



**Equity Bank Kenya Limited v Thiongo & 4 others (Civil Appeal
168 of 2019) [2023] KECA 558 (KLR) (12 May 2023) (Judgment)**

Neutral citation: [2023] KECA 558 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 168 OF 2019
MSA MAKHANDIA, F SICHALE & HA OMONDI, JJA
MAY 12, 2023**

BETWEEN

EQUITY BANK KENYA LIMITED APPELLANT

AND

PENNINAH NJERI THIONGO 1ST RESPONDENT

LUCY NDUTA THIONGO 2ND RESPONDENT

ROSE NJOKI KENJU 3RD RESPONDENT

THE LAND REGISTRAR, KIAMBU COUNTY 4TH RESPONDENT

SUSAN CAROLINE GATHIGIA WERU 5TH RESPONDENT

(An appeal against the judgment and decree of the High Court of Kenya at Nairobi (L.N. Mbugua, J) dated 3rd November, 2017 in Environment and Land Cause No. 902 of 2014)

JUDGMENT

1. The appeal herein arises from the judgment of L.N. Mbugua, J delivered on 3rd November, 2017.
2. The appellant, Equity Bank Kenya Limited named Penninah Njeri Thiongo (Penninah), Lucy Nduta Thiongo, Rose Njoki Kenju, the Land Registrar, Kiambu County and Susan Caroline Gathigia Weru as the 1st, 2nd, 3rd, 4th and 5th respondents respectively.
3. A brief background to this appeal is that Penninah filed suit (the subject of this appeal) against Lucy Nduta Thiongo (her daughter), Rose Njoki Kenju (her niece), Equity Bank Kenya Limited (the appellant) and the Land Registrar, Kiambu County (the then 1st, 2nd, 3rd & 4th defendants respectively) vide a plaint dated 2nd July, 2014. The gist of Penninah's complaint was that her daughter (Lucy) and her niece (Rose) caused her property known as Kiambaa/Thimbigua/4662 (the mother title) to be sub-divided into 4 portions namely Kiambaa/Thimbigua/5144, Kiambaa/



Thimbigua/5145, Kiambaa/Thimbigua/5146 and Kiambaa/Thimbigua 5147; that on 16th April, 2009, Lucy fraudulently transferred Kiambaa/Thimbigua/5144 into her name and on 16th March, 2009, Rose also fraudulently transferred Kiambaa/Thimbigua/5145 into her name; that on 30th June, 2009, Kiambaa/Thimbigua/5144 which was then registered in Lucy's name was transferred to Rose and these two properties namely, Kiambaa/Thimbigua/5144 and Kiambaa/Thimbigua/5145 in the name of Lucy & Rose respectively were amalgamated to be Kiambaa/Thimbigua/5317 (the suit property) in the name of Rose. The suit property having been transferred to Rose the latter used the title of the suit property as security for various loans obtained from the appellant.

Subsequently, Rose sold the suit property to Susan Caroline Gathigia Weru (the 5th respondent herein) who procured a loan of Kshs 40.5 million from the appellant herein, the title of the suit property being charged as security for the loan. As Penninah alleged fraud against Lucy and Rose in the suit she sought the following orders:

- i. A declaration that the consent to transfer and eventual transfer of all that property being Title No. Kiambaa/Thimbigua/5317 into the name of the 2nd defendant was unlawfully, fraudulently and illegally obtained by the 1 and 2nd defendant.
 - ii. An Order that the 3rd defendant surrenders the original Title of all that property being Title No. Kiambaa/Thimbigua/5317 together with executed discharge of charges to the 4th defendant for purposes of discharge of charges and nullification and/or cancellation of the Title Deed in the name of the 2nd defendant within fourteen (14) days from the date of judgment.
 - iii. An Order that the 4th defendant proceeds to nullify and/or cancel Title No. Kiambaa/Thimbigua/5317 and have the same restored to Title No. Kiambaa/Thimbigua/5144 and Title No. Kiambaa/Thimbigua/5145 respectively in the name of the plaintiff.
 - iv. Cost and interest of this suit.
 - v. Any other relief that this Honourable Court may deem fit and just to grant.”
4. In the impugned judgment, the court noted that Lucy, Rose, as well as the appellant herein and the Land Registrar, Kiambu County being the 1st, 2nd, 3rd and 4th defendants respectively did not file their statements of defence. However, a perusal of the record shows that the appellant (the 3rd defendant therein) filed its statement of defence dated 8th December, 2014. It was therefore erroneous for the court to have stated that the appellant did not file its statement of defence. In its defence, the appellant contended that its first encounter with the suit property was on or around 7th June, 2010 when the suit property was charged by Rose to the appellant for a sum of Kshs 9.5 million. Secondly, the appellant contended that it no longer has any relationship with Rose who had since sold the suit property to Susan, the 5th respondent herein. Indeed, one Gerald Gakiri, a Credit Manager of the appellant testified on behalf of the appellant and adopted his statement of 21st July, 2016 as his evidence. It was his evidence that before the charge in favour of the appellant was registered, an official search confirmed that Rose was the registered owner of the suit property; that the appellant, over a period of time advanced Rose the following sums of money:
 1. Kshs 9.5 million on or about 7th June, 2010;
 2. Kshs 1.3 million on 25th February, 2011 and



