are satisfied that, indeed, the respondent was the rightful deceased persons' heir.
37. On to the second issue. The respondent asserted that he was the son of Ongubo, the initial registered owner of the first suit property, and the nephew of Obare, the registered owner of the second suit property. He presented copies of the Grant of Letters of Administration for both estates and the Death Certificates of both deceased. He explained that the suit properties adjoin each other and had been inherited by Ongubo and Obare their late grandfather. The respondent provided evidence showing that the identity card numbers used in the transfer of the suit properties did not belong to either of the deceased. He testified that Obare died in 1975 and could not have sold and transferred the second suit property to the 2nd appellant in 1990 or signed the transfer forms in 1994. Similarly, Ongubo did not have a national identity card at the time and could not have therefore indicated the same on the transfer forms for the property as suggested. He stated that he still had the original title deed for the first suit property. The respondent also mentioned that the 1st appellant demanded Kshs. 40,000/= for taking care of the first suit property as well as keeping in safe custody the title deed for Ongubo. The 1st appellant undertook to re-transfer the parcel to him, and pursuant to which, he filled the transfer documents but did not sign them and later failed to attend Land Control Board meetings to finalize the land transfer.
38. There were several issues that arose, which we think, just as the ELC held, brought out a lot of doubt as to the authenticity of the transactions by the 1st and 2nd appellants with regard to the suit properties. The transfer forms and applications for consent of the relevant Land Control Board produced by the respondent, dated 21st June 1989 and 10th January 1990 respectively, indicate or suggest that Ongubo had identity card number 10021052. However, the respondent contended that this identity card number was not his father's, as he did not possess a National Identity Card then. This assertion was corroborated by a report from the Director of the National Registration Bureau dated 22nd October 2018. This report, compiled following an application by the 1st appellant concluded that Identity Card number 10021052 was not in their records. It was therefore non-existent.
39. The respondent also produced an agreement drafted by PW7, which confirmed that the 1st appellant had acknowledged holding the title deed in respect of the first suit property on behalf of the late Ongubo's estate and had agreed to surrender it to the respondent for Kshs. 40,000/=. This agreement was signed voluntarily by the 1st appellant and the respondent in the presence of PW8, who also witnessed it. It is instructive that none of the parties claimed duress in the execution of the agreement. More importantly, it was the 1st appellant who availed PW7 for the purpose. The 1st appellant's last-ditch attempt to challenge the agreement's authenticity on the basis that it was drawn by an unqualified person could not hold as PW7 was hauled into the mix by the 1st appellant and not the respondent. Further, PW7 did not draw it as an advocate for the respondent but at the request of the 1st appellant. By challenging the agreement on the ground aforesaid, the 1st appellant appears to want to benefit from his own mischief, which a court of equity will not countenance.



40. The 1st appellant raised the issue as to how the respondent would still be in possession of the title deed in respect of the first suit property when he had surrendered it to the lands office upon his subdivision of the first suit property. In our view, the 1st appellant was being less than candid on this. The terms of the agreement were specific regarding the handing over of the original title deed.

It was done in the presence of PW8 and witnessed by PW7. Both witnesses testified and confirmed the transaction. Their evidence was hardly controverted. These witnesses had nothing to gain from lying. We are therefore satisfied, just like the ELC, that pursuant to the agreement, the 1st appellant willingly handed over the title deed in respect of the first suit property, and the story weaved by the 1st appellant that he surrendered the original title to the Lands office was but a red herring. Surprisingly, the 1st appellant did not call the Land Registrar to clear the air on this aspect of his evidence, if at all.

41. The title deed for the first suit property further had a missing Entry No. 1 in Part B of the proprietorship section and lacked the initials of the Land Registrar, showing only his signature. Ordinarily, the details in the register of titles will include the Land Registrar's initials and surname. The abstract of title indicated that Ongubo was the first proprietor as of 21st July 1969, but no title was issued to him. The title deed was first issued to the 1st appellant on 18th January 1990, showing his identity card number, while Ongubo's identity card was missing. This supports the respondent's claim that his father had no Identity Card and the identity card number 10021052 was not his father's, as verified by the report from the National Registration Bureau.

42. As regards the second suit property, the respondent presented evidence that the initial owner thereof was Obare, who died in 1975, yet it was alleged he transferred to 2nd appellant in 1994 using Obare's identity card. The death certificate showed that Obare died 20 years before the alleged transfer, and the identity card used for the transfer belonged to Henry Kamau Wambuga, who testified that he never purchased nor did he own such parcel of land at any given time. This discrepancy surely shows that the transfer to the 2nd appellant of second suit property was fraudulent, as Obare could not have transferred the parcel posthumously. Further, though the 2nd appellant stated that he bought the parcel from Obare, he could not, however, produce a sale agreement to that effect.

43. A sale agreement is essential to prove the existence and terms of the sale, especially in cases where the title is under challenge. Without a written sale agreement, it is difficult to demonstrate that the sale of the suit properties ever occurred and the consideration paid thereof, if at all. Typically, the Land Registrar would require a copy of the sale agreement before registering a transfer. Additionally, there is no evidence of stamp duty payment for the transfers, and the transfer forms did not indicate the assessed amount payable as stamp duty. We would therefore agree with the ELC that, indeed, it is questionable how the Land Registrar signed the transfers without the stamp duty being assessed and paid in respect of those suit properties.

44. The provisions of Article 40 of *the Constitution* and section 26 of the *Land Registration Act* are only meant to protect persons who genuinely enter into agreements for sale or transfer of land and who can establish their bona fides in the transactions and not crooks who criminally interfere with government land records. As long as a transaction is not perceived by the court to have been carried out in good faith, there will always be considerable doubt that such a title can be protected, especially where the holder thereof does nothing to disabuse the court of the suspicion that it was illegally obtained, and keeps waltzing around the witness box proclaiming innocence and intermittently waving a certified copy of the land register or title deed.



