



REPUBLIC OF KENYA



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**Wambui v Mwangi & 3 others (Civil Appeal 465 of 2019)
[2021] KECA 144 (KLR) (19 November 2021) (Judgment)**

Neutral citation: [2021] KECA 144 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 465 OF 2019
RN NAMBUYE, MK KOOME & MSA MAKHANDIA, JJA
NOVEMBER 19, 2021**

BETWEEN

EDWARD NDUNG’U WAMBUI APPELLANT

AND

FRANCIS KANYANJUA MWANGI 1ST RESPONDENT

MUGO GITARI ALIAS JULIUS MUTUGI MUCHEMI 2ND RESPONDENT

COMMAT MERCHANTS LIMITED 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

(Being an appeal against the judgment and decree of the Environment and Land Court of Kenya (S. Okong’o, J.) dated 25th July, 2019 in Milimani ELC Case No. 281 of 2015)

JUDGMENT

1. This is a first appeal arising from the judgment and the decree of the Environment and Land Court “ELC” at Nairobi in Cause No. 281 of 2015, S. Okong’o, J. dated 25th day of July, 2019.
2. The sequence of events giving rise to the litigation resulting in this appeal is that the 1st respondent sued the 2nd, 3rd respondents, appellant and 4th respondent as 1st, 2nd, 3rd and 4th defendants. The Attorney General was sued as a State officer appointed pursuant to Article 156 of the *Constitution of Kenya, 2010* sued on behalf of the Government of the Republic of Kenya pursuant to section 12 of the *Government Proceedings Act*, Cap 40 Laws of Kenya, on behalf of the Land Registrar through a plaint dated 7th April, 2015, amended on 30th April, 2015 and further amended on 8th December, 2015. In it, the 1st respondent averred, *inter alia*, that: in November, 1989 he acquired a leasehold interest in a property known as Nairobi/Block 93/1257 (the suit property) for a period of 99 years commencing 1st July, 1989.



3. In April, 2015, he came to learn that unknown to him the 2nd respondent had on or about July, 2009 and with intent to defraud him of the suit property fictitiously, unlawfully and unprocedurally instituted Milimani High Court Civil Suit No. 555 of 2009 (the High Court suit) against him, obtained an ex parte judgment and decree against him; caused a prohibitory order to be registered against the title to the suit property and subsequently caused it to be sold to the 3rd respondent through an auction. He reported the matter to the criminal investigation department (CID) for investigations. The CID brought the ongoing investigations to the notice of both the 3rd and 4th respondents. The 1st respondent claimed that with the knowledge that the above mentioned investigations were still ongoing, the 3rd and 4th respondents irregularly, unprocedurally, unlawfully and fraudulently passed on title to the suit property firstly to the 3rd respondent and subsequently to the appellant.
4. Particulars of unprocedural, irregularity, unlawfulness, fraud, misrepresentation, illegalities, negligence, corrupt schemes and conspiracies, attributed to the 2nd respondent were given as: impersonation and misrepresenting himself as Julius Mutugi Muchemi; instructing an unqualified person to file a fictitious claim, unlawfully obtaining an ex parte judgment and decree, failing to disclose and or serve summons of the suit, impersonating, forging the 1st respondent's signature and entering appearance on his behalf in the High Court suit, obtaining and or causing to be filed in the High Court suit based on false information on service on him of the court processes; failing to serve the notice of entry of the ex parte judgment and decree on the 1st respondent before carrying out execution; unlawfully obtaining orders and decree from the High Court suit, fraudulently executing the decree and orders obtained by fraud in the High Court suit; representing and or causing a transfer of the suit property to the 3rd respondent knowing that the transfer was tainted with illegality, irregularity, unlawfulness and fraud, all with the intention to defraud the 1st respondent and the court.
5. The allegations attributed to the 3rd respondent were: knowingly acquiring title to the suit property irregularly, illegally, unlawfully, fraudulently and through conspiracy.
6. Those attributed to the appellant were: knowingly purchasing or acquiring title to the suit property knowing that the same had been acquired illegally, unlawfully and fraudulently.
7. Those attributