Pande & another (Suing as the Legal Representatives of the Estate of Aboma Otieno (Deceased)) v Karia & 4 others (Civil Appeal 110 of 2020) [2025] KECA 741 (KLR) (25 April 2025) (Judgment)

Neutral citation: [2025] KECA 741 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 110 OF 2020

MSA MAKHANDIA, F TUIYOTT & LK KIMARU, JJA

APRIL 25, 2025

BETWEEN

CONSOLATA PANDE ..... 1ST APPELLANT

JENIFER OLOO OLIECH ..... 2ND APPELLANT

SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF ABOMA OTIENO (DECEASED)

AND

ASHISH BHUPENDRA PATEL ..... 1ST RESPONDENT

KARIA NISHIMA RAMESH KARIA ..... 2ND RESPONDENT

SHADRACK OKELLO CHAN ..... 3RD RESPONDENT

DISTRICT LAND REGISTRAR, KISUMU ..... 4TH RESPONDENT

THE ATTORNEY GENERAL ..... 5TH RESPONDENT

(Appeal from the judgment and decree of the ELC Court of Kenya at Kisumu (M. A. Odeny, J) dated 25th January 2019 in ELC Case No. 327 of 2025)

JUDGMENT

1. This is a first appeal against the judgment and decree of the Environment and Land Court (ELC) of Kenya at Kisumu (Odeny, J.) dated 25th January, 2019. By the judgment and decree, the ELC dismissed the appellants' suit with costs to the 1st and 2nd respondents.

2. The facts leading to this appeal are fairly simple and straightforward. The appellants claiming to be the sisters of Aboma Otieno, deceased, and as the administrators of his estate, filed suit against the respondents, jointly and severally. They sought a declaration that the transfer of all that piece or parcel

of land known as Kisumu/Ojola/2103, hereinafter ("the suit property") from the name of the deceased to Shadrack Okello Chan ("the 3rd respondent"), was fraudulent, illegal, and thus null and void; the court do revoke the title deed of the suit property and revert it to the deceased; an order that the Land Registrar ("the 4th respondent") do rectify the land register to reflect the same; that Ashish Bhurupendra Patel and Karia Nishima Ramesh Karia ("the two respondents"), be ordered to surrender the title deed to the 4th respondent and vacate the suit property forthwith, they also asked for costs and interest.

3. In a joint statement of defence, the two respondents denied that the appellants were sisters, dependents, relatives, administrators, or surviving beneficiaries of the deceased. That if at all, they obtained a grant of letters of administration, it was through fraud and falsification. That they were the duly registered proprietors of the suit property having lawfully purchased it from Silvanus Onyiego Nyamwaga, ("Silvanus") after carrying out due diligence.

4. The 3rd respondent neither entered an appearance nor filed a defence.

5. The 4th and 5th respondents in their joint statement of defence averred that the suit property was registered in the name of the deceased in the year 1973 and not 1978 as claimed by the appellants. That the transfer and registration of the suit property into the names of the two respondents was undertaken procedurally and in accordance with the law. That even if there were any lapses or omissions on their part regarding the transaction, they were not deliberate or fraudulent. That they all along acted in good faith when they were presented with the necessary documents for the transfer and registration. They otherwise denied fraud and illegalities attributed to them by the appellants and the particulars thereof and prayed for the dismissal of the suit.

6. Contemporaneous with the filing of the suit, the appellants took out an application for an injunction against the two respondents, barring them from dealing with the suit property in a manner detrimental or prejudicial to their interest. Following inter partes hearing of the application, it was dismissed on account of the appellants' failure to establish a prima facie case against the two respondents as well as their failure to create a nexus between the two respondents and the 3rd respondent. The effect and consequence of this holding will become clearer in the course of this judgment.

7. During the hearing, the 1st appellant testified on her own behalf and on behalf of the co-appellant. They asserted in their evidence that they were the sisters of the deceased and the only surviving beneficiaries of his estate. They presented various documents, including a death certificate, national identification card of the deceased, a limited grant issued to them in respect of the estate of the deceased, and a title deed for the suit property. They stated that the first registered proprietor of the suit property was the deceased, and it was the only asset of the estate.

8. They contended that the 3rd respondent had fraudulently acquired the suit property from the estate and subsequently transferred it to Silvanus, who then transferred it to the two respondents. This sequence of transfers were evident from the green card tendered in evidence. The appellants went on to state that the 3rd respondent did not have a valid title to the suit property and, therefore, could not pass it to Silvanus and, thereafter, to the two respondents. They maintained that the 3rd respondent's actions were fraudulent and illegal, and as such, the subsequent transfers to the two respondents were also invalid. They confirmed, though, that the 3rd respondent was their paternal uncle.