3. Kshs 12.9 million on 13th June, 2013, and all on the strength of the suit property as collateral.
5. That later, Rose sold the suit property to Wells Investment Limited (a company in which the 5th respondent was a director) and it offered a facility of Kshs 40.5 million towards the purchase of the suit property, again on the strength of the suit property as collateral.
6. In her judgment of 3rd January, 2017, Mbugua, J. found in favour of Penninah and made the following declarations: “
 1. A declaration is hereby issued that the plaintiff is the legal owner of Land Parcel Title No. Kiambaa/ Thimbigua 5317.
 2. declaration is hereby issued that the transfer of Title No. Kiambaa /Thimbigua /5144 from plaintiff to 1st defendant was illegal.
 3. A declaration is hereby issued that the transfer of Title No. Kiambaa /Thimbigua/5145 from plaintiff to 2nd defendant was illegal
 4. A declaration that the Amalgamation of parcels of Land No. Kiambaa /Thimbigua/5144 and Kiambaa /Thimbigua /5145 into Kiambaa /Thimbigua /5317 in the name of 2nd defendant is illegal.
 5. A declaration is hereby issued that the transfer of land parcel No. Kiambaa Thimbigua/5317 by 2nd defendant to Susan Caroline is illegal.
 6. Any encumbrances including charges, executed over the Land Parcel No. Kiambaa/ Thimbigua/ 5317 are hereby declared as illegal and are hereby nullified.
 7. An order is hereby issued to 4th defendant to forthwith cancel Title No. Kiambaa/Thimbigua 5317 and in place of it, to restore the Title Nos. Kiambaa/Thimbigua /5144 and Kiambaa / Thimbigua /5145 in the names of the plaintiff.
 8. The plaintiff is awarded costs of the suit to be borne by 1st, 2nd and 3d defendants herein”.
7. The appellant was dissatisfied with the said outcome thus provoking the instant appeal.
9. On 25th July, 2022 when this appeal came up for hearing, learned counsel Mr. Kivindyo appeared for the appellant and learned counsel Mr. Njuguna holding brief for Mr. Ochieng Oduol appeared for the 5th respondent. There was no representation for the 1st, 2nd and 3rd respondents in spite of service of a hearing notice upon them on 4th July, 2022. The Attorney General for the 4th respondent was however not served with the hearing notice. Be that as it may, we deemed it fit to proceed with the hearing of the appeal notwithstanding the lack of service on the part of the 4th respondent given the fact that the 4th respondent did not participate in the trial at the High Court.
10. In the Memorandum of Appeal dated 26th April, 2019, the appellant listed 27 grounds of appeal. Fortunately, Mr. Kivindyo for the appellant condensed the 27 grounds into three. Firstly, the appellant contended that it had registered encumbrances on the title vide a charge dated 4th July, 2014 (the same date the title was registered in the name of Susan Caroline Gathigia Weru, the 5th respondent) and that although in the impugned judgment the court made adverse orders in respect of the suit property, the registered proprietor (Susan) was not a party in the proceedings at the trial court. To this end, the learned trial judge was faulted for making adverse orders against Susan, a party who did not take part in the proceedings culminating in the impugned judgment.



