Kibathi t/a Osoro Chege Kibathi & Co Advocates v Musti Investments Ltd (Civil Appeal E134 of 2022) [2024] KECA 270 (KLR) (8 March 2024) (Judgment)

Neutral citation: [2024] KECA 270 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E134 OF 2022

MSA MAKHANDIA, K M'INOTI & M NGUGI, JJA

MARCH 8, 2024

BETWEEN

MOSES KIBATHI T/A OSORO CHEGE KIBATHI & CO ADVOCATES ..... APPELLANT

AND

MUSTI INVESTMENTS LTD ..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Majanja, J.) dated 31st March 2020 in HCCC No. 400 of 2017 (OS))

JUDGMENT

1. At all material times the respondent, Musti Investments Ltd., was the registered owner of some seventeen (17) properties in Kajiado County which it had offered for sale to seventeen purchasers who were being financed by Equity Bank (Kenya) Ltd. ("the Bank"). The purchasers were also employees of the Bank and their particulars, the properties they were buying, and the agreed purchase prices were as follows:

    1. Benson Mbuvi Mutambai, Kajiado/Kitengela/79865, Kshs 1, 450,000;
    2. Anthony Kamau Waithaka, Kajiado/Kitengela/81696, Kshs 1,500,000;
    3. Louise Kemunto Araka, Kajiado/Kitengela/81686 and 81687, Kshs 3,000,000;
    4. Daniel Kisemei Kirrinkol, Kajiado/Kaputiei North/83150, Kshs 950,000;
    5. Misheck Ngunjiri Gathiti, Kajiado/Kitengela/81708, Kshs 1,500,000;
    6. Moses Mwaniki Waweru, Kajiado/Kitengela/81659, Kshs 1,500,000;
    7. Charles Mugecha Maina, Kajiado/Kitengela/81712, Kshs 1,500,000;

8. Wycliff Cheruiyot Langat, Kajiado/Kitengela/81679, Kshs 1,500, 000;

9. George Mutiso Mutua, Kajiado/Kitengela/81714, Kshs 1,500,000;

10. Michael Brian Njenga, Kajiado/Kitengela/81657, Kshs 1,500,000;

11. Samuel Thong'o Kamau, Kajiado/Kitengela/81654, Kshs 1,500,000;

12. Adan Adou Kinyua, Kajiado/Kitengela/81656, Kshs 1,500,000;

13. Doreen Nyanbura Nga'ng'a, Kajiado/Kitengela/81664, Kshs 1,500,000;

14. Kipkurui Bosuben Dickson, Kajiado/Kitengela/79868, Kshs 1,500,000;

15. Charity Nyambura Ngubiru, Kajiado/Kitengela/81680, Kshs 1,200,000;

16. Rose Nanjala Wekesa, Kajiado/Kitengela/81666, Kshs 1,500,000; and

17. Peter Muhia Macharia, Kajiado/Kitengela/81658, Kshs 1,500,000.

2. On 15th, 20th, 22nd, and 27th May 2015 and on 4th June 2015, the appellant, Osoro Chege Kibathi & Company Advocates, who were acting for the Bank, gave to the respondent professional undertaking to pay to the respondent the purchase prices upon registration of the properties in the names of the purchasers. The 17 standard undertakings were worded as follows, in the material part of the letters of undertaking:

> " ...We act for Equity Bank (Kenya) Ltd and are informed that you are the vendor of the parcel of land known as (particulars of the land) which the borrower (identified by name) is using to secure the loan facility.
>
> We have instructions to issue an undertaking on behalf of Equity Bank (Kenya) Ltd for payment of Kenya Shillings (the agreed purchase price) upon registration of the transfer in favour of the borrower and a legal charge in favour of the bank.
>
> Kindly release the original title deed, consent to transfer, transfer in triplicate with affixed photos, copies of PIN and ID, certificate of incorporation and any other document the borrower may need to register the transfer in his/her favour and the legal charge in favour of the bank..."
>
> The total amount covered by the 17 undertakings was Kshs. 26,100,000.00."

