



**MFI Office Solutions v Landlords Limited & 3 others (Civil Appeal E351 of 2023) [2025] KECA 1200 (KLR) (4 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1200 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL E351 OF 2023  
M NGUGI, F TUIYOT'T & GV ODUNGA, JJA  
JULY 4, 2025**

**BETWEEN**

**MFI OFFICE SOLUTIONS ..... APPELLANT**

**AND**

**LANDLORDS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**ROGGER HANNS KINYONGA DDUNGU ..... 2<sup>ND</sup> RESPONDENT**

**WAYMAX COMPANY LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

*(Being an appeal from the judgment of the Environment and Land Court at Nairobi (Angote, J) delivered on 23rd February 2023 in ELC Case No. 578 of 2010)*

**JUDGMENT**

1. The 1<sup>st</sup> and 2<sup>nd</sup> respondents, as 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs respectively, sued the 3<sup>rd</sup> respondent, the appellant and the 4<sup>th</sup> respondent as 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants before the Environment and Land Court in ELC Case No. 578 of 2010 in which it was contended: that the 1<sup>st</sup> respondent, Landlords Ltd, bought parcel of land known as L.R. No. 209/359/16 originally known as L.R. No. 209/359/2/3 (the suit property) on 25<sup>th</sup> February 2004 from the official receiver/ liquidator of Uganda Airlines Holdings Ltd for Uganda Shillings Two Hundred and One Million, Five Hundred and Sixty Thousand Only (Ushs. 201,560,000/-); that the 1<sup>st</sup> respondent passed a resolution in 2003 to have the suit property transferred to the 2<sup>nd</sup> respondent, a director of the 1<sup>st</sup> respondent, who then became a beneficial owner thereof pending formalities pertaining to registration of transfer instruments; that on 9<sup>th</sup> June 2009, the 2<sup>nd</sup> respondent paid the outstanding rates for the suit property which then stood at Kshs. 458,200; that on 6<sup>th</sup> November 2010, the 2<sup>nd</sup> respondent learnt from his caretaker that the suit property had been sold to a third party; that he reported the matter to the Kilimani Police Station as O.B. No. 55/12/11/2010



and upon visiting the suit property, found visible signs of renovations being carried out; that the 1<sup>st</sup> and 2<sup>nd</sup> respondents never sold the suit property to the appellant and 3<sup>rd</sup> respondent, who acquired the title fraudulently; that the Chief Land Registrar acted fraudulently and/or perpetrated misrepresentation by accepting transfer documents which he knew or ought to have known to be fraudulent from individuals who had no right or interest in the suit property; and that the Chief Land Registrar issued a title which he knew to be false and fraudulent and facilitated illegal transfer of the suit property knowing that such transfer was null and void.

2. In their Amended Plaintiff dated 2<sup>nd</sup> November 2018, the 1<sup>st</sup> and 2<sup>nd</sup> respondents prayed for the following reliefs:
  - a. A declaration that the Plaintiffs are the legal owners of all that land parcel known as L.R. No. 209/359/16 originally known as L.R. No. 209/359/2/3.
  - b. That the defendants by themselves, their servants or agents or anyone else claiming through them otherwise howsoever be compelled to immediately surrender and deliver up the suit property L.R. No. 209/359/16 originally known as L.R. No. 209/359/2/3 in vacant possession to the plaintiffs to hold quietly enjoy, use, possession and occupation of the suit property.
  - c. That the Defendants/ Respondents their servants and/or agents or otherwise howsoever be restrained from being or remaining or entering upon all that piece of land situate in Nairobi and known as L.R. No. 209/359/16 originally known as L.R. No. 209/359/2/3.
  - d. A permanent injunction restraining the defendants from trespassing onto the Plaintiff's suit property known as L.R. No. 209/359/16 originally known as L.R. No. 209/359/2/3.
  - e. General damages for trespass.
  - f. Costs and interest.
  - g. Any other relief that this Honourable Court may deem fit and just to grant.”
3. On its part, the appellant denied the claims and averred: that the suit property was registered in the appellant's name on 20<sup>th</sup> April 2010 after payment of stamp duty, registration fees and all other charges; that the appellant obtained confirmation from the Commissioner of Lands that the Indenture was registered in the name of the 3<sup>rd</sup> respondent and that all official searches were done before the suit property was transferred to the appellant; that there were no records at Lands Office or any other office showing the 1<sup>st</sup> and 2<sup>nd</sup> respondents' alleged interest in the suit property; and that on or about 5<sup>th</sup> March 2010, the appellant entered a sale agreement with the 3<sup>rd</sup> respondent for the purchase of the suit property for a consideration of Kshs. 27,000,000.
4. In opposing the suit, the 3<sup>rd</sup> respondent through a Statement of Defence dated 18<sup>th</sup> February 2011, denied the facts as averred in the plaint and stated that the invitation to tender and/or sale alleged by the 1<sup>st</sup> and 2<sup>nd</sup> respondent was a nullity from the outset as the alleged vendors had no title to offer the property or to dispose of the same.
5. The 4<sup>th</sup> respondent, vide their Statement of Defence dated 14<sup>th</sup> January 2020, denied the averments by the 1<sup>st</sup> and 2<sup>nd</sup> respondent and averred: that if the 1<sup>st</sup> and 2<sup>nd</sup> respondent made a complaint to the police as alleged, it was a statutory complaint; that there was no nexus of sale of the suit property between the 1<sup>st</sup> and 2<sup>nd</sup> respondents and the 3<sup>rd</sup> respondent and that the appellant does not have any record to show how the property evolved to it to enable it transfer to the appellant hence a fraudulent transfer; and that the 1<sup>st</sup> and 2<sup>nd</sup> respondents' claim for purchase was not presented at the land registry.