9. The second witness to testify was PW2, James Olwete, the in-charge of the family and Succession Causes registry of Kisumu High Court. He tendered in evidence the record of the Succession Cause number No. 38 of 2002. He testified further that the Succession Cause related to the Estate of Barack Odhiambo Gumbe and not the deceased. That the Succession Cause file could, however, not be traced

and availed as it had been archived. He admitted, nonetheless, that limited grants sometimes bore similar numbers as full grants. He stated that he could not, therefore tell whether the certificate of confirmation of grant issued to the 3rd respondent under the same cause number was a forgery.

10. The 2nd respondent testified on his own behalf and on behalf of the 1st respondent. Their testimony was that they were the registered owners of the suit property, having acquired it from Silvanus for valuable consideration and after due diligence. That they had a good title to the suit property as evidenced by the transfer documents. They produced copies of the transfer forms, stamp duty payment receipts, Land Control Board consent to transfer, an application for consent of Land Control Board, stamp duty declaration forms, and a certificate of official search. They asserted, therefore, that they were innocent purchasers for value without notice of any defect in the title.

11. After reviewing the evidence on record, the rival submissions by counsel, and the relevant judicial authorities cited, the ELC framed issues for determination as being whether: the 3rd respondent fraudulently transferred the suit property to his name without obtaining a confirmed grant of letters of administration; there was any collusion between the 3rd and 4th respondents and the two respondents in the scheme; the two respondents acquired the title to the suit property legally and procedurally; and finally, whether the respondents qualified as innocent purchasers for value without notice.

12. The ELC determined that no fraud was proved against the two respondents in their acquisition of the suit property; similarly, no collusion between the two respondents and the 3rd and 4th respondents was established and that therefore the two respondents acquired the suit property legally and procedurally and were therefore innocent purchasers for value without notice. The consequence of the above holdings was the dismissal of the suit with costs to the two respondents.

13. Aggrieved by the judgment and decree, the appellants filed this appeal on four grounds to wit: that the ELC erred in law and fact by failing to: appreciate the provisions of the *law of succession Act*; grant the appellants the prayers sought in the plaint wholly or in part; write a judgment that was at variance with the pleadings and against the weight of evidence; and lastly, deliver judgment in accordance with the principles established by precedents.

14. The appeal was heard by way of written submissions with limited oral highlights. The appellants, through Mr. G. Okoth, learned counsel, submitted that the deceased died intestate on 12th September 1978. In May 2015, the appellants discovered that the two respondents were claiming ownership of the suit property, which had hitherto been in possession and use by the extended family members of the deceased, including the appellants. That upon investigations, they discovered that through Succession Cause No. 38 of 2002 and by way of transmission, the 3rd respondent had purportedly obtained the title to the suit property and subsequently transferred and registered it in the name of Silvanus and thence to the two respondents.

15. Further investigations revealed that the 3rd respondent had not obtained any confirmed grant of letters of administration for the estate of the deceased. Instead, with the collusion of the 4th respondent, he had illegally and fraudulently procured the transfer of the suit property to himself. Counsel submitted that the 3rd respondent did so without the knowledge, involvement, participation, or consent of the appellants, yet they were the closest surviving dependents of the deceased.

16. It was further submitted that the appellants fell under the category of dependents as per section 39 of the *Law of Succession Act*. In this instance, the first registered owner of the suit property was the deceased, who was their brother. The appellants were the only legal representatives and administratrix of the estate of the deceased by virtue of the Limited Grant of Letters of Administration Ad Litem. They argued that the 3rd respondent fraudulently and without any colour of right procured the transfer

of the suit property into his name using forged court papers purporting to emanate from Kisumu Court in Succession Cause No. 38 of 2002. According to the evidence tendered, the grant in respect of Kisumu Succession Cause No. 38 of 2002, was for the estate of one, Barack Odhiambo Gumbe and not the deceased. That the 3rd respondent did not, therefore, obtain any grant of letters of administration for the estate of the deceased and did not follow due process in procuring the suit property therefor. In the ultimate, the 3rd respondent did not have a good title to the suit property to pass to Silvanus and, thereafter, to the two respondents.