3. It is common ground that based on the undertakings, the respondent released to the appellant the relevant documents and on diverse dates in the months of May and June 2015, the 17 properties were successfully registered in the names of the 17 purchasers. On 29th July 2015, the respondent requested the appellant to honour its professional undertaking and pay the sum of Kshs 26,100,000. After the appellant failed to honour the undertaking, on 28th September 2017, the respondent took out in the High Court an originating summons under Order 52 rule 7(b) of the Civil Procedure Rules against the appellant for enforcement of the professional undertaking.

4. The appellant opposed the summons vide a replying affidavit sworn on 26th April 2018 by Mr. Kariuki King'ori, the Bank's legal services manager. The essence of the response was that after conducting an audit of the loans, the Bank discovered that some of the employees-purchasers, with the collusion of the respondent and valuers, were involved in a fraudulent scheme whereby the value of the sold properties was inflated. Upon the Bank paying the inflated purchase price to the respondent, the amount over and above the true value of the property was paid back to the purchasers and shared with the respondent.

Mr. King'ori further deposed that after conducting independent valuation of some select properties, the Bank discovered that the open market value of 13 properties sold for Kshs 1, 500,000 was only Kshs 500,000 whilst that of 2 of the properties was only Kshs 450,000. This led to summary dismissal of the employees who were involved in the fraud.

5. As further evidence of the fraud alleged by the Bank, Mr. King'ori averred that the purchasers paid stamp duty on the properties at rates that were far below the agreed purchase price, which was also a violation of the Stamp Duty Act. It was the appellant's further plea that honouring the professional undertaking in the circumstances would constitute a violation of the *Banking Act*. The appellant pleaded the particulars of fraud and illegality that it alleged against the respondent and the purchasers, including collusion to overstate the purchase price so as to defraud the Bank; knowingly or recklessly stating inflated prices for the properties while knowing the true value was significantly lower; concealment or nondisclosure of material facts; knowingly paying lower stamp duty than the indicated purchase prices and violation of the *Stamp Duty Act* and the *Banking Act*.

6. Lastly, it was the Bank's position that the lending contracts it had entered into with the purchasers and on the basis of which the professional undertakings were given were unenforceable because they were tainted by fraud and illegality.

7. In a supplementary affidavit sworn on 15th May 2015 by Mr. Stephen Muturi Ngugi on behalf of the respondent, the respondent denied the fraud and illegality alleged by the appellant and averred that the values of the suit properties as indicated in the agreements for sale were determined by a firm of valuers, Messrs. Lloyd Masika, who were appointed by the Bank rather than by the respondent and further, that the stamp duty was assessed and inserted by the appellant rather than by the respondent. The respondent maintained that under the agreements for sale, the purchase price was payable within seven days of the registration of the titles in the purchasers' names and that the appellant had given unequivocal professional undertaking which it was bound to honour.

8. By a preliminary ruling dated 1st February 2019, Tuiyott, J. (as he then was) directed that in light of the allegations of fraud and illegality, the summons should be heard by viva voce evidence. The learned judge further identified the issues for determination in the summons to be:

    i. whether the transactions upon which the professional undertaking were given were tainted by fraud;

    ii. if so, whether the respondent was party to the fraud;

    iii. if so, whether the professional undertakings were vitiated by fraud; and

    iv. costs of the suit.

9. The summons was ultimately heard by Majanja J. with the appellant calling three witnesses and the respondent one witness. By a judgment dated 31st March 2020, which is impugned in this appeal, the learned judge found that the respondent was not involved in any fraud or collusion as regards the purchase of its properties by the 17 employees of the Bank and further, that the respondent was not implicated in the alleged violation of the *Stamp Duty Act* and the *Banking Act*. Accordingly, the learned judge allowed the summons and directed the appellant to honour the 17 professional undertakings within 30 days from the date of the judgment. The respondent was also awarded costs of the suit.

10. The appellant was aggrieved and lodged a notice of appeal on 2nd April 2020, followed by a memorandum of appeal founded on five grounds of appeal, which the appellant agrees raises only two issues, namely, whether the trial court erred by failing to hold that the appellant adequately proved

collusion and fraud orchestrated by the respondent, and whether the court erred by failing to hold that the professional undertakings were vitiated by fraud or illegality.