6. At the hearing, the 2<sup>nd</sup> respondent, who testified on behalf of the plaintiffs as PW1, relied on his witness statement dated 13<sup>th</sup> February 2018 as his evidence in chief and testified: that following an advertisement by the Official Receiver/Liquidator of Uganda Airlines Holdings Limited on 9<sup>th</sup> July 2001 for the sale of the suit property, he submitted a tender bid in the name of his company, the 1<sup>st</sup> respondent, and emerged the winner of the tender when the bids were opened in public on 10<sup>th</sup> August 2001; that the 1<sup>st</sup> respondent complied with all conditions of the sale and a sale agreement was executed on 13<sup>th</sup> June 2002; that the 1<sup>st</sup> respondent passed a resolution to transfer the property to him (2<sup>nd</sup> respondent); that he agreed with the Official Receiver that the transfer forms would indicate him as the transferee and would be prepared in Kenya, a position which was confirmed by the Official Receiver of Uganda in the letter dated 23<sup>rd</sup> September 2003 addressed to Kavumba Kabenge & Co. Advocates and copied to the 1<sup>st</sup> respondent, which also conveyed a copy of the title of the suit property to enable the preparation of the documents for execution; that an indenture was prepared on 25<sup>th</sup> February 2004 which was executed by himself and the Official Receiver/Liquidator of Uganda Airways Holding Limited and that the said Official Receiver/Liquidator through the letter dated 15<sup>th</sup> November 2010 confirmed that the suit property had been sold to him; that vide a letter dated 25<sup>th</sup> February 2011, the Principal Registrar of Government Titles wrote to the Divisional CID Officer, Kilimani, advising that the conveyance dated 24<sup>th</sup> January 2001 between Uganda Airways corporation and the 3<sup>rd</sup> respondent was fraudulent and that no good title was conveyed to the appellant; that the appellant filed a Judicial Review Application No. 39 of 2011 wherein it sought an order of certiorari to quash the decision of the Principal Registrar of Government cancelling the appellant's title.
7. In support of his case, PW1 produced several documents including the sale agreement dated 13<sup>th</sup> June 2011; a copy of the Indenture dated 11<sup>th</sup> June 1979; a copy of the Uganda Gazette dated 11<sup>th</sup> May 2001 on the appointment of a liquidator for Uganda Airlines Holdings Ltd; draft copies of an Indenture dated 24<sup>th</sup> and 25<sup>th</sup> February 2004; a notice of sale of the suit property in The New Vision dated 9<sup>th</sup> July 2001, The East African dated 3<sup>rd</sup> December 2001 and The Monitor dated 3<sup>rd</sup> December 2001 and the valuation report dated 26<sup>th</sup> July 2007; payment request from Nairobi City Council dated 9<sup>th</sup> June 2009 for Kshs. 458,200; a copy of the cheque drawn in favour of the Nairobi City Council for Kshs. 458,200; and a letter dated 15<sup>th</sup> June 2009 from the Official Receiver/ Liquidator to L. Kwamboka & Co. Advocates.
8. In cross-examination, PW1 stated: that he was never shown the original title of the suit property but was given a certified copy of the title in the name of Uganda Airlines Corporation since the original title was missing; that he became aware of the missing title after the bid process; that the process of transfer was never completed as there was no title; and that the registered owner of the property was Uganda Airlines Holdings Limited.
9. The Official Receiver, Uganda Registration Bureau, Ntale Mustapher, testified as PW2 and relied on his statement dated 16<sup>th</sup> November 2018 in which he averred: that the suit property belonged to Uganda Airlines Corporation, which ceased to exist on 14<sup>th</sup> April 2000 and its operations were later taken over by Uganda Airlines Holdings Limited; that following the Government of Uganda's privatisation program, the Official Receiver was appointed as liquidator of Uganda Airlines Holdings Limited; that the suit property was sold to the 1<sup>st</sup> respondent in the liquidation process vide a sale agreement dated 13<sup>th</sup> June 2002 and the 1<sup>st</sup> respondent took possession of the suit property thereafter; that the 1<sup>st</sup> respondent then requested to have the property transferred to the 2<sup>nd</sup> respondent, which request was granted; and that, having divested its interest in the suit property, Uganda Airlines Holdings Limited could not sell the suit property to any other party.



10. In support of his evidence, PW2 produced the gazettelement of the resolution by Uganda Airlines Holdings Ltd dated 20<sup>th</sup> April 2001; the advertisement of the sale of the suit property in The Monitor newspaper; and the letter addressed to L. Kwamboka & Co. Advocates confirming the sale of the suit property.
11. In cross-examination, PW2 stated: that the suit property was still registered in the name of Uganda Airlines Corporation; that the title to the suit property was never handed to Uganda Airlines Holdings Ltd; that he was not aware of any complaint regarding the lost title, which loss was only discovered in 2001, and they wrote to the lands office in Nairobi to that effect; that Uganda Airlines Corporation could not transact in the suit property after incorporation of Uganda Airlines Holdings Limited; that from the records as shown to him, as at 2001, the 3<sup>rd</sup> respondent was indicated as the registered owner of the suit property; and that the Indenture held by the 1<sup>st</sup> respondent had not been registered.
12. DW1, Fredrick Kimemia Kimani, who at the time of his testimony was a director of the 3<sup>rd</sup> respondent, testified that the 3<sup>rd</sup> respondent's other director was Mercy Makena. According to him, in January 2008, he saw a signage on the suit property advertising the sale of the land and that being a property dealer, and in consultation with his wife, they expressed interest in purchasing the suit property to the former directors of the 3<sup>rd</sup> respondent. (In order to avoid confusion, we shall henceforth refer to that original company as Waymax).
13. DW1 further stated: that ownership of the suit property was confirmed by the searches conducted at the Lands Office and the Companies Registry; that according to those records, the suit property was owned by Waymax, whose directors were Jonah Kimaiyo Nyolei, Peter Maina Ngatia and Edgar Kyprotich Misoi; that in March 2008, he entered into a formal negotiation with the said directors through which he purchased the shares of Waymax together with its only asset, the suit property; that he and his co-director effected the necessary changes and became directors of Waymax; that to raise the purchase price, they applied for a financing facility from K-Rep Bank in March 2008 and a mortgage was registered in favour of the bank against the suit property; that on 5<sup>th</sup> March 2010, they entered into a sale agreement with the appellant and the suit property was subsequently transferred to the appellant by an Indenture of Conveyance dated 20<sup>th</sup> April 2010 and registered on 3<sup>rd</sup> May 2010; and that it was not until 2<sup>nd</sup> December 2010 when he was informed that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were claiming ownership of the suit property.
14. In cross-examination, DW1 stated: that he paid Kshs. 6 million in cash when he bought the suit property from the former directors of Waymax, but had no proof of payment; that he later paid Kshs 14 million in US dollars, whereafter the shares were transferred to him and his co-director; that they did not append their signatures to the transfer document; that the Indenture in favour of the 3<sup>rd</sup> respondent was made on 24<sup>th</sup> January 2001 and registered on 17<sup>th</sup> July 2007; that he did not inquire about the payable stamp duty and was not bothered about who made payment for the rates; that he sold the suit property for Kshs. 27 million to the appellant; and that the declared value of the suit property for payment of stamp duty was Kshs. 30 million.
15. DW1 produced a bundle of documents as evidence, including a receipt dated 13<sup>th</sup> October 2009 from Kenya Power and Lighting Company being payment for power connection and water bills for the suit property from Nairobi Water Company issued in the name of the 3<sup>rd</sup> respondent's director; the mortgage dated 31<sup>st</sup> March 2008 over the suit property in favour of K-Rep Bank guaranteed by Waymax Co Ltd; an indenture of re-conveyance of mortgage dated 3<sup>rd</sup> November 2009 by K-Rep to the 3<sup>rd</sup> respondent; the indenture of Conveyance dated 20<sup>th</sup> April 2010 between the 3<sup>rd</sup> respondent and appellants; valuation reports dated 19<sup>th</sup> April 2010 and 26<sup>th</sup> July 2007; sale agreement dated 5<sup>th</sup> March



- 2010 between the appellant and 3<sup>rd</sup> respondent; certificates of postal search dated 3<sup>rd</sup> May 2010 and 9<sup>th</sup> December 2009; and an indenture of conveyance dated 24<sup>th</sup> January 2001 between Uganda Airlines Corporation and Waymax Ltd.
16. On behalf of the appellant, the appellant's General Manager, Naushad Abdi, who testified as DW2, stated: that the appellant entered into a sale agreement with the 3<sup>rd</sup> respondent on 5<sup>th</sup> March 2010 for the sale of the suit property at a consideration of Kshs. 27 million; that before they purchased the land, they were shown a certificate of search dated 9<sup>th</sup> February 2010 confirming that the property was in the 3<sup>rd</sup> respondent's name and that a subsequent search on 26<sup>th</sup> February 2010 confirmed the same; that the appellant paid a deposit of Kshs. 11 million following which the title documents were released to their advocates on 10<sup>th</sup> March 2010, including the original indenture of conveyance in the 3<sup>rd</sup> respondent's favour, a mortgage in favour of K-Rep Bank dated 31<sup>st</sup> March 2008 and an indenture of re-conveyance of mortgage dated 10<sup>th</sup> March 2009; that the appellant paid the stamp duty of Kshs. 1,280,050 on 20<sup>th</sup> April 2010, based on the government valuer's confirmation of the value of the suit property at Kshs. 32 million; that the indenture of conveyance dated 20<sup>th</sup> April 2010 was registered on 3<sup>rd</sup> May 2010 and entered into the Government Lands Registry as entry No. 72/N86/82/10/15132; and that they had been in quiet possession of the suit property since May 2010.
17. The Deputy Chief Land Registrar, DW3, testified: that the suit property L.R. 209/359/16 was registered in the name of Uganda Airline Corporation and that there were no records relating to the alleged purchase and transfer of the suit property from Uganda Airlines Corporation to Jonah Kimayio Nyolie, Peter Maina Ngatia and Edgar Kyprotich Misoi; that there was an investigation conducted in November 2011 by the Chief Land Registrar from which it was recommended that the entry in the register in favour of Waymax, which was fraudulent, be cancelled; that the appellant could not obtain a better title than that of the person from whom it obtained it; and that the Chief Land Registrar expunged the entry and reverted the suit property to Uganda Airlines Corporation.
18. In support of his evidence, DW3 produced a bundle of documents including a copy of the extract of the register of the suit property, a letter from Kilimani CID to the Land Registrar dated 26<sup>th</sup> August 2010, a letter from Kilonzo & Co. Advocates dated 30<sup>th</sup> August 2010 and a letter from the Land Registrar, and the transfer documents.
19. In his judgement, the learned Judge identified the following issues for determination:
- Whether the 1<sup>st</sup> and 2<sup>nd</sup> respondents acquired legal ownership of the suit property
  - Whether the 3<sup>rd</sup> respondent lawfully acquired title to the suit property.
  - Whether the appellant acquired good title to the suit property
  - Whether the 1<sup>st</sup> and 2<sup>nd</sup> respondents were entitled to the reliefs sought
20. In his judgement, the learned Judge found: that as at 1979, Uganda Airlines Corporation was the registered owner of the suit property, having acquired the same from a Mr. George Elijah Tibakuna; that evidence on record showed that the 1<sup>st</sup> respondent properly purchased the suit property from the liquidator of Uganda Airline Holding Limited by way of an agreement dated 13<sup>th</sup> June 2002 and paid rates to the then Nairobi City Council of KShs.458,200; that although the suit property was never transferred to the 1<sup>st</sup> and 2<sup>nd</sup> respondent, due to the missing title, the Official Receiver of Uganda Airlines Holdings Limited continued holding the said land in trust for the 1<sup>st</sup> respondent; that the present directors of the 3<sup>rd</sup> respondent did not present evidence of payment of the purchase price by Waymax to Uganda Airlines Corporation or the sale agreement between Waymax and Uganda Airlines Corporation, duly signed and sealed by the two companies; that there was no evidence of the



consideration for the acquisition of Waymax shares by Fredrick Kimemia Kimani and Mercy Makena Mbogori; that save for the indenture of conveyance, the 3<sup>rd</sup> respondent failed to provide any evidence of the process through which it obtained ownership of the suit property as no sale agreement was presented for the court's scrutiny, nor any proof of payment of the purchase price to Uganda Airlines Corporation; that the 3<sup>rd</sup> respondent's current directors also failed to call the directors of Waymax or any director of Uganda Airlines Corporation as witnesses who could have easily presented evidence of the agreement entered into with Uganda Airlines Corporation and evidence of payment of the purchase price; that the 3<sup>rd</sup> respondent failed to establish the root of its title; and that the evidence before the court showed that its directors acted fraudulently, hence any title they purported to obtain from this scheme was illegal, unlawful, null and void.

21. On the claim by the appellant that it was a bona fide purchase without notice, the learned Judge found: that Article 40(6) of *the Constitution* bars legal protection of unlawfully acquired property while section 26(1)(b) of the *Land Registration Act* provides that title that has been illegally acquired may be impeached. The cases of Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & Another (2013) eKLR and Darelle Limited Plaintiff vs ASL Limited & 2 Others [2015] eKLR were cited to support the position that if indeed the appellant relied on the register to purchase the suit property, then it should have sought for indemnity from the government; and that to the extent that the 3<sup>rd</sup> respondent did not have a valid title to pass to the appellant, the suit property should revert to its legal and beneficial owners, that is Uganda Airlines Holding Limited and the 1<sup>st</sup> respondent respectively.
22. It was the learned Judge's holding that having found that the appellant had no valid title to the suit property, its actions of entering and taking possession of the suit property amounted to trespass and as was held by this court in Duncan Nderitu Ndegwa v Kenya Pipeline Company Ltd & Another (2013) eKLR, once trespass has been established, it is actionable per se and no proof of damage is required. However, taking into consideration the circumstances of the case, and considering that the appellant was likely defrauded by the 3<sup>rd</sup> respondent, no damages would be awarded in that regard.
23. In the end the learned Judge allowed the 1<sup>st</sup> and 2<sup>nd</sup> respondents' case and held that:
  - a. The 1<sup>st</sup> and 2<sup>nd</sup> respondents were the beneficial owners of all that land known as L.R. No. 209/359/16 originally known as L.R. No. 209/359/2/3.
  - b. Any entry purporting to grant title of L. R. No. 209/359/16 to the appellant and 3<sup>rd</sup> respondent be cancelled.
  - c. The appellant, 3<sup>rd</sup> and 4<sup>th</sup> respondents by themselves, their servants or agents or anyone else claiming through them howsoever be compelled to immediately surrender and deliver up the suit property L.R. No. 209/359/16 originally known as L.R. No. 209/359/2/3 in vacant possession to the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
  - d. The appellant, 3<sup>rd</sup> and 4<sup>th</sup> respondents and or their servants and/or agents or otherwise howsoever be and are hereby restrained from being or remaining on or entering upon all that piece of land situate in Nairobi and known as L.R. No. 209/359/16 originally known as L.R. No. 209/359/2/3.
  - e. A permanent injunction be and is hereby issued restraining the appellant, 3<sup>rd</sup> and 4<sup>th</sup> respondents from trespassing onto the suit property known as L.R. No. 209/359/16 originally known as L.R. No. 209/359/2/3.
  - f. The 1<sup>st</sup> and 2<sup>nd</sup> respondents be awarded costs of the suit to be paid by the 3<sup>rd</sup> respondent.
24. Dissatisfied with the said decision, the appellant appealed to this Court on the grounds:



1. That the learned Judge failed to determine and to distinguish which of the 1st and 2nd respondents was allegedly entitled to ownership of the suit property, their individual claims being based on separate and distinct alleged conveyances.
2. That the learned Judge erred in fact and in law in failing to find and hold that the 1st and 2nd respondents had not shown any evidentiary nexus between Uganda Airlines Holding Limited and Uganda Airlines Corporation.
3. That the learned Judge erred in failing to uphold the standard and burden of proof imposed on the 1<sup>st</sup> and 2<sup>nd</sup> respondents by law and instead, erroneously shifted the burden of proof to the appellant and the 3rd respondent.
4. That the learned Judge's finding that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were the beneficial owners of the suit property, flies in the face of his other findings, to wit:
  - a. That the 1<sup>st</sup> respondent did not produce the special resolution for the property to be registered in the name of the 1<sup>st</sup> and 2<sup>nd</sup> respondent
  - b. That the 1<sup>st</sup> and 2<sup>nd</sup> respondents did not produce complete indentures of conveyance; and
  - c. That the 1<sup>st</sup> and 2<sup>nd</sup> respondents' interest was not registered at the Lands Office.
5. That the learned Judge erred in fact and in law in failing to address the fact that the documents relied upon by the 1<sup>st</sup> and 2<sup>nd</sup> respondents were inadmissible for failing to comply with the *Stamp Duty Act*.
6. That the learned Judge erred in failing to find that the Gazette Notice dated 11<sup>th</sup> May 2001 appointing an Official Receiver for Uganda Airline Holding Limited was published long after the suit property had been sold by Uganda Airlines Corporation to the 3rd respondents on 24th January 2001.
7. That the learned Judge erred in law and in fact in finding that the purchase by the 1st respondent of the suit property by way of agreement dated 13<sup>th</sup> June 2002 was unimpeached.
8. That the learned Judge erred in law and in fact in finding that the Official Receiver of Uganda Airlines Holdings Limited held the land in trust for the 1<sup>st</sup> respondent when the same had been sold and transferred to the 3rd respondent and to the appellant.
9. That the learned Judge erred in fact and in law in finding that the 3rd respondent did not produce the Sale Agreement between it and Uganda Airlines Corporation.
10. That the learned Judge erred in law and in fact in finding that the 3<sup>rd</sup> respondent did not establish the root of its title.
11. That the learned Judge erred in law and in fact in finding that the directors of the 3<sup>rd</sup> respondent acted fraudulently.
12. That the learned Judge erred in law and in fact in finding that the appellant obtained the Certificate of Title for the suit property illegally and fraudulently.
13. That the learned Judge erred in law and in fact in finding that the appellant ought to have sought for indemnity from the Government and in doing so filing to find that there was no notice of defect in the title, and that the appellant was an innocent purchaser for value without any notice of defect in the title.



14. That the learned Judge erred in law and in fact in allowing the plaint and declaring the 1<sup>st</sup> and 2<sup>nd</sup> respondents as beneficial owners of the suit property yet holding that the property ought to revert to Uganda Airlines Holdings Limited and the 1<sup>st</sup> respondent.
15. That the learned Judge erred in law and in fact in finding that the appellant was a trespasser and held no title.
16. That the learned Judge erred in law and in fact in finding that the 3<sup>rd</sup> respondent defrauded the appellant.
25. We heard the appeal on the Court's virtual platform on 19<sup>th</sup> February 2025 when learned counsel, Mr Omwanza Ombati, appeared for the appellant, learned counsel, Mr Arthur Ingutya, appeared with Mr A. K Mwangi for the 1<sup>st</sup> and 2<sup>nd</sup> respondents, learned counsel, Mr Kisigwa, appeared for the 3<sup>rd</sup> respondent and learned counsel, Mr Allan Kamau, appeared for the 4<sup>th</sup> respondent.
26. The submissions by the appellants, as presented through the firm of Kilonzo & Company Advocates, were: that this Court, in the exercise of its first appellate jurisdiction, is enjoined to re- evaluate the evidence and arrive at its own conclusions; that the evidence of the 2<sup>nd</sup> respondent differed in material respects from the averments pleaded in the amended plaint; that the amended plaint sought a declaration that both the 1<sup>st</sup> and 2<sup>nd</sup> respondents were the legal owners of the suit property contrary to the pleadings that by a special resolution, the 1<sup>st</sup> respondent transferred the ownership of the suit property to the 2<sup>nd</sup> respondent; that the trial court arrived at contradictory findings regarding the ownership of the suit property since, on one hand, it held that Uganda Holdings Limited held the property in trust for the 1<sup>st</sup> respondent and that the 1<sup>st</sup> respondent's agreement dated 13<sup>th</sup> June 2002 was impeachable, while on the other hand, it held that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were beneficial owners of the suit property; that the trial court did not address the contradictory and competing claims of the 1<sup>st</sup> and 2<sup>nd</sup> respondents; and that the learned Judge failed to direct his mind to the fact that the agreement of sale dated 13<sup>th</sup> June 2002 between the Official Receiver/Liquidator of Uganda Airlines Holdings Limited and the 1<sup>st</sup> respondent produced by PW2 was not duly stamped as required under the [Stamp Duty Act](#) and was not signed by the directors of the 1<sup>st</sup> respondent.
27. It was further submitted: that the liquidator of Uganda Airlines Holdings Limited was appointed on 7<sup>th</sup> May 2001 which appointment did not have retrospective effect and there was no evidence that the suit property belonged to or was vested in Uganda Airlines Holdings Limited; that the indenture dated 13<sup>th</sup> June 1979 produced by the 3<sup>rd</sup> respondent and confirmed by the 4<sup>th</sup> respondent's witness, DW3, shows that the suit property was owned by Uganda Airlines Corporation before it was sold to Waymax on 24<sup>th</sup> January 2001; that no evidence was produced showing the nexus between Uganda Airlines Corporation and Uganda Airlines Holdings Limited (in liquidation) by the 1<sup>st</sup> and 2<sup>nd</sup> respondents who had possession of the facts; that the trial court erred in failing to draw an adverse inference from the failure to provide that evidence; that the liquidator of Uganda Airlines Holdings Limited (in liquidation) did not have any title or authority over the suit property capable of being sold or transferred to the 1<sup>st</sup> respondent since by the time the liquidator was appointed on 7<sup>th</sup> May 2001, the title to the suit property had passed from Uganda Airlines Corporation to the 3<sup>rd</sup> respondent through the Indenture dated 24<sup>th</sup> January 2001; that the indenture dated 25<sup>th</sup> February 2004 between the liquidator and the 2<sup>nd</sup> respondent was not stamped under the [Stamp Duty Act](#); that although the 1<sup>st</sup> and 2<sup>nd</sup> respondents each claimed to have bought the suit property from the liquidator at the same price of Uganda Shillings 201,560,00 and sought declaration that the suit property belonged to each one of them, the learned Judge granted each separate and distinct declaration of ownership which was an error in light of the evidence adduced, pleadings and the law; that the indenture dated 24<sup>th</sup>



January 2001 between Uganda Airlines Corporation and Wamax was registered in the Government Lands Register and upon conducting a search, the appellant found that the suit property belonged to the 3<sup>rd</sup> respondent; that after the purchase of the suit property, the appellant conducted another search on 11<sup>th</sup> May 2010 which confirmed that the property was registered in the appellant's name.