11. Secondly, it was contended that Penninah had failed to prove that dealings in respect of the suit property were fraudulent.
12. Thirdly, it was contended that the appellant was not party to the fraud, if at all, as it was merely a financier of the sale between Rose and Susan, the latter being a bona fide purchaser for value of the suit property.
13. Mr. Njuguna (for the 5th respondent) in support of the appeal wholly associated himself with the appellant's submissions.
14. In Penninah's written submissions dated 1st December, 2022 in opposition to the appeal, it was contended that the appellant was a party to the illegalities and fraud in the acquisition and charging of the suit property; that Penninah had no knowledge of the transfer of Plot Numbers Kiambaa/Thimbigua/5144 and Kiambaa/Thimbigua/5145 to Lucy and Rose respectively; that the summons to Enter Appearance in the suit, the subject of this appeal was served upon the appellant on 12th August, 2014, who, inspite of service of the summons, disbursed the sums of money borrowed by the 5th respondent on 21st November 2014; that Penninah never ever appeared before any Land Control Board for purposes of obtaining consent to transfer her plots to either Lucy and/or Rose (the two did not defend the suit filed in the High Court); that in the absence of consent of the local Land Control Board as per section 6(1) of the *Land Control Act*, the division of Kiambaa/Thimbigua/4662 into Kiambaa/Thimbigua/5144, 5145, 5146 and 5317 and the transfer of Kiambaa/Thimbigua/5144 and Kiambaa/Thimbigua/5145 to Lucy and Rose respectively and the subsequent amalgamation of Kiambaa/Thimbigua/5144 with Kimbaa/Thimbigua/5145 to create the suit property in the name of Rose as well as the charging of the suit property to the appellant was all a nullity; that Article 40 of *the Constitution* of Kenya (2010) and section 20 of the *Land Registration Act* does not protect title obtained illegally and through fraud. Penninah prayed that the appeal be dismissed with costs.
15. We have considered the record, the rival oral and written submissions, the authorities cited and the law. Our position as a first appellate court is as set out in *Selle vs. Associated Motor Boat Co. of Kenya & others* [1968] EA 123 wherein it was stated:

“ An appeal to this court from a trial by the High Court is by way of a 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 witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. (*Abdul Hameed Saif -vs- Ali Mohamed Sholan* (1955), 22 EACA 270.”
16. The background facts leading to the institution of the suit by Penninah are fairly straight forward. It is not in dispute that Penninah was the owner of the title Kiambaa/Thimbigua/4662 (the mother title). It is also not in dispute that Lucy and Rose caused the mother title to be sub-divided into 4 portions namely: Kiambaa/Thimbigua/5144, 5145, 5146 & 5147. These 4 sub-divisions were initially registered in Penninah's name. On 16th March, 2009 and 16th April, 2009, title numbers Kiambaa/Thimbigua/5144 and Kiambaa/Thimbigua/5145 were transferred to Lucy and Rose respectively. On 30th June, 2009, Lucy transferred Kiambaa/Thimbigua/5144 to Rose; that on or about 30th June, 2009, the title in the name of Lucy and the title in the name of Rose were amalgamated to become Kiambaa/Thimbigua/5317 (the suit property). It is also not in dispute that Lucy and Rose had promised to



build shops for Penninah after the sub-divisions. This comes out clearly from the plaint dated 2nd July, 2014 filed by Penninah, wherein she averred in paragraph 19 as follows:

“The plaintiff contend (*sic*) that the 1st and 2nd defendant caused her semi-permanent shops to be demolished and thereafter built a shop wherefrom the plaintiff has not received a single cents(*sic*) out of it’s operation since the year 2009 contrary to the agreement between the plaintiff and the 1st and 2nd defendant”.

17. Additionally, the fact of an agreement between the trio is reiterated in Penninah’s witness statement appearing at pages 16 – 18 of the record of appeal wherein she stated, in part:

“I Penninah Njeri Thiongo, being the plaintiff herein do hereby state as follows:

That am the biological mother to the 1st defendant with the 2nd defendant being my niece. Sometimes in early 2009, the 1st and 2nd defendant (*sic*) approached me with an offer to built (*sic*) for me a shop within my property being No's. Kiambaa/Thimbigua/4662 (hereinafter referred to as "the mother property") measuring approximately 0.5000 Hectares or thereabout whereat there was a shop built temporary and my house. As there was need to provide an access road to the shop, I agreed that the mother property be sub-divided into four (4) portions as long as all the titles will be in my name...” (emphasis added).

She proceeded to state:

“I stress that at no time whatsoever did I consent to the 1st and 2nd defendant transferring to themselves my properties. It has come to my late attention that the 2nd defendant has used her illegally acquired property as security to various loan facilities with the 3rd defendant. The 1st and 2nd defendant have further never shared the proceeds from the shop with me as initially agreed. (emphasis ours). I have applied for a caution as against Title No. Kiambaa/Thimbigua/5137 (*sic*) to safeguard my interest thereof.”

18. Further, the letter of 5th November, 2012 addressed to her daughter and niece by her then counsel is instructive. It states:

“Re: Title Number Kiambaa/Thimbigua/5317 Instructing Client: Penninah Njeri Thiongo

The above refers.

We have been instructed by our above named client to write to and address you as follows:

That our client was registered proprietor of land parcel number Kiambaa/Thimbigua/4662 which you manipulated her into signing documents on the pretext that you will build her a house. That if at all she executed any document, which is denied, then it was under misinformation and misrepresentation of facts. (emphasis ours)

Take Notice that unless you transfer back this parcel of land to our client within fourteen (14) days from the date hereof we shall honour our client’s mandatory instructions and move to court to seek such redress as shall be appropriate with the risk of added costs being borne by you.