17. Counsel while relying on Article 40(6) of *the Constitution* of Kenya, submitted that the title obtained by the two respondents, having been fraudulently acquired by the 3rd respondent, falls squarely under the rule of Nemo Dat Quod Non Habet, which is to the effect, that no one can give title he does not have. The appellant further relied on the case of Arthi Highway Developers Limited vs. West End Butchery Limited & 6 Others [2015] eKLR for the same proposition. The two respondents cannot, therefore, invoke the indefeasibility of title to impugn the appellants' claim. The appellants thus prayed that the appeal be allowed with costs.

18. On their part, the two respondents, through Ms. Anyango, learned counsel submitted that the trial court correctly applied the provisions of the *Law of Succession Act*. The main issue was how the suit property changed hands and whether the succession proceedings for the estate of the deceased were concluded. That though the appellants claimed that there were no succession proceedings undertaken and that Succession Cause No. 38 of 2002 pertained to the estate of Barack Odhiambo Gumbe and involved a limited grant of letters of administration ad colligenda bona, the two respondents, however, provided a certificate of confirmation of grant from Kisumu High Court Succession Case No. 38 of 2002, that related to the deceased's estate. That PW2 testified and admitted that limited grants sometimes bore similar numbers as full grants, and could not tell whether the certificate of confirmation of grant issued to the 3rd respondent in that regard was a forgery.

19. That the appellants' fraud claims against the two respondents failed as the latter demonstrated how they legally and procedurally acquired the suit property. The sale of the suit property by the 3rd respondent to Silvanus was, in any event, valid under section 93(1) of the *Law of Succession Act*, which holds that a transfer by a person with a grant of representation is valid despite subsequent revocation or variation of that grant. Therefore, the two respondents' purchase of the suit property from Silvanus cannot be impugned, as the grant issued to the 3rd respondent has never been revoked. Counsel went on to submit that the trial court properly applied the *Law of Succession Act*, as a confirmed grant of letters of administration for the deceased's estate was duly issued to the 3rd respondent, thereby rendering subsequent transactions regarding the suit property lawful.

20. It was submitted that though the appellants made vague, unsubstantiated and general allegations of fraud against the two respondents' with regard to the ownership of the suit property, they were unable to prove with credible evidence the claims. Conversely, the respondents provided evidence demonstrating how they acquired the suit property. They were, therefore, able to prove step- by-step how they became the registered proprietors of the suit property, thereby making them innocent purchasers for value without notice, deserving full legal protection. On this concept, counsel relied on the case of Katende vs. Haridar & Company Limited [2008] 2 E.A. 123.

21. Counsel maintained that courts have consistently held that fraud must be strictly pleaded and proved. For this proposition, counsel relied on the case of Kuria Kiarie & 2 Others vs. Sammy Magera [2018] eKLR. According to counsel, the appellants were unable to prove the alleged acts of fraud were allegedly perpetrated by the two respondents on them. Citing the case of Ndolo vs. Ndolo [2008] KLR (G&F) 742, counsel submitted that the court had stated that the burden of proof for allegations of

forgery or fraud is higher than that required in ordinary civil cases but not as high as in criminal cases. In this case, the appellants failed to prove any act of fraud by the two respondents. They left the fraud to be inferred by the ELC from the facts, which is not permissible.

22. Counsel further submitted that the appellants' own identity and relationship to the deceased was questionable. Both appellants claimed to be sisters born in 1947, a fact the ELC found wanting as it was unsure whether they were twins or stepsisters or how they came to be born in the same year. Furthermore, counsel submitted that the appellants had admitted that they were not in occupation of the suit property and had not used it for over 10 years by the time they filed the suit, and that the two respondents were the ones in occupation. Counsel therefore, prayed that the appeal be dismissed with costs to the two respondents.

23. Once again, the 3rd, 4th, and 5th respondents neither filed their written submissions nor participated in the plenary hearing of the appeal though served with the hearing notices by court.

24. We are well aware that this is a first appeal, and our duty is to reconsider the evidence, re-evaluate it, and draw our own conclusions in deciding whether the judgment of the trial court should be upheld - see Selle vs. Associated Motor Boat Co. [1968] EA 123. But at the same time, we need to exercise caution and respect the trial court's findings on the demeanor of witnesses, especially since it had the advantage of seeing and hearing the witnesses. See Peters vs. Sunday Post Ltd. [1958] EA.

25. The issues for determination in this appeal are in our view, whether: the 3rd respondent fraudulently transferred the suit property to his name without obtaining a confirmed grant of letters of administration; there was any fraud, misrepresentation, or illegality and collusion between the two respondents and 3rd and 4th respondents in facilitating the transaction; the two respondents acquired the title to the suit property legally and procedurally; and if so, whether they were as such innocent purchasers for value without notice.