28. The appellant added; that under section 97 of the repealed Government Lands Act which governed the suit property, the Principal Registrar of Government Lands was required to keep the register and cause to be recorded any dealing affecting the land; that the appellant followed all the processes after conducting due diligence and consequently acquired vacant and quiet possession of the land; that the appellant had no knowledge of any allegation of fraud at the time of the transfer and was, in line with the decision in *Weston Gitonga & 10 Others v Peter Rugu Gikanga & Anpthr* [2017] eKLR and *Kuria Greens Limited v Registrar of Titles & Another* [2011] eKLR, a bona fide purchaser whose title was absolute and indefeasible; and that its title was protected by Article 40 of *the Constitution* as read with sections 26 and 80(2) of the *Land Registration Act*; that since the appellant is in possession of the suit property and the certificates of official search that reflect the entries in the Government Lands Registry show that it is the registered owner thereof, the trial court erred in not finding that the 1<sup>st</sup> and 2<sup>nd</sup> respondents did not discharge their burden.
29. On behalf of the 3<sup>rd</sup> respondent, it was submitted, through the firm of MMA Advocates LLP: that the judgement of the trial court was wrong in finding that the 3<sup>rd</sup> respondent did not acquire a good title and therefore was incapable of passing a good title to the appellant; that from the evidence adduced, the 3<sup>rd</sup> respondent was a bona fide purchaser without notice of any fraud in line with the decision of this Court in *Njenga & 3 Others v Ndua & Another* [2021] KECA 253; that the 3<sup>rd</sup> respondent conducted due diligence which showed that Uganda Airlines Corporation had a valid title free from any encumbrances and sold the same legitimately to the appellant; that on the authority of *Opiyo & Another v Olunje* [2023] KECA 1539, the allegations of fraud made by the 1<sup>st</sup> and 2<sup>nd</sup> respondents were not substantiated; that the 1<sup>st</sup> and 2<sup>nd</sup> respondents failed to meet the required burden of proof threshold as required by section 107 of the *Evidence Act*; that the documents relied upon by the 1<sup>st</sup> and 2<sup>nd</sup> respondents were not stamped and in any case there was no property to be transferred since Uganda Airlines Holding Limited (in liquidation) was not in possession of the suit property; the root of title to the suit property was established by the 3<sup>rd</sup> respondent which acquired the land from Uganda Airlines Corporation before lawfully selling it to the appellant; that the trial court contradicted itself on multiple fronts in arriving at a wrong decision; and that the trial court erred in law and in fact by relying on unregistered and unstamped documents contrary to section 19(1)(b) of the *Stamp Duty Act* while disregarding the 3<sup>rd</sup> respondent's undisputed evidence.
30. The submissions by the 1<sup>st</sup> and 2<sup>nd</sup> respondents, as presented through the firm of Arthur Ingutya & Co Advocates, were: that the issue of the sale of the suit property could not have been confirmed by a better source than the manager of the official receiver unit of the Government of Uganda since he was the individual holding the records relating to the liquidator of Uganda Airlines Holdings Limited which had taken over the assets of Uganda Airlines Corporation, including the suit property; that from his evidence, the sale to the 1<sup>st</sup> respondent was procedurally lawful and the 1<sup>st</sup> respondent thereby obtained a legal interest in the suit property; that save for the formalities of registration of the indenture, the interest in the property vested in the 1<sup>st</sup> respondent upon payment of the purchase price and the 1<sup>st</sup> and 2<sup>nd</sup> respondents were thereupon entitled to possess, use and enjoy the suit property to the exclusion of all others and were entitled to have the same registered in their favour; that the 3<sup>rd</sup> respondent's statement of defence did not contain any positive assertion of title or when it was acquired and the particulars of the acquisition; that although the decision of the Chief Lands Registrar expunging the transaction through which the conveyance dated 24<sup>th</sup> January 2001 was registered on 17<sup>th</sup> July 2007



was reversed by the High Court, the issue of ownership and validity of title of the suit property was left to the Environment and Land Court to determine; that there was no evidence showing that there was sale of the suit property to the 3<sup>rd</sup> respondent since there was no agreement produced between Uganda Airlines Corporation and the 3<sup>rd</sup> respondent; that there was no evidence payment of the purchase price, stamp duty and rates by the 3<sup>rd</sup> respondent; and that, as held in *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR, the entry in the register of payment does not suffice where the validity of title is put to question since in that case, the root of title must be established.

31. It was further submitted: that the 3<sup>rd</sup> respondent's directors did not deem it necessary to call the former directors of Waymax who were the individuals said to have bought the property from Uganda Airlines Corporation to shed light on how they bought the property and deliver evidence on payment; that the appellant had a duty to investigate how the 3<sup>rd</sup> respondent acquired title as was held in *Katende v Haridar and Company Ltd* [2008] 2 EA 173; that it was revealed from the agreement for sale between the appellant and the 3<sup>rd</sup> respondent, that the 3<sup>rd</sup> respondent's title was not clean since a sum of Kshs 500,000 was stated to be required to enable the vendor make clearance of the title; that the appellant was aware or ought to have been aware that the 3<sup>rd</sup> respondent had no valid title but chose to proceed with the purchase nevertheless; that there was no paper trail to back the payment of large sums of money purportedly paid by the appellant to Fredrick Kimemia and his co-director, Mercy Makena Mbogori, which payment was made to the personal accounts of the two directors as opposed to that of the company; that it was curious that Fredrick Kimemia and his co-director Mercy Makena Mbogori, being aware that Waymax acquired the suit property in 2001 in the sum of Kshs 30,000,000, had no qualms selling it for the sum of Kshs 27,000,000 after 7 years; that Fredrick Kimemia and his co-director Mercy Makena Mbogori had, two months before acquiring the suit property, charged it to a bank signing as directors of Waymax Company Limited, an indication that they and the previous directors of Waymax were together in a grand scheme to steal the suit property in cahoots with the appellant who was keen to acquire it for a fraction of its real value; that a search of the suit property, had it been done, would have revealed that the conveyance from Uganda Airlines Corporation to Waymax was not registered until 7 years later; that the appellant must have known that there were no records of resolutions signed, affidavits sworn and share transfer documents executed by previous directors and duly registered as evidence of sale of shares of Waymax as required by law; that whereas the sale agreement between the appellant and the 3<sup>rd</sup> respondent dated 5<sup>th</sup> March 2010 indicates the purchase price as Kshs 27,000,000, the indenture dated 20<sup>th</sup> April 2010 indicates the price as Kshs 30,000,000; that going by the above indicators which the appellant ignored or perpetuated, it did not fit the description of a bona fide purchaser but was quite prepared to acquire the property even if it had to cut corners by paying huge sums of cash to "make clearances of title"; that, on the authority of the case of *Dina Management Limited v County Government of Mombasa & 5 Others* [2021] eKLR, since the 3<sup>rd</sup> respondent had no valid title, the appellant's title is a nullity.
32. The 4<sup>th</sup> respondent, through the Attorney General, submitted: that, as captured in section 107 of the [Evidence Act](#) and the Supreme Court case of *Dr Samson Gwer & 5 Others v Kenya Medical Research Institute & 3 Others* [2020] eKLR, *Rhesa Shipping Co. SA v Edmunds* [1955] 1 WLR 948, this Court's decision in *Agnes Naymbura Munga v Lita Violet Shepard* [2018] eKLR and *Britestone Pte Ltd v Smith & Associates Far East Ltd* [2007] 4 SLR, a party that seeks to assert proprietorship of the suit property is obligated to prove its case on the required standards; that although the 1<sup>st</sup> and 2<sup>nd</sup> respondents raised allegations of fraud before the trial court, they failed to substantiate the same as no single piece of evidence was tendered to show that the 3<sup>rd</sup> respondent obtained the disputed parcel of land fraudulently, and thereafter passed on an alleged fraudulent title to the appellant; that on the authority of the majority judgement in *Martevé Guest House Limited v Njenga & 3 Others* [2022] KECA 539 and *Kagina v Kagina & 2 Others* [2021] KECA 242, no proof of fraudulent transfer