11. Relying on written submissions dated 4th October 2022 which were highlighted by its learned counsel, Mr. Ohaga, SC, the appellant submitted, as regards the first issue, that it adequately proved collusion and fraud on the part of the respondent by the inconsistent valuation reports as well as the appellant's investigation report. Using the example of Benson Mbuvi Mutambai who was purchasing the property known as Kajiado/Kitengela/79865, the appellant submitted that in the sale agreement, the purchase price was indicated as 1,500,000 while in the transfer document the consideration was not indicated but the property was valued for purposes of stamp duty at Kshs 700,000, thus making the appellant pay twice the real value of the property.

12. Counsel submitted that the respondent could not explain these discrepancies and that the trial court erred by attributing the inconsistencies to negligence of the initial valuer, which was not pleaded and was outside its remit. He relied on Chumo Arap Songok v. David Kibiego Rotich [2006] eKLR in support of the submission that a court can only pronounce itself on pleaded issues. He added that although valuation was not a precise science, the difference in the valuations in this case were over 100%, which was indicative of fraud.

13. Counsel further faulted the trial court for holding that the Bank's investigation report was hearsay because the employees who were interviewed for the report, were not called as witnesses. He contended that the court had misapplied Sabrimanian v. The Public Prosecutor [1956] WLR 965, which was not applicable in this case because its context was a criminal prosecution and the present appellant merely sought to rely on the statements in question to prove that they were made, not their veracity. Relying on Sakar's Law of Evidence (15th Ed. 1999, Vol 1), counsel submitted that the investigation report was admissible as direct and primary evidence because it was a record of what the investigator as a qualified expert observed and found.

14. Lastly, on the first issue, counsel submitted that the appellant proved fraud on the part of the respondent by adducing evidence that the respondent had deposited money in the accounts of some employees of the Bank. It was contended that the respondent did not explain the circumstances under which the payments were made, which was indicative of a larger fraudulent scheme. We were urged not to turn a blind eye to that glaring evidence of fraud.

15. Turning to the second issue, counsel submitted that the professional undertakings were not enforceable because they were tainted by fraud and were based on violation of statutes. Citing Mistry Amar Singh v. Serrano Wofunira Kulubya [1963] EA 406, counsel submitted that once brought to its attention, the court will not enforce an illegal contract. While accepting that the standard of proof in fraud is beyond a balance of probabilities but below proof beyond reasonable doubt, counsel argued that by its nature, fraud is covert, with seldom any direct evidence, and therefore the court must take into account all suspicions and irregularities surrounding the transactions. He submitted that the trial court erred by adopting a higher standard of proof, and that the evidence adduced proved beyond a balance of probabilities that the respondent perpetrated a fraudulent scheme in the transactions.

16. Turning to enforcement of agreements in violation of statutes, counsel cited the decision of this Court in Kenya Pipeline Co. Ltd v. Glencore Energy (UK) Ltd. [2015] eKLR and submitted that the court cannot come to the aid of a party who has violated a statute. It was submitted that the respondent had violated the Stamp Duty Act and that enforcement of the undertaking would also entail violation of the *Banking Act*. Citing section 10 of the *Stamp Duty Act*, counsel submitted that all facts and circumstances on stamp duty must be fully and truthfully disclosed in the instrument on which stamp duty is chargeable. He added that it was a criminal offence on the part of any person responsible for

execution of such an instrument to do so without full and truthful disclosure. It was the appellant's contention that the failure to indicate the consideration for the properties in the instruments of transfer was in violation of section 10 of the *Stamp Duty Act* and that rendered the professional undertakings unenforceable.

17. As regards the violation of the *Banking Act*, the appellant submitted that section 11 thereof prohibits the Bank from advancing a facility, incurring any liability or conducting its business in a fraudulent or reckless manner. It was contended that honouring the professional undertakings would constitute aiding and abetting an illegality in violation of the Act. The decision in Njogu & Co Advocates v. National Bank of Kenya Ltd. [2016] eKLR was deployed in support of the view that a contract in contravention of a statute is void ab initio and unenforceable while those in Takhar v. Gracefield Development Ltd & Others [2019] UKSc 13 and Holman v. Johnson [1775-1802] All ER 98 were cited in support of the contention that a defrauder cannot benefit from the passivity or lack of diligence on the part of his opponent, because the deception is really on the rule of law.

18. For the above reasons, the appellant urged the Court to allow the appeal with costs.

19. The respondent, who was represented by Mr. Kamau, learned counsel, opposed the appeal, relying on written submissions dated 14th November 2022. The respondent did not address the issues in the order they were raised and addressed by the appellant. We shall, however, strive to fit the response within the approach adopted by the appellant.