26. On the first issue, it was common ground that the deceased was the registered proprietor of the suit property. That the 3rd respondent was the appellants' paternal uncle, as he was a brother to the deceased, that the appellants had not been in occupation of the suit property and that the last time they used it was over 10 years prior to the filing of the suit.

27. According to the appellants, they were the only surviving beneficiaries of the estate of the deceased, which solely consisted of the suit property. However, without any colour of right, their permission, or consent, the 3rd respondent fraudulently caused the suit property to be transferred to himself by way of transmission, whereupon he sold and transferred it to Silvanus, who in turn also sold and transferred it to the two respondents. Believing that the whole process leading to the acquisition of the suit property by the two respondents was illegal and fraudulent, the appellants sought to have the court revoke the title.

28. As already stated, the appellants faced challenges in establishing a prima facie case against the two respondents when they filed an interlocutory application for injunction. The application did not see the light of day because the appellants were unable to establish the nexus between the two respondents and the 3rd respondent. We do not think that the situation has changed that much nor do the appellants fare any better. The two respondents did not purchase the suit property from 3rd respondent but Silvanus. However, Silvanus was never a party to the suit. How would the two respondents' alleged fraud, illegalities and other malfeasance in the acquisition of the suit property be proved in the absence of Silvanus in the suit? The importance of establishing a nexus between the parties in a suit, and in

particular in matters of land, was reiterated in the case of Mohamed vs. Duba & Another (2022) KECA 442 thus:

> "The nexus between the parties and the resulting transfer of the property is crucial in determining the legitimacy of the transactions. Failure to establish this connection can hinder the court's ability to make a just determination."

29. Indeed, the nexus between the parties and the resulting transfer from the deceased, the 3rd respondent, Silvanus, and the two respondents was crucial. The record and documents produced by both the appellants and the two respondents indicated that the 3rd respondent became the registered proprietor of the suit property on 13th November 2002, while Silvanus was registered as such on 4th December 2002. As already stated, the appellants did not enjoin Silvanus in the suit, even after the trial court indicated in the ruling on the injunction application that this failure was fatal to their case. They could not, therefore, establish a prima facie case against the two respondents. This aspect continued to haunt the appellants to the end of their case. We are satisfied that the joinder of the said party would have helped in establishing the nexus regarding the various transfers and changes in the ownership of the suit property up to and including the two respondents. This omission, in our view, and as correctly observed by the ELC, was fatal to the appellants' case.

30. The appellants alleged that the 3rd respondent fraudulently transferred the suit property to himself without first obtaining a confirmed grant of letters of administration. This court in the case of Wambui vs. Mwangi & 3 Others [2021] KECA 144 (KLR) emphasized:

> "The transfer of property without obtaining the necessary letters of administration is considered fraudulent and invalid. The proper legal procedures must be followed to ensure the legitimacy of the transactions."

31. It is on record that the 3rd respondent filed Succession Cause No. 38 of 2002, which was in respect of the estate of the deceased, obtained a grant of letters of administration dated 22nd April 2002, and later a certificate of confirmation of grant which was issued on 30th October 2002. Using these documents, the 3rd respondent, as the administrator of the estate, transferred the suit property to himself as the sole beneficiary of the estate.

32. It is instructive to note that in the grant of letters of administration issued to the 3rd respondent, it is indicated that the deceased died on 23rd May 1976. However, the death certificate produced by the appellants shows that the deceased died on 12th September 1978 at the age of 14 years. This discrepancy raised doubts, and rightly so, in our view, about the authenticity of the appellants' death certificate. If the deceased died at the age of 14 years, as alleged by the appellants, he was then a minor. This then raises the question of whether he could have been registered as the proprietor of the suit property before reaching the age of majority.

33. Additionally, the replying affidavit and documents on record from the Land Registrar confirmed that, according to the adjudication records, the suit property was originally allocated to the deceased in 1973. If the deceased died in 1978, as indicated in the death certificate produced by the appellants, at the age of 14 years, it would mean he was allocated the suit property at the age of 5 years.

    This is well nigh impossible. There was no evidence that any other adult person was registered to hold the suit property in trust for the deceased. Given the foregoing, we are, just like the trial court, unable

to agree with the appellants' version of events. In Mwangi & Another vs. Mwangi (Civil Appeal 213 of 2017) [2019] KECA, this Court held:

> " A minor cannot be a registered owner of property in Kenya. The law requires that property ownership be vested in individuals who have attained the age of majority, as minors lack the legal capacity to hold and manage property independently."