of the parcel of land was tendered before the Chief Lands Registrar and the trial court to indicate that Waymax acquired the title fraudulently from Uganda Airlines Corporation; that, as held in *Arthi Highway Developers Limited v West End Butchery Limited & 6 Others* [2015] eKLR, fraud is a serious allegation that must be proved; that, on the authority of *Mbarak v Freedom Limited* [2024] KECA 160 (KLR) and based on the documentation presented before the trial court, the acquisition, registration, transfer and new owner registration process was above board and no proof of a fraudulent transfer took place hence the 3<sup>rd</sup> respondent was able to sufficiently demonstrate the legitimacy of the root of the title; that a purported sale agreement by the 1<sup>st</sup> respondent and Uganda Airlines Holdings Limited (in liquidation) dated 13<sup>th</sup> June 2002 over the same parcel of land shows the commencement of a fraudulent scheme to divest and disentitle the appellant of its rightful ownership; that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were not bona fide purchasers for value without notice based on the decision in *Mwangi James Njehia v Janetta Wanjiku Mwangi & Another* [2021] eKLR and *Dina Management Limited v County Government of Mombasa & 5 Others* [2023] KESC 30 (KLR); that the trial court relied on unstamped and unregistered documents to divest the appellant of their lawfully acquired title; and that based on the authority of the case of *Wambui v Mwangi & 3 Others* [2021] KECA 133 (KLR), acquisition of the parcel of land by the 3<sup>rd</sup> respondent and onward transfer to the appellant was lawful and procedural as the 1<sup>st</sup> and 2<sup>nd</sup> respondents did not have any registered documents to show that title to the property ought to be conferred on them.

33. We have considered the submissions made before us. The matter before us being a first appeal from the decision of the Environment and Land Court, our mandate is as espoused in the case of *Ng'ati Farmers' Co-operative Society Ltd vs. Ledidi & 15 Others* [2009] KLR 331 that:

“An appeal to this Court from a trial by the High Court is by way of re-trial 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 witness and should make due allowance in that 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 demeanour of a witness is inconsistent with the evidence in the case generally.”

34. However, in *Peters vs Sunday Post Ltd* [1958] E.A 424 it was held that:

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion.”

35. Before we delve into the merits of the appeal, we must point out that we have been rather taken aback by the position adopted by the 4<sup>th</sup> respondent in this appeal. Before the trial court, as in this Court, the 4<sup>th</sup> respondent, Hon Attorney General, was sued on behalf of the Commissioner of Lands. The evidence for the Commissioner of Lands was given by the Deputy Chief Land Registrar who stated that the suit property L.R. 209/359/16 was registered in the name of Uganda Airline Corporation, and that there were no records in relation to the alleged purchase and transfer of the suit property from Uganda Airlines Corporation to Mr. Jonah Kimaiyo Nyolei, Peter Maina Ngatia and Edgar Kyprotich



Misoï who were the directors of Waymax. According to him, an investigation conducted in November 2011 by the Chief Land Registrar found that the entry in the register of the title to the suit property in favour of Waymax was fraudulent and consequently, there could be no good transfer of the suit property to the appellant as a result of which the Chief Land Registrar expunged the entry and reverted the suit property to Uganda Airlines Corporation. In the submissions made before the trial court, the 4<sup>th</sup> respondent took the view that the 1<sup>st</sup> respondent was the owner of the suit property, having proved that it was declared the highest bidder during the sale at a public auction and that if Jonah Kimayio Nyolei, Peter Maina Ngatia and Edgar Kyprotich Misoï were not called to produce evidence on how they purchased the suit property, then they could not pass a good title to the 3<sup>rd</sup> respondent who could not thereby pass a better title of the suit property to the appellant.

36. It is clear that before this Court, the 4<sup>th</sup> respondent has adopted a position that is incompatible with the evidence that it adduced before the trial court as well as its submissions before that court. Whereas a party, who took one position before the lower court is at liberty to adopt another position on appeal in terms of submissions, it is unusual and we daresay inappropriate for a party to make submissions that contradict its evidence presented before the trial court. Such conduct amounts, in our view, to dishonesty, unless the party ably explains the reason for the sudden about-turn. Court proceedings ought to be conducted candidly and transparently by each party placing before the court, as honestly as possible, its case based on the material in its possession. Where a party has taken a particular position and adduced evidence in support of that position, without that evidence being expunged from the record, it is clearly ill-advised to turn round at the appellate stage and advance a case contrary to the one that the party set out to prove before the trial court. In the premises, we are at a loss as to what motivated the 4<sup>th</sup> respondent's submissions in this appeal which are clearly misplaced in so far as its evidence before the trial court is concerned.
37. The appeal before us substantially revolves around the issue whether or not the learned Judge was right in finding that the 3<sup>rd</sup> respondent, from which the appellant claimed its title had proved the root of its title, and whether the appellant was a bona fide purchaser for value without notice of fraud. Clearly, there are two rival claims to the suit property. Whereas the appellant has the title to the suit property, the 1<sup>st</sup> and 2<sup>nd</sup> respondents, who similarly claim the same land, have no title. It is however alleged that the 3<sup>rd</sup> respondent fraudulently acquired title to the suit land and therefore the appellant's title was tainted with fraud. Section 26 of the *Land Registration Act* provides that:
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.
  2. A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.
38. From the foregoing, it is clear that, where it is proved that the above mentioned vitiating factors exist, the presumption of indefeasibility and absoluteness of title may be discarded. The question regarding the indefeasibility of title has now been well settled in this jurisdiction. The myth that hitherto held



sway, to the effect that once a person holds a title to land, his proprietorship cannot be successfully challenged, has now been debunked. This Court has explained that the mere fact of issuance of a title deed does not confer the status of indefeasibility of title, and that courts of this country would not hesitate to nullify titles held by those who stare at the court and wave a title of grabbed land by merely pleading loudly, in reliance on the general principle of the indefeasibility of title. In cases where the very process of acquisition of the land in question is under challenge, it is not enough to simply rely on the instrument of title. In this regard, this Court in *Munyu Maina v Hiram Gathina Maina* [2013] eKLR held that:

“...when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument that is under challenge and the registered proprietor must go beyond the instrument and prove legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant’s testimony.”

39. In the case of *Funzi Development Ltd & Others v County Council of Kwale*, [2014] eKLR, this Court held that:

“... a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot on the basis of indefeasibility of title sanction an illegality or gives its seal of approval to an illegal or irregularly obtained title.”

40. We are, however, not to be understood to be watering down the importance of title to land. Neither are we saying that, once allegations are made, however spurious, that the title was inappropriately obtained, the registered proprietor will thereby be called upon to prove the root of title. To take that casual view would open floodgates to for those whose aim is simply to cause mischief to conjure up fanciful allegations simply to vex title holders for ulterior motives. Our view is that, in order to call upon title holders to prove the root of their title, there must credible allegations and a basis laid for believing that acquisition of property may have not been made through proper channels. Only then is the registered proprietor called upon to prove the process through which that title was acquired.