Kindly be informed accordingly. Yours Faithfully,

Ngugi S.W.



Ngugi Waithuki & Co. Advocates

CC.

1. Client
2. Area Chief- Njoro Sub-Location.”

19. Suffice to state that Penninah surrendered the mother title to Lucy and Rose for purposes of subdivision on condition that the duo will built for her shops in place of the semi-permanent shop which was on the suit property but was nonetheless demolished to pave way for the new construction. Penninah’s testimony was that Lucy offered to step in for her as she was an old woman. She stated in her statement:

Due to my old age, the 1st defendant, being my daughter requested me not to disturb myself so much but to release the mother title to her on trust that she will obtain sub-divided portions in my name which I did.”

20. Indeed, the idea of Lucy and Rose to build the complex was welcomed by Penninah’s family. According to Peter Kamande Thiongo, (Penninah’s son and whose witness statement appears at page 20 of the record), the idea to demolish the old shops built by their late father was an idea that “...everyone in the family welcomed...” It was his further evidence that the construction of the shops took place from 2009 to 2012, a period of over 3 years.

21. And true to word, a shopping complex cum residential property stands on the suit property. The fact of this construction is attested by a valuation report dated 28th January, 2014. In the report, it is indicated that the “Commercial – cum- residential property” comprised of the following:

- “(b) Accommodation
- Basement Floor
- 1 -Bedroom Unit
- No. 1 -Bedroom Unit
- 2 Ground Floor
- 2.No. Shop Units with a shared Cloakroom
- 1 -Bedroom Unit
- No. 1 -Bedroom Unit Car Park
- 2 First, Second, Third, and Fourth Floors
- 1 Each floor comprises of:
- 3 -Bedroom Units
- No. 1 -Bedroom Unit”
- 2 No.

22. It is this property that Penninah sought to have it revert to her as her first prayer was for:

“A declaration that the consent to transfer and eventual transfer of All That property being Title No. Kiambaa/Thimbigua/5317 into the name of the 2nd defendant was unlawfully, fraudulently and illegally obtained by the 1st and 2nd defendants.”



23. As averred in par. 19 of the plaint, Penninah’s grievance was that she had not “...received a single cents (*sic*) out of its operations since the year 2009 contrary to the agreement between the plaintiff and the 1st and 2nd defendants”. The letter of 5th November, 2012 reproduced above accused Lucy and Rose of “Manipulation”, “Misinformation” and “Misrepresentation of facts”. It is instructive to note that the letter of 5th November, 2012 is silent on any allegation of fraud on the part of Lucy and Rose, the crux of the matter being that Penninah was not benefiting from the sky rise development on the suit property. Although Penninah alleged fraud on the part of Lucy and Rose, in her pleadings, Penninah’s averment was that she had struck an agreement with Lucy and Rose for them to construct a shop for her and that based on her trust, she surrendered the mother title to Lucy. According to Penninah, this trust was abused by Lucy and Rose as she had not received a cent from the rental income of the construction. In our view, Penninah, Lucy and Rose, having entered into an agreement for the demolition and construction of a shopping complex on the suit property, then it is not in Penninah’s place to allege fraud simply on account of the deal having gone sour.
23. In the case of *Denis Noel Mukhulo Ochwada & Another vs Elizabeth Murungari Njoroge & Another* [2018] eKLR the court stated thus as regards the standard of proof in fraudulent dealings:
- “As regards standard of proof of fraud, the law is quite clear. In *R. G. Patel vs Lalji Makanji* (*Supra*), the former Court of Appeal for Eastern Africa stated 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.”
24. Also in the case of *Urmilla w/o Mahendra Shah vs Barclays Bank International Limited & Another* [1979] KLR 76; [1976-80] 1KLR 116B it was held that:
- “allegations of fraud must be strictly proven and that 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. A higher standard of proof is required to establish such findings, proportionate to the gravity of the offence concerned”.
25. The need to prove fraud was further underscored in the decision of *Jose Estates Limited vs Muthumu Farm Ltd & 2 Others* [2019] eKLR wherein, the Court of Appeal observed thus: -
- “.....Similarly in cases where fraud is alleged it is not enough to simply infer fraud from the facts. In *Vijay Morjoria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR, Tunoi JA (as he then was):-
- “It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleadings. The acts alleged to be fraudulent must of course be set out and then it should be stated that these acts were done fraudulently. It is also well 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”.
26. In our view, although Penninah alleged fraud against Lucy and Rose, this was not proved as it was not enough to merely allege fraud. We find that Penninah voluntarily gave Lucy the mother title which was sub-divided into 4 portions which initially were all registered in Penninah’s name. The commercial cum residential development was undertaken on one of the plots. According to Peter



Kamande Thiongo (Penninah's son), the construction of the commercial cum residential house on the suit property took place from 2009 to 2012. It is not that this property which was by all standards a huge construction (comprising of several storeys), sprung up from the blues. Given its magnitude, it cannot be true that Penninah had no knowledge of the development on the suit property which development took more than 3 years to construct. We think there was much more than the court got to know.