34. Much as the confirmed grant held by the 3rd respondent was contested by the appellants as a forgery, there was no hard evidence of any endeavours by the appellants to initiate a process to hold the perpetrators of the alleged fraud accountable through established criminal investigative process. Neither a complaint nor report was made to the police or the Criminal Investigation Directorate to investigate the obtaining of the grant by the 3rd respondent and the issuance of the title to the suit property to the 3rd respondent through forgery or fraud. It is also noteworthy that the appellants to date have never sought the revocation of the grant on that basis.

35. The Supreme Court in the case of Kagai vs. Wanjohi (Civil Appeal 92 of 2019) [2023] KEHC 24820 (KLR) emphasized the importance of following proper legal procedures and the necessity of reporting and investigating claims of forgery or fraudulent activities to ensure the legitimacy of property transactions. It would appear that this was not done in the circumstances of this case and thereby made the claims of forgery and fraud by the appellants against the 3rd respondent and the two respondents ring hollow.

36. PW2 confirmed that there were instances where two succession causes were registered with the same number when they involved limited and full grants. He stated that he could not conclusively verify whether the confirmed grant issued to the 3rd respondent was authentic or a forgery without the original file, which had been archived. With no other evidence to challenge the authenticity of the confirmed grant that allowed the 3rd respondent to transfer the suit property to himself by way of transmission, the court held, and rightly so in our view, that the grant was authentic as it originated from the court and had not been revoked according to law. It is also not lost on us that the grant exhibited by the appellants was a limited grant of letters of administration ad colligenda bona and or ad litem. Given that this was a limited grant for a limited purpose, it could not have been the basis for the transfer of the suit property from the estate of the deceased by the 3rd respondent to himself by way of transmission. This can only be possible courtesy of a confirmed grant.

37. We also note that the ELC also grappled with the issue of the relationship of the appellants. Their identity cards indicated that they were both born in 1947. However, it was not shown whether they were twins, step-sisters, or even cousins. In their evidence, the appellants testified that they came from a big family, some of whom were tilling the suit property before the advent of the two respondents. If that be so, why was it so difficult or well nigh impossible for them to call any of the said relatives to testify and corroborate their story? No doubt this omission, deliberate or otherwise, left the ELC to infer that maybe they were imposters and therefore not the rightful beneficiaries of the estate of the deceased.

38. Finally, there is the issue of the application of section 93 (1) of the *Law of Succession Act*. The section, in a nutshell, provides that a transfer by a person with a grant of representation is valid despite subsequent revocation or variation of the grant. So, pursuant to this provision, the title of the two respondents cannot be impugned since all subsequent transactions involving the suit property were pursuant to the original grant issued to the 3rd respondent, which to date, has not been revoked. In the ultimate, we answer the first issue in terms that the 3rd respondent did not fraudulently transfer the suit property to his name without obtaining a confirmed grant of letters of administration.

39. On the second issue, the two respondents provided documentation to demonstrate how they came by the suit property. To reiterate, they presented a sale agreement between the 3rd respondent and Silvanus, a title deed in Silvanus's name, a transfer of land form by way of transmission, an application for registration as proprietor by transmission by Silvanus, a certificate of confirmation of grant, an application for consent from the relevant Land Control Board, letter of consent from the relevant Land Control Board, Kenya Revenue Authority declaration form, Kenya Revenue Authority stamp duty receipts, and a certificate of official search. If all these were acts of collusion as claimed by the appellants, surely, they would not have escaped scrutiny by all these organizations and or authorities. In a nutshell, no sufficient evidence of forgery, fraud, misrepresentation, illegality, or collusion involving the two respondents was tendered at all. Nor could it even be inferred in the absence of the evidence by Silvanus, whom, as we have already stated, was never made a party to the suit. As has constantly been reiterated, allegations of fraud and forgery are serious allegations that must be specifically pleaded and strictly proved on a scale higher than on the balance of probabilities but lower than beyond reasonable doubt.

40. In the case of Elijah Kipng'eno Arap Bii vs. KCB & Another - Civil Appeal Number 276 of 2018, this Court stated that:

> " ...it is trite that where fraud is alleged, it must be specifically pleaded, and it is not enough to deduce it from the facts. The standard of proof of an allegation of fraud is above a balance of probabilities and the onus is on the party alleging fraud to provide evidence and prove his case..."