41. In order to determine the issues herein, it is necessary to revisit each parties’ evidence. The 1<sup>st</sup> and 2<sup>nd</sup> respondents’ case as supported by PW2, an officer from Uganda Registration Bureau was that in the year 2000, the Government of Uganda decided to privatise its assets, one of which was the suit property that was registered in the names of Uganda Airline Corporation. Accordingly, an advert was placed in the *New Vision* newspaper of 3<sup>rd</sup> December 2001 and the sale was conducted by Uganda Airline Holdings Ltd (in liquidation). The 1<sup>st</sup> respondent, through the 2<sup>nd</sup> respondent successfully bid for the same after which an agreement for sale dated 13<sup>th</sup> June 2002 was entered into and the purchase price paid. An indenture dated 25<sup>th</sup> February 2004 was prepared and signed but the transfer was not effected due to the missing original title. Possession was, however, given to the 1<sup>st</sup> respondent, which passed a resolution that the property be registered in the names of its director, the 2<sup>nd</sup> respondent.

42. The evidence of the history of the sale of the suit property came from PW2, Ntale Mustapher, the Official Receiver/ Liquidator based at the Uganda Registration Services Bureau. It was his evidence that the suit property belongs to Uganda Airlines Corporation which was later taken over by Uganda Airlines Holdings Limited and that following the Government of Uganda’s privatisation program, the Official Receiver was appointed as liquidator of Uganda Airlines Holdings Limited. One of the



assets of Uganda Airlines Corporation was the suit property which was sold to the 1<sup>st</sup> respondent in the liquidation process vide a sale agreement dated 13<sup>th</sup> June 2002 and possession handed to the 1<sup>st</sup> respondent. After purchasing the suit property, the 1<sup>st</sup> respondent requested to have the property transferred to the 2<sup>nd</sup> respondent, which request was granted. According to him, Uganda Airlines Holdings Limited never and could not sell the suit property to any other party as it had divested its interest. He clarified that Uganda Airline Corporation ceased to exist on 14<sup>th</sup> April 2000.

43. Support for the 1<sup>st</sup> and 2<sup>nd</sup> respondent's claim came from the Deputy Chief Land Registrar, DW3, who testified that the suit property L.R. 209/359/16 was registered in the name of Uganda Airline Corporation and that there were no records in relation to the alleged purchase and transfer of the suit property from Uganda Airlines Corporation to Mr. Jonah Kimayio Nyolie, Peter Maina Ngatia and Edgar Kyprotich Misoi, the directors of Waymax. According to him, an investigation conducted in November 2011 by the Chief Land Registrar found that the entry was fraudulent and so Waymax could not pass a good title to the appellant, MFI Office Solutions.
44. The case for the appellant, as supported by the 3<sup>rd</sup> respondent was that DW1, Fredrick Kimemia Kimani together with his co- director acquired the suit property from the 3<sup>rd</sup> respondent's director in January 2008. He conducted searches at the Lands Office and the Companies Registry and confirmed the owner of the suit property to be Waymax, whose directors were Jonah Kimaiyo Nyolei, Peter Maina Ngatia and Edgar Kyprotich Misoi. In March 2008, he entered into a formal negotiation with the said directors and purchased Waymax together with its only asset, the suit property. Together with his co-director, Mercy Makena, they effected the necessary changes and became directors of Waymax. In order to raise the purchase price, they applied for a financing facility from K-Rep Bank in March 2008 and a mortgage was registered in favour of the bank against the suit property. He added that they entered into a sale agreement with the appellant dated 5<sup>th</sup> March 2010 and the suit property was subsequently transferred to the appellant by an indenture of conveyance dated 20<sup>th</sup> April 2010 which was registered on 3<sup>rd</sup> May 2010. He was only informed on 2<sup>nd</sup> December 2010 that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were claiming ownership of the suit property. It was his evidence that he realised that the ratepayer was Uganda Airlines Corporation but he was not worried about it because the vendor had promised to clear the rates. He was also not aware if Waymax changed the records from Uganda Airlines Corporation into its name. While insisting that he had possession of the suit property for 19 months, he stated that he could not recall if there were tenants on the suit property since he was not staying on the property which was occupied by a caretaker.
45. In cross-examination, DW1 stated that he paid Kshs. 6 million in cash when he bought the land from the former directors, but had no proof of payment, and that he later paid Kshs 14 million in US dollars whereafter the shares were transferred to him and his co-director, although they did not append their signatures to the transfer document. Again, no evidence of such payment was adduced. It was his evidence that although the indenture in favour of Waymax was made on 24<sup>th</sup> January 2001, it was registered on 17<sup>th</sup> July 2007. It was his evidence that he did not inquire about the payable stamp duty and was not concerned about who paid the rates. He admitted that he sold the suit property for Kshs. 27 million to the appellant although the declared value of the suit property for payment of stamp duty was Kshs. 30 million.
46. DW2, Naushad Abdi, the General Manager of the appellant, testified that the appellant entered into a sale agreement with the 3<sup>rd</sup> respondent on 5<sup>th</sup> March 2010 for the sale of the suit property at a consideration of Kshs. 27 million. Prior to the purchase of the suit property, they were shown a certificate of search dated 9<sup>th</sup> February 2010 confirming the property was in the 3<sup>rd</sup> respondent's name and that a subsequent search on 26<sup>th</sup> February 2010 confirmed the same. According to him, they paid a



deposit of Kshs. 11 million following which the title documents were released to their advocates on 10<sup>th</sup> March 2010, including the original indenture of conveyance in the 1<sup>st</sup> Defendant's favour, a mortgage in favour of K-Rep Bank dated 31<sup>st</sup> March 2008, and an Indenture of Re-conveyance of mortgage dated 10<sup>th</sup> March 2009. He stated that they paid the stamp duty of Kshs. 1,280,050 on 20<sup>th</sup> April 2010 based on the government valuer's confirmation of the value of the suit property at Kshs. 32,000,000. According to him, they had been in quiet possession of the suit property since May 2010 without any interruption.

47. It is clear from the above evidence, that whereas the 1<sup>st</sup> and 2<sup>nd</sup> respondents' case was supported by the liquidators of Uganda Airline Holdings Limited and the office of the Land Registrar, the custodian of land records in this country, the appellant's case was only supported by the vendor from whom it purportedly obtained title. The manner in which Waymax acquired its title was itself suspect. While the evidence was that the conveyance between Uganda Airlines Corporation and Waymax was on 24<sup>th</sup> January 2001, it was not until 17<sup>th</sup> July 2007 that it was registered. There was no explanation as to why it took several years before the registration. The manner in which the purchase price was paid by the 3<sup>rd</sup> respondent was similarly not clear. There was no single document produced evidencing the payment of such a large amount of money leave alone an agreement for sale. There was no evidence of payment of stamp duty for that transaction and there was no evidence of payment of rates by Waymax.
48. As authorities show, mere entry in the Land Register that Waymax acquired the land for Kshs 30,000,000 was not sufficient evidence of actual payment in a case where the validity of the title had been brought into question. In this case, it would have been helpful if the appellant had called the person from Waymax, from whom the 3<sup>rd</sup> respondent purportedly acquired the title, to prove that the 3<sup>rd</sup> respondent did pay for the suit property. That person would also have explained how Waymax acquired its title from Uganda Airlines Corporation in light of the evidence that the assets of Uganda Airlines Corporation, including the suit property, were transferred to Uganda Airlines Holdings Limited. As opposed to the 1<sup>st</sup> and 2<sup>nd</sup> respondent who called an official from the office of the liquidator to explain the circumstances under which Uganda Airlines Corporation ceded its rights in the suit property to Uganda Airlines Holdings Corporation (in liquidation), there was no evidence availed from any officer from Uganda Airlines Corporation to support the 3<sup>rd</sup> respondent's evidence as regards the root of the title. In *Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd 1979 (1) SA 621 (A)* it was held that:

“where a party fails to call as his witness as one who is available and able to elucidate the facts, whether the inferences that the party failed to call such a witness because he feared that such evidence would expose facts unfavourable to him should be drawn would depend on the facts peculiar to the case where the question arises.”