45. Section 26 provides that:

“...the Certificate of Title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except - on the ground of fraud or misrepresentation to which the person is proved to be a party where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

46. Most worthy of note is the fact that the appellants did not produce the sale agreements.

47. Section 3 (3) of the *Law of Contract Act* provides as follows:

“(3) No suit shall be brought upon a contract for the disposition of an interest in land unless –

- a. The contract upon which the suit is founded:
 - i. Is in writing;
 - ii. Is signed by all the parties thereto; and
- b. The signature of each party signing has been attested by a witness who is present when the contract was signed by such party:
Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (cap 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.”

In the absence of sale agreements and other relevant documentation regarding the transactions, the appellants had no valid defence and could not hoist any liability on any other party, especially when their duplicitous conduct in the transactions was so vivid, apparent, and even annoying.

48. Article 40 (6) of *the Constitution* removes the protection of title to property that is found to have been unlawfully acquired. This provision of *the Constitution*, coupled with the provision of section 26 (1) (a) and (b) of the *Land Registration Act*, in our view, places a responsibility upon prospective purchasers of titled properties to diligently ascertain the status of a property before purchase.

49. This Court in the case of *Esther Ndengi Njiru & Another vs. Leonard Gatei Mbugua* [2020] eKLR held as follows:

“...Additionally, the appellants who had no sale agreement between themselves and Waiharo did not call Waiharo as their witness to substantiate the sale and legality of title (if at all) that he transferred to the appellants. It is on the basis of the evidence adduced and the non-denial of the respondent’s claims against Waiharo that the judge found that Waiharo “...did not hold a valid title to the suit property which he could sell and transfer”.

50. Back to the action of the 2nd appellant transferring the second suit property to himself when the alleged vendor had died long before, we find this interesting and the argument by the appellants wanting. The issue has not even been addressed by the appellants in their both oral and written submissions.



This Court in *Denis Noel Mukhulo Ochwada & Patrick W. Obonyo Agutu vs. Elizabeth Murungari Njoroge & Lilian Wairimu Ngatho* (Civil Appeal 298 of 2014) [2018] KECA 726 (KLR) held:

“This is yet another of those cases involving shameless and egregious fraud at the Ministry of Lands. In the not too uncommon practice, a total stranger obtains false duplicate documents of title to a property duly registered in the name of a citizen. While the genuine owner of the property has his documents of title ensconced in a safe or in some financial institution’s strong room, the stranger, mostly with the collusion of Ministry of Lands’ officials, surreptitiously and fraudulently transfers the property to another person, who may or may not be party to the fraud. That party subsequently sells and transfers the property to a third party who, more often than not, has no notice of the fraud that resulted in the transfer of the land to him. Whatever the ultimate result of the judgment in such a dispute, along the chain an innocent party ends up suffering losses and prejudice.”

51. This is a matter where there was fraud that was evidently clear and widely pronounced. The registration of the forged documents was subsequently used by the fraudsters for the purpose intended by them, that is, to have access to the suit properties in the name of the 1st appellant and later transferred to the co-appellants. The trial court found upon reviewing the evidence on record that fraud was committed in the transactions and upon re-examination of that evidence, we respectfully agree.

52. It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. In *Bullen & Leake & Jacobs*, Precedent of pleadings 13th Edition at page 427 it is stated that:

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (*Wallingford vs. Mutual Society* (1880) 5 App. Cas. 685 at 697, 701, 709, *Garden Neptune vs. Occident* [1989] 1 Lloyd’s Rep. 305, 308).”

53. This means therefore that the statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of. (see *Lawrence vs. Lord Norreys* (1880) 15 App. Cas. 210 at 221). It is not allowable to leave fraud to be inferred from the facts pleaded, and accordingly, fraudulent conduct must be distinctly alleged and distinctly proved. In *Davy vs. Garrett* (1878) 7 ch.D. 473 at 489), the court stated thus:

“General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice”.

54. We have highlighted instances that left the court with no alternative than to reach the conclusion that indeed the acts by the appellants were intended to fraudulently acquire the suit properties and use them for their own benefit. Indeed, fraud was pleaded and proved in this case and the appellants cannot be seen to justify any part of their illegal actions.

55. The appellants’ claim of bona fide purchasers cannot stand. From the record, the actions of the appellants, in our view, were inconsistent with the conduct of a “bona fide purchaser”. A bona fide is defined in *Black’s Law Dictionary* 8th Edition as:

“One who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities



against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”

56. From what has flowed so far, there is no way that the 1st and 2nd appellants could qualify as innocent purchasers for value without notice.

57. On the last issue, it is trite and practice that judgments should be consistent and relevant with evidence to ensure fairness and justice. If a judgment is founded on extraneous issues or inconsistent evidence, it can be overturned on appeal. While extraneous issues in a judgment refer to matters that are irrelevant or unrelated to the core issues of the case which can distract from the main points and potentially lead to an unfair or incorrect decision, having analyzed the judgment of the trial court, we are satisfied that the judgment did not suffer from those inadequacies.

It was not at all based on any extraneous issues and inconsistent evidence, nor did the ELC grant prayers not sought for.

58. Upon thorough analysis of all the grounds of appeal presented by the appellants, we are persuaded that the ELC delivered a sound judgment based on a comprehensive and accurate assessment of the facts, evidence, and applicable law. As a consequence, we dismiss the appeal with costs to the respondent.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF MARCH 2025.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

Page 1 of 25