20. On fraud and its proof, the respondent submitted that the appellant did not adduce any evidence to prove fraud on its part or collusion between itself and the purchasers to defraud the Bank. It was contended that under sections 107, 109 and 112 of the *Evidence Act*, the onus was on the appellant to prove fraud by evidence to the required standard of above a balance of probabilities, rather than by conjecture, inference or suspicion. In support of the submission, counsel relied on the decisions of this

    Court in Vijay v. Nansingh Madhusingh Darbar & Another [2000] eKLR and Kinyanjui Kamau v. George Kamau [2015] eKLR.

21. The respondent invited the Court to ignore the appellant's contention that previously, some two employees of the Bank had received money from the respondent, arguing that it had no nexus or relevance to the present case as there was no evidence of any of the 17 purchasers who were covered by the professional undertaking having received any money from the respondent.

22. On the valuation reports, the respondent submitted that there was no requirement to plead negligence and that the learned judge could properly conclude that the variations in the valuation reports could have been the result of recklessness or negligence. It was also contended that the learned judge could properly raise and decide the issue suo motu.

23. As regards the investigation report, the respondent submitted that the trial court did not err in holding that it was inadmissible hearsay because the appellant wanted the courts to rely on the truth of the contents of the report. The respondent maintained that the trial court had properly interpreted and applied the judgment in Sabrimanian v. The Public Prosecutor (supra), noting that the principle expounded therein on admissibility of evidence applied to both criminal and civil cases. The respondent cited the case of Prime Bank v. Joseph Ogora Esige [2005] eKLR, where the decision in Sabrimanian was applied in a civil case.

24. UMoving on to illegality and the violation of the *Stamp Duty Act* and the *Banking Act*, the respondent submitted that the trial court correctly held that a court will not assist a party to fraud or illegality to benefit from his fraudulent or illegal actions, but in this case the appellant did not adduce any evidence to show that the respondent violated the two statutes. If anything, it was submitted, it was the appellant

and the Bank who were in violation and yet were seeking to benefit from their violations by refusing to honour the professional undertaking. The respondent further submitted that it was not aware of the alleged infractions of the *Stamp Duty Act* and that the same were committed by the appellant, who was responsible for preparing, completing, endorsing, and presenting the stamp duty forms and ultimately paying the stamp duty and registration fees. In support of these submissions the appellant relied on Kenya Pipeline Co. Ltd v. Glencore Energy (UK) Ltd. (supra) and Githunguri v. Jimba Credit Corporation Ltd [1988] KLR 825.

25. On the basis of the above submissions the respondent urged the Court to dismiss the appeal with costs.

26. As we turn to consider the merits of this appeal, we remind ourselves of our duty as a first appellate court to appraise and re- evaluate the evidence so as to reach our own independent conclusions, but always bearing in mind that, unlike the trial court, we do not have the benefit of having seen or heard the witnesses as they testified (See Seascapes Ltd v. Development Finance Co of Kenya Ltd. [2009] KLR, 384).

27. The fraud that the appellant relies on as vitiating the professional undertaking is firstly, the contention that the respondent and the purchasers colluded in a fraudulent scheme to overvalue the properties sold and that once the Bank paid the purchase price to the respondent, the moneys over and above the true value of the properties was shared between the respondent and the purchaser. To prove the fraud it alleged, the appellant relied on the disparities between the value of the properties and the evidence of its three witnesses. The first witness, Mr. Kariuki King'ori, the Bank's manager, legal services, confirmed that the valuation on which the purchase prices were based was conducted by Messrs.

28. Lloyd Masika Valuers, who were instructed by the Bank, rather than by the respondent. He admitted that the audit report on which the allegations of fraud were based did not involve any of the 17 purchasers in respect of whom the appellant had given professional undertakings.

29. The second witness, Mr. Elijah Matheri, was a fraud investigator from the Bank. He prepared the report dated 11th June 2015 after interviewing 26 employees of the Bank. He found that 12 of those employees were involved in the fraud. He however did not interview the valuers who prepared the valuation reports on the basis of which the purchase price was determined. None of the purchasers in this case were among the 12 employees that the witness found to have been involved in the fraud. In addition, none of the persons interviewed by Mr. Matheri were called as witnesses, and that led the learned judge to reject his report as hearsay under Sabrimanian v. The Public Prosecutor (supra).