27. It is also not in dispute that Rose used the title of the suit property as collateral for the sums of money borrowed from the appellant. She borrowed Kshs 9.5 million on 7th June, 2010; Kshs 1.3 million on 25th February, 2011 and finally, Kshs 12.9 million on 13th June, 2013. The amalgamation of the two titles into one title being the suit property was on 30th June, 2009, long before the appellant came on the scene (the first loan was advanced on 7th June, 2010) and the only reason the appellant was sued as averred by Penninah in paragraph 24 of the plaint dated 2nd July, 2014 was because "The plaintiff verily believes that the 3rd defendant is currently in possession of the original title to the suit property". It is true that the appellant was in possession of the title Kiambaa/Thimbigua/5317 at the time Penninah filed suit as the same had been charged to the appellant for the various sums of money advanced to Rose. A search conducted on 29th May, 2014 confirmed that the suit property was on 7th June, 2010 charged to the appellant for Kshs 9.5m; on 25th February, 2011, there was a further charge for Kshs 1.3m and a subsequent second further charge of Kshs 12.9m on 13th June, 2013. It follows that at the time the suit was filed (2nd July, 2014), the suit property had been charged in no less than 3 occasions to the appellant, the last of such a charge being on 13th June, 2013.
28. It is also not lost to us that in the plaint, Penninah avers that after the sub-divisions, all the 4 sub-divisions were registered in her name. She averred that through fraud Lucy and Rose transferred two plots to themselves. In other words, Lucy and Rose forged her signature in order to effect the transfers. If indeed this be true that the transfer forms were forged by Lucy and Rose, why were criminal charges not preferred against the two? We think the answer to this lies in the fact that the mother title as stated by Penninah was released to Lucy in trust that she will cause sub- divisions of the title and have the newly created titles in Penninah's name. The new titles were indeed registered in Penninah's name. Thereafter, there was an agreement that Lucy and Rose will built shops on the suit property in place of the old shops, and Penninah was asked by Lucy to let go the assignment on account of her old age. It would appear that the sums of money borrowed by Lucy from the appellant went towards the construction of the shopping cum residential complex and at the time the suit property was sold to Susan, it fetched a cool sum of Kshs 45 million as purchase price. At the time, Rose's indebtedness to the appellant was Kshs 22 million. The property having been valued at Kshs 45 million, the appellant advanced Susan the sum of Kshs 40.5 million, Susan having raised the difference thereof from her own sources. To date, the title to the suit property is still charged to the appellant here and in our view, it is unconscionable for Penninah to want to unjustly enrich herself by her quest to want to acquire the commercial cum residential property built using funds borrowed from the appellant and yet her allegation is that the transfer of the suit property to Rose and the subsequent charge to the appellant was fraudulent. In other words, she has no qualms with the proceeds of a process she considers illegal and which she sought to challenge in the suit the subject of this appeal. It may be true that differences may have arisen in so far as sharing of the rental income is concerned but clearly, the property was developed with the knowledge and blessings of Penninah. It is our considered view that no fraud was proved as against Lucy and Rose, the only issue being that Penninah had not received a cent from the income of the construction and we have no hesitation in coming to the conclusion that the title that Rose passed to Susan was a valid title.



29. As stated above, Rose subsequently sold the suit property vide an agreement dated 3rd February, 2014 to Susan for Kshs 45 million. The purchase price was financed by the appellant who all along had the title having previously charged it for various sums of money. The charge by the 5th respondent and the discharge of the sums of money borrowed by Penninah’s niece was done contemporaneously. In our view, there was nothing wrong with this as this is a common practice in conveyancing where a title is discharged, a transfer effected and another charge registered in the name of the financier. At the time, the outstanding loan to the appellant was Kshs 22million. The letter of offer of the loan facility of Kshs 40.5million was issued to Susan on 26th March, 2014. The loan proceeds were released on 21st November, 2014, the charge having been registered on 4th July, 2014 and in our view, Penninah’s complaint that the loan proceeds to the 5th respondent were disbursed inspite of the appellant being on receipt of the summons to Enter Appearance having been served on 12th August, 2014, holds no sway given that the charge in favour of the appellant in respect of the sums of money lent to the 5th respondent was registered on 4th July, 2014, long before the service of the summons on the appellant on 12th August, 2014.

30. Then there was the other complaint that the transfers and charges did not receive the blessings of the Land Control Act. Section 6 of the Land Control Act provides as follows:

“6. Transactions affecting agricultural land

1. Each of the following transactions that is to say—

- (a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;
- b. the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 (L.N. 516/1961) for the time being apply;
- c. the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area, is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.”

31. It is noteworthy to point out that Penninah’s suit against Lucy and Rose was based on the contention that the duo transferred two titles to themselves and without her consent. Although in the plaint she averred that the transfers did not receive the blessings of the Land Control Board, her witness statement dated 2nd July, 2014 is completely silent on the issue of lack of consent of the Land Control Board. The several orders she sought by way of declarations were on account of illegalities based on fraud



as opposed to the transfers being null and void on account of lack of consent of the Land Control Board. Besides, nowhere was it pleaded that the suit property was agricultural land. The provisions of the [Land Control Act](#) apply to agricultural land and do not apply in respect of urban/town plots. We also hasten to add that the subdivision of the mother title into four titles that were initially registered in Penninah's name did not get the blessings of the Land Control Board as no consent to subdivide was produced in court or even alluded to. The preamble to the [Land Control Act](#) provides that it is "An Act of Parliament to provide for controlling transactions in agricultural land". Suffice to state that consent of the Land Control Board is sought if the land is agricultural. In our view, the basis for the requirement of the consent was not pleaded and neither was evidence adduced that the suit property was agricultural land more so noting that the mother title was 0.5 hectares and this is the title that was subdivided to give rise to 4 titles, two of which were subsequently amalgamated to give rise to the suit property. It was imperative for Penninah to have proved that the suit property was agricultural land before delving into the issue of whether consent of the Land Control Board was mandatory. In our view, the issue of lack of consent of the Land Control Board was an afterthought, the crux of the appeal being whether the two titles were transferred to her Lucy and Rose without her consent.

32. The undisputed facts relating to the acquisition of the suit property by Susan is that she purchased it from Rose. At the time of the purchase, the title to the suit property was charged to the appellant and the outstanding loan was Kshs 22 million. The sale price being Kshs 45 million, Susan raised the 10% thereof and the appellant advanced her Kshs 40.5 million. It is therefore not disputed that the title to the suit property at the time of the sale/purchase between Rose and Susan was encumbered in view of the sums of money borrowed from the appellant by Rose. At the time of the institution of the suit, the title that was charged to the appellant was in the name of Susan or a company affiliated to her. Prior to that, Lucy and Rose had amalgamated Kiambaa/Thimbigua/5144 and Kiambaa/Thimbigua/5145 into the suit property. The two titles held by Lucy and Rose were excisions from the mother title in the name of Penninah who had willingly and freely surrendered it to the duo. The 4 titles that were created after the sub-division of the mother title were initially registered in Penninah's name. Although Penninah alleged that two of these titles were transferred to Lucy and Rose, there is ample evidence to the contrary. In particular, the letter of 5th November, 2012 addressed to Lucy and Rose by Penninah's then counsel, the complaint was that the two had manipulated Penninah to sign documents on the pretext that they will construct a building for her. The letter went on to state: "that if at all she executed any document, which is denied, then it was under misinformation and misrepresentation of facts". Although Lucy and Rose did not file any defence to Penninah's claim and neither did they take part in the trial, it is common ground that the suit property was in the name of Rose, it having been created out of the mother title. We further note that each of the two had the titles registered in their favour on 16th April, 2009 and 16th March, 2009. The amalgamation to create the suit property was on 30th June, 2009. Surely, if Penninah had been misled, she had all the time from 30th June, 2009 upto 2014 when Susan bought the property, more so given the fact that Penninah had seen a high-rise building being constructed on the suit property which construction we were told took 3 years from 2009 to 2012. We have discussed in the preceding paragraphs of this judgment how Penninah complained of "Misinformation", "Misrepresentation" and "Manipulation". If it be true that she was manipulated by the two who lied to her that she will derive income from the development in the suit property, then it was open for Penninah to enforce the terms of that agreement, albeit it being oral. Further, Susan came into the picture in the year 2014, long after the title was amalgamated and registered in the name of Rose on 30th June, 2009. It is also evident that Penninah seems to have had knowledge that the title was held by the appellant as in her plaint, she sued the appellant on the basis that she "verily believes that the third defendant is currently in possession of the original title to the suit property". True to word the appellant held the title in its capacity as a chargee and Susan was a bona fide purchase for value. She



was not a party to any fraud and /or deceit, if at all. Her rights to the suit property are protected by Article 40 of the Constitution of Kenya (2010) which provides as follows:

40.

- (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property--
 - a. of any description; and
 - b. in any part of Kenya.
2. Parliament shall not enact a law that permits the State or any person—
 - a. to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
 - b. to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).
3. The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—
 - a. results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
 - b. is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—
 - i. requires prompt payment in full, of just compensation to the person; and
 - ii. allows any person who has an interest in, or right over, that property a right of access to a court of law.
4. Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause who may not hold title to the land.
5. The State shall support, promote and protect the intellectual property rights of the people of Kenya.
6. The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.



Similarly, Section 26 of the [Land Registration Act](#) provides:

“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 the 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, unprocedurally or - through corrupt scheme ”.

33. In the decision of [Elizabeth Wambui Gitbinji & 29 others – vs- Kenya Urban Roads Authority & 4 others](#) [2019] eKLR, Ouko, JA (as he then was) stated:

“The thrust of Article 40 is to protect proprietary rights which are lawfully acquired. The Supreme Court in *Rutongot Farm Ltd vs. Kenya Forest Service & 3 others* [2018] eKLR, expressed this position thus:

“Once proprietary interest has been lawfully acquired, the guarantee to protection of the right to property under Article 40 of the [Constitution](#) is then expressed in the terms that no person shall be arbitrarily deprived of property. The same guarantee existed in Section 75 of the repealed *Constitution...* Article 40 guarantees every person the right to acquire and own property in any part of Kenya and Parliament is enjoined not to enact any law that permits the State or any person to arbitrarily deprive a person of his or her property unless the deprivation is as a result of compulsory acquisition by the Government for a public purpose or in the public interest and only upon prompt payment in full, of just compensation to the land owner. Section 143 of the *Registered Land Act* underscores the sanctity of title to land by stating in subsection (2) that;

“(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake (emphasis ours) in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default”.

Such, is the protection granted to a registered proprietor whose registration, as a bona fide purchaser, may only be cancelled where it is proved that it was obtained by fraud or mistake, in which the proprietor had knowledge of or was a party or substantially contributed to. (emphasis ours). The protection of innocent purchasers has been recognized from time immemorial. But for this jurisdiction, the relevance of the decision is its creation of



a precedent for the sanctity of legal title to land vis à vis innocent third party purchasers. Delivering the opinion of the court Marshall, C. J., said:-

.....If a suit be brought to set aside a conveyance obtained by fraud and the fraud be clearly proved, the conveyance will be set aside, as between the parties; but the rights of third persons who are purchasers without notice, for a valuable consideration cannot be disregarded. Titles which according to every legal test, are perfect are acquired with that confidence which is inspired by the opinion that the purchaser is safe. If there be, any concealed defect arising from the conduct of those who had held the property long before he acquired it of which he had no notice that concealed defect cannot be set up against him.

He has paid money for a title good at law, he is innocent whatever may be the guilt of others and equity will not subject him to the penalties attached to that guilt. All titles would be insecure, and intercourse between man and man would be very seriously obstructed if this principle be overturned”

Courts in Kenya have enforced this edict in countless cases and have consistently declined to recognise and protect titles to land, which have been obtained illegally or tainted with fraud. In this regard the decision of the Court in *Chemey Investment Limited v Attorney General & 2 others* Civil Appeal No. 349 of 2012 is the latest. In it the Court rejected the invitation to uphold the sanctity of title of the allottees upon finding that allottees applied and were allocated the suit property, which was Government land on which was erected buildings used for public purposes. The allottees had deliberately represented that the suit property was vacant. This, no doubt was a clear case of fraud in which the allottees fully participated.

The courts have indeed been consistent that a bona fide purchaser will not be bound by any interests of which he or she does not have actual, constructive or imputed notice, as long as he or she did reasonable due diligence before purchasing. See: *Moses Lutomia Washiali v Zephaniah Ngaira Angweye & another*, Civil Appeal No. 139 of 2013.



Bona fide purchaser, the courts have maintained, is assured of protection, notwithstanding that previous dealings might be shown to have been mired in fraud. See *Dr. Joseph Arap Ngok V Justice Moiwo ole Keiwua & 5 others*, Civil Appeal No. Nai. 60 of 1997.

The Ugandan case of *Katende v. Haridar & Company Limited* (2008) 2 E.A.173, has been cited extensively with approval in many local decisions. It developed the following strictures to be satisfied before a conclusion can be drawn that the purchaser is innocent and acquired the property for value and without notice:-

“..... 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:

- a. he holds a certificate of title;
- b. he purchased the property in good faith;
- c. he had no knowledge of the fraud;
- d. he purchased for valuable consideration;
- e. the vendors had apparent valid title;
- f. he purchased without notice of any fraud;
- g. he was not party to any fraud.

A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.”

34. We have cited the above judgment in extenso to show the extent the law protects a *bona fide* purchaser for value as it is our view that no fraud or misrepresentation of fact can be attached to Susan. She bought property which was registered in the name of Rose. This registration was on 30th June, 2009. Rose had used the same title as collateral to borrow money from the appellant on no less than three times. At the time of sale/purchase of the suit property, the title was charged to the appellant. The argument that Lucy and Rose misled, misrepresented and or manipulated Penninah in obtaining the mother title from her and causing the subdivisions that eventually birthed the suit property cannot be a basis to infer that Susan’s title was tainted with illegality. We have endeavoured not to draw inferences of what the trio, that is, Penninah, Lucy and Rose may have been upto, more so, knowing that Lucy and Rose kept off the proceedings, the subject of this appeal. They did not file their defences and neither did



they take part in the trial. What was their end game? It is our considered view that innocent purchasers such as Susan must be protected by the law more so when they fall prey to scrupulous individuals' hell-bent on wrecking havoc to their lives by scrupulously "stealing" their hard earned cash, some of which is borrowed from financial institutions, such as is the case herein. We shall say no more on this.

35. The other issue raised by the appellant's counsel is that in the impugned judgment, adverse orders were made against Susan when she was not a party. Indeed, this is true. In the submissions of Penninah, she complained that the loan proceeds for the purchase of the suit property by Susan were disbursed on 21st November, 2014 notwithstanding the fact that the appellant had been served with the summons on 12th August, 2014, the suit having been filed on 2nd July, 2014. Since Penninah got to know of the disbursement of the sums in respect of the purchase of the suit property to Susan, even assuming that this was on 21st November, 2014, why did she not amend her plaint to cite Susan in the suit? It is our view that Penninah knew Susan as the purchaser of the suit property as the reason the appellant was sued is that it held the title having advanced a sum of Kshs 40.5 million to Susan. At the time, the title was registered in the name of a company where Susan held shares. This company ought to have been a party in the suit filed by Penninah. A fundamental principle of natural justice is that no man/woman should be condemned unheard, "audi alteram partem". This principle of natural justice has found a place in our 2010 Constitution. Article 50(1) of our Constitution provides:

50. "Fair hearing

1. Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."

36. Being condemned unheard is the anti-thesis of fair hearing. As pointed above, Penninah knew of Susan at the time she filed the suit as she named the appellant herein as a party. The only reason the appellant was named as a party was because the title to the suit property was charged by Susan in order to obtain the purchase price of Kshs 40.5 million. It was a case of "I am Because You Are". There was absolutely no reason why the matter proceeded in the absence of Susan, yet she was going to be greatly affected by the adverse orders as was the case in the instant matter. She had a right to be heard and natural justice abhors her being condemned unheard.

37. It is for the above reasons that we have come to the conclusion that this appeal is for allowing. It is hereby allowed with costs to the appellant and the 5th respondent as against Penninah.

38. Having determined this appeal (Civil Appeal No. 168/2019) we also hasten to add that this appeal was heard back to back with Civil Appeal No. 169 of 2019. In respect of Civil Appeal No. 169 of 2019, the appellant therein (Rose) was aggrieved by Obaga, J's ruling dated 19th July, 2018 on the motion of 29th November, 2017.

39. In the motion of 29th November, 2017, Rose had sought the following orders:

1. That this matter be certified urgent and service thereof be dispensed with.
2. That the firm of Kimani & Michuki Advocates be allowed to come on record for the Proposed Interested Party/5th Respondent herein.
3. That stay of execution of the Judgment dated 3 November, 2017 by Honourable Justice L. N. Mbugua be granted pending the hearing and determination of this application.



4. That the Judgment dated 3rd November, 2017, ex-parte the Proposed Interested Party/5th Respondent, be set aside pending the hearing and determination of this application.
5. That the Proposed Interested Party/5th Respondent herein be enjoined in the instant suit as a Proposed Interested Party or 5th Respondent.
6. That costs of this application be provided for in any event”.

In the appeal before us, we have set aside the Judgment of 3rd November, 2017 by Mbugua, J. Rose’s appeal therefore in Civil Appeal No. 169 of 2019 is rendered otiose. We further direct that the findings in Civil Appeal No. 168 of 2019 to the extent that they are applicable, shall apply *mutatis-mutandis* in Civil Appeal No. 169 of 2019.

40. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY, 2023.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