49. In *Just Names Properties II CC & Another v Fourie & Others 2007 (3) SA. 1 (W)* the court held that:
- “In the present matter I am not persuaded that an inference against the Defendant should not be drawn from the fact that they did not call Oosthuizen as a witness. There were many issues that called out for her testimony. This was not forthcoming. I was not informed as to what the reasons for her nonappearance was. Strictly speaking, I am not entitled to an explanation, however, at the end of the day, I must draw certain reasonable inferences from such a decision...”
50. In the instant case, there are many issues which required elucidation by either Waymax or Uganda Airlines Corporation. There were gaps in the manner in which the 3<sup>rd</sup> respondent acquired the property from Waymax and whether any consideration passed between the 3<sup>rd</sup> respondent and



Waymax. The omission to call witnesses either from Waymax or Uganda Airlines Corporation and to adduce satisfactory evidence in support of transfers from Uganda Airlines Corporation to Waymax and from Waymax to the 3<sup>rd</sup> respondent, not only raises the need to draw reasonable inferences from their omission, but also means that the 3<sup>rd</sup> respondent did very little to explain the root of the title it claimed to have genuinely acquired.

51. Since the appellant and the 3<sup>rd</sup> respondent's titles were under challenge, the procedure that was followed by the 3<sup>rd</sup> respondent, from whom the appellant purportedly acquired its title, was in law a fact in issue. It is clear that the 3<sup>rd</sup> respondent failed to prove that the suit property was acquired by it lawfully from Waymax. The evidence relating to its acquisition of the suit property left a lot to be desired in a transaction of that magnitude. It was also suspicious that a property which had been acquired for the sum of Kshs 30,000,000 was, seven years later, sold for the sum of Kshs 27,000,000. There was also a discrepancy between the figure in the agreement for sale dated 5<sup>th</sup> March 2020 (Kshs 27,000,000) and the figure in the indenture dated 20<sup>th</sup> April 2010 (Kshs 30,000,000). In *Katende Case* (supra), the DCJ held that:

“There were also other serious omissions and irregularities which reflected fraudulent transaction. A good example is the different figures shown as consideration on purchase price in different documents.”

52. Whereas the appellant was acquiring the suit property from a company, it was unclear why the purchase price was paid into the personal account of the two directors. It was unclear how the directors of the 3<sup>rd</sup> respondent charged the suit property to a bank two months before the 3<sup>rd</sup> respondent acquired the property. Without an explanation, it can only be construed that the directors of the 3<sup>rd</sup> respondent and Waymax colluded in entering into an illegal transaction.
53. The appellant, however, contends that it was a bona fide purchaser without notice of fraud. The Supreme Court, dealing with the issue of who is a bona fide purchaser for value in *Dina Management Ltd v County Government of Mombasa* Petition No 8 (010) of 2021, observed:

“The Black's Law Dictionary 9<sup>th</sup> Edition defines bona fide purchaser 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.”

The Court of Appeal in Uganda in *Katende v Haridar & Company Ltd* [2008] 2 EA 173, defined a bona fide purchaser for value as follows:

“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 the bona fide doctrine he must prove that:

1. he holds a certificate of title;
2. he purchased the property in good faith;
3. he had no knowledge of the fraud;
4. he purchased for valuable consideration;



5. the vendors had apparent valid title;
6. he purchased without notice of any fraud; and
7. he was not party to the fraud.”

54. The Supreme Court continued to state:

“On the same issue, the Court of Appeal in *Samuel Kamere v Lands Registrar, Kajiado Civil Appeal No 28 of 2005 [2015] eKLR* stated as follows:

‘...in order to be considered a bona fide purchaser for value, they must prove; that they acquired a valid and legal title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property...’”

55. This Court in the case of *Mwangi James Njehia & Another v Simon Kamanu [2021] eKLR*, placed the law in its proper perspective when it distinguished *Katende v Haridar & Co. Ltd(supra)*, by holding that:

“We nonetheless wish to state that the law, including case law is not static and the above requirements which were crafted over twenty years ago cannot be said to have been cast in stone. We hold the view that (5) above will need to be revisited and the word “apparent” be done away with altogether.

We say so because in the recent past and even presently, fraudsters have upped their game and we have come across several cases where Title deeds manufactured in the backstreets have, with collusion of officers in land registries, been transplanted at the Lands Office and intending buyers have been duped to believe that such documents are genuine and on that basis they have “purchased” properties which later turn out to belong to other people when the correct documents mysteriously reappear on the register or the genuine owner show up after seeing strangers on their properties waving other instruments of title. It is the prevalence of these incidents that have necessitated the current overhaul and computerization of the registration systems at the Land Registry in Nairobi.”

56. In this case the agreement for sale between the appellant and the 3<sup>rd</sup> respondent stated that:

“A sum of Kenya Shillings Five Hundred Thousand (500,000) to be acknowledged by vendor to enable them make clearance of the title.”

57. What was being cleared about the title was, however, not explained. From that clause it was clear that the appellant was made aware that there was an element of clarification about the title that was required to be done before the transfer could be made to it. From the figure necessary to clear the title, it seemed not to have been a very minor clearance. That ought to have put the appellant on notice that the title may not have been as clean as it had been made to appear and it ought to have dug further into the root of the title. The appellant must also have been aware of the discrepancy between the amount indicated in the agreement of Kshs 27,000,000 and the figure in the indenture of Kshs 30,000,000 but seemed



not to have been bothered by this glaring inconsistency and clearly fraudulent action. In our view, the actions or omissions of the appellant in the transaction did not meet the test in Katende Case (supra) of:

“a purchaser who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly.”

58. In this case, the appellant knew or ought to have known that the 3<sup>rd</sup> respondent’s title to the suit property was suspect and ought to have done thorough due diligence. What due diligence amounts to is a matter of both law and fact and depends on the circumstances of a particular case. Had the appellant done due diligence in light of the prevailing circumstances, it would have realised that the root of the title held by the 3<sup>rd</sup> respondent was suspect. Having not done that, it cannot claim that it was a bona fide purchaser for value without notice.
59. On the issue of non-payment of stamp duty, the issue ought to have been taken at the time that the documents were being produced before the trial court since mere non-payment of stamp duty does not render the documents inadmissible since the court has the power to direct that appropriate stamp duty be paid.
60. Having considered the evidence placed before the trial court and the law, we have no basis for interfering with the learned Judge’s decision. We find no merit in this appeal which we hereby dismiss with costs to the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
61. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 4<sup>TH</sup> DAY OF JULY, 2025.**

**MUMBI NGUGI**

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**JUDGE OF APPEAL**

**F. TUIYOTT**

.....

**JUDGE OF APPEAL**

**F. V. ODUNGA**

.....

**JUDGE OF APPEAL**

I certify that this is the true copy of the original

signed

**DEPUTY REGISTRAR**