30. Secondly, the appellant relies on the huge difference between the valuations conducted by Lloyd Masika and the valuations conducted subsequently by two firms, Acumen Valuers and Accurate Valuers to conclude that the transactions between the Bank and the purchasers were marred in fraud. Mr. Daniel Muriuki Kibugi of Acumen Valuers, who was the last witness for the appellant, prepared the subsequent valuation report. He did not interview the valuer from Llyod Masika who conducted the first valuation, but he concluded that the properties were overvalued. As we have also noted, even the expert witness did not interview the first valuers.

31. It is trite law that no court will allow a party to benefit from his fraud. In Lazarus Estates Ltd v. Beasley [1956] 1 All ER 341, Lord Denning stated the principle as follows:

> "No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless

it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever."

32. In this appeal, and as correctly noted by the trial judge, the fraud that the appellant relies upon was distinctly pleaded. The question is whether that fraud was proved to the required standard. The standard of proof of fraud in civil disputes is the intermediate one, not as high as beyond reasonable doubt, but higher than on a balance of probabilities. In R. G. Patel v. Lalji Makanji [1957] EA 314, the former Court of Appeal for Eastern Africa explained the standard thus:

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

33. Further, in Richard Akwesera Onditi v. Kenya Commercial Finance Co Ltd [2010] eKLR, this Court, in rejecting what it found to be bare allegations regarding fraud, stated thus:

> " ...fraud and collusion are serious accusations and require a very high standard of proof, certainly above mere balance of probability and the bare allegations put forward by the appellant do not therefore avail him."

34. This Court has also rejected the notion that a party can prove fraud to the required standard purely from inference. In his concurring judgment in Vijay Morjaria v. Nansingh Madhusingh Darbar & Another [2000] eKLR, Tunoi, JA. (as he then was) stated as follows on this point:

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

(See also Kinyanjui Kamau v. George Kamau Njoroge [2015] eKLR).

35. We respectfully agreed with that view. If fraud were provable on a balance of probabilities, may be then it could be proved by inference. Where the court has to have assurance on a level that is above a balance of probabilities, we agree that fraud cannot be merely proved by inference. As regards the standard of proof, we are not persuaded that the learned judge relied on a standard higher than the accepted one.

36. The evidence which the appellant adduced in support of the alleged fraud did not involve any of the 17 purchasers. Indeed, the appellant's expert witness did not interview any of the 17 purchasers. The appellant was simply asking the trial court to conclude that there was fraud in the 17 transactions merely because some of the Bank's employees had been found to have engaged in fraud in some other instances. That, in our view, the trial court properly refused to do.

37. It was also alleged that the respondent was involved in fraud because it had made some payments to two employees of the Bank (not among the 17 purchasers). The respondent's witness explained the reason for the payment and the trial judge, as the best judge of credibility of witnesses before him, believed the explanation. We note that the respondent was not confronted by his accusers, the persons he was alleged to have fraudulently paid. The learned judge was obliged to accept one piece of evidence over the other, and we can only overturn him on solid and compelling grounds, which we do not see in this appeal.

38. Regarding the differences in the valuation report, we find major gaps, the blame for which lies squarely on the appellant. The first valuation report on which the purchase prices were based was prepared by a firm of valuers appointed and instructed by the Bank rather than by the appellant. This valuer was not called as a witness to shed light on how he arrived at the purchase prices. In fact, Acumen Valuers

who impeached the first valuation report, did not interview the maker, nor was he called as a witness. The court was therefore being asked to accept the Acumen report without the benefit of hearing the first valuer. In these circumstances, we are satisfied that the learned judge did not err in declining to find that the differences in the valuation reports constituted proof of fraud. We do not therefore find any merit in the argument that the learned judge determined unpleaded issues.

39. On the admissibility of the report of the expert witness, we are satisfied that the appellant was relying upon that report to prove that the transactions in question were fraudulent, based on what he had been told by the persons whom he had interviewed and who were not called as witnesses in court. Accepting and relying on the report in those circumstances would have been contrary to the rule in Sabrimanian v. The Public Prosecutor (supra), which posits that:

> " Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made."