41. In Esther Ndegi Njiru & Another vs. Leonard Gatei (Petition 2 of 2011) [2014] eKLR, the Court held:

> " Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, one doesn't need to demonstrate that the title holder is guilty of any immoral conduct on his part."

42. See also Kuria Kiarie & 2 Others vs. Sammy Magera (supra). To conclude, much as the allegations of fraud were bandied around by the appellants against the two respondents, there was no scintilla of evidence to back up the claims. Our answer to the second issue framed, therefore, is that no fraud, misrepresentation, illegality, or collusion between the two respondents and the 3rd and 4th respondent in facilitating the transaction was established, more particularly in the absence of the nexus between the third respondent, Silvanus, and the two respondents.

43. It is common ground that the two respondents are the registered proprietors of the suit property. Section 26 of the *Land Registration Act*, 2012 provides:

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

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

b. Where the certificate of title has been acquired illegally, un procedurally or through a corrupt scheme."

44. A registered proprietor of land, thus, enjoys full protection of the law, save for the circumstances outlined above when such title can be impeached. The appellants sought to impugn the two respondents' title on account of fraud, misrepresentation, or illegality, but as we have already demonstrated, they never met the tall order of proof of the allegations as required.

45. We can only restate that the two respondents explained step by step the whole process leading to their acquisition of the suit property. No evidence was led to impugn the processes by the appellants. It was common ground that the 3rd respondent held a valid grant at the time of the transaction, leading to the acquisition of the suit property by the two respondents. Therefore, the provisions of Article 40 of *the constitution*, section 26 of the *Land Registration Act*, and the rule of Nemo Dat Quod Non Habet, is inapplicable in the circumstances of the case.

46. The two respondents were therefore not to blame for any malfeasance in the earlier acquisition of the suit property. They were therefore innocent purchasers for value without notice.

47. Who is an innocent purchaser for value without notice? In Midland Bank Trust Co. Ltd and Another vs. Green and Another [1981] 1 ALL ER 155, the House of Lords held:

> "... the character in the law known as the bona fide (good faith) purchaser for value without notice was the creation of equity. In order to affect a purchaser for value of a legal estate with some equity or equitable interest, equity fastened on his conscience and the composite expression was used to epitomise the circumstances in which equity would, or rather would not, do so. ... Equity, in other words, required not only absence of notice but genuine and honest absence of notice. As the law developed, this requirement became crystallized in the doctrine of constructive notice.... it would be a mistake to suppose that the requirement of good faith extended only to the matter of notice, or when notice came to be regulated by statute the requirement for good faith became obsolete. Equity still retained its interest in, and power over, the purchaser's conscience. ... good faith there is stated as a separate test which may have to be passed even though absence of notice is proved."

48. In the case of Katende vs. Haridar & Company Limited (supra), the Court of Appeal of Uganda held that:

> " For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on a bona fide doctrine, ... (he) must prove that:-
>
> a. he holds a certificate of title;
>
> b. he purchased the property in good faith;
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> c. he had no knowledge of the fraud;
>
> d. he purchased for valuable consideration;
>
> e. the vendors had apparent valid title;

f. he purchased without notice of any fraud;

g. he was not party to any fraud."

49. We may also add that he must demonstrate that he carried out due diligence by conducting an official search of the title to the property as well as making reasonable inquiries regarding the state of the property and also physical inspection of the same. He must also demonstrate that he made inquiry as to the ownership antecedents of the property. When a property is in the possession of another person, that per se is constructive notice and should raise a red flag in the mind of an intended purchaser.

50. One thing that is clear to us is that the two respondents produced relevant documentation in respect of what they contended they had purchased. Those documents were not impugned by the appellants at all. We are satisfied, just like the trial court, that the two respondents proved that they had purchased the suit property for valuable consideration. Did they have notice of any other interest by any party in the suit property adverse to theirs? From the evidence on record, the two respondents conducted due diligence as required before purchasing the suit property. They took vacant possession. There were no apparent and visible encumbrances on the suit property that would have alerted the two respondents of the need to tread carefully. Was the purchase in good faith? From the analysis above, we have no doubt in our minds that indeed that was the case. In any event, even if there was fraud, illegality, or misrepresentation in the acquisition of the suit property, the appellants did not demonstrate that the two respondents were party to the scheme.

51. In the ultimate, the appeal must fail in its entirety and is accordingly dismissed with costs to the two respondents.

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF APRIL 2025.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

Deputy Registrar