40. The report was offered, not merely to prove that the statements were made. But even if the statements were admitted as an exception to the hearsay rule to prove that they were made, the appellant was still obliged to adduce acceptable evidence of fraud, which he did not do.

41. Nor do we agree with the appellant that the rule in Sabrimanian v. The Public Prosecutor (supra) is restricted to criminal prosecutions. By dint of section 2(1) of the Law of *Evidence Act*, cap 80, that Act is applicable to all judicial proceedings in Kenya, save Kadhis Courts or arbitral proceedings. Accordingly, the statement of the law on admissibility of hearsay evidence applies equally to civil cases, the primary difference being the standard of proof required in criminal and civil cases. Accordingly, we are satisfied that the trial court did not misapply the rule in Sabrimanian v. The Public Prosecutor (supra).

42. The appellant further contends, as an alternative argument, that the learned judge erred by failing to act on the report of Mr. Elijah Matheri, yet he was an expert witness. In the appellant's view, that report was entitled to more weight, coming, as it did, from an expert. As this Court has explained, the evidence of an expert witness in a case cannot be considered in isolation. It has to be considered in the totality of the evidence because the court is not bound to accept evidence merely because it is expert evidence. In Ndolo v. Ndolo [2008] 1 KLR (G&F) 742, at P. 751 this Court held as follows:

> " [B]ut as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say-
>
> > " because this is the evidence of an expert, I believe it." That, we think, is the proper direction which a court dealing with the opinion of an expert or experts must give itself and the assessors when it is necessary to direct the assessors on such evidence. Of course, where the expert who is properly qualified in his field gives an opinion and gives reasons upon which his opinion is based and there is no other evidence in conflict with such opinion, we cannot see any basis upon which such opinion could ever be rejected. <u>But if a court is satisfied on good and cogent grounds(s) that the opinion though it be that of an expert, is not soundly based, then a court is not only entitled but would be under a duty, to reject it</u>" (Emphasis added).

43. In view of what we have stated regarding the failure to interview the original valuer and the purchasers, and the nature and quality of the evidence on record regarding the alleged fraud and collusion, we are not persuaded that the learned judge erred in the manner in which he treated the expert evidence.

44. Turning to the contention that the professional undertakings were not enforceable because they were illegal and in violation of the *Stamp Duty Act* and the *Banking Act*, it is the appellant's contention that the instruments of transfer in the impugned transactions did not fully and truthfully disclose all the material particulars, especially the stamp duty chargeable, which was a criminal offence under section 10 of the *Stamp Duty Act*. In particular, the appellant argues that the transfers did not indicate the consideration and further, the stamp duty paid was for purchase prices far less than the agreed purchase prices between the Bank and the purchasers. The violation of section 11 of the *Banking Act* alleged by the appellant is a corollary to the violation of the *Stamp Duty Act*, the contention being that violation of the *Stamp Duty Act* necessarily triggers Section 11 of the *Banking Act*, which prohibits banks from advancing facilities or incurring any liability in a reckless manner. Honouring the professional undertakings would thus amount to a violation of the *Banking Act*.

45. The record is crystal clear that it was the appellant, rather than the respondent or the purchasers, who was responsible for completing the transfer forms and paying the stamp duty. It is the appellant who certified the transfers, failed to disclose the consideration, and paid the stamp duty on a value different from the agreed purchase price. Before the trial court, the appellant elected not to testify, and therefore he did not come forward to explain himself as the obvious perpetrator of the violations that his client, the Bank, seeks to rely on.

46. Our reading of the decisions in Kenya Pipeline Co. Ltd v. Glencore Energy (UK) Ltd (supra), Lazarus Estates Ltd v. Beasley (supra), among other decisions on fraud and illegalities, leaves no doubt that the law seeks to deny a perpetrator of fraud or an illegality from benefitting from his fraud or illegal conduct. In this case, it was the appellant who was squarely responsible for the violations which he now seeks to rely on to avoid honouring the professional undertakings. Once more, we are satisfied that the learned judge did not err in his interpretation and application of the law.

47. For the foregoing reasons, we do not find any merit in this appeal. We uphold the judgment of the trial court and award costs of the appeal to the respondent. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MARCH 2024.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

MUMBI NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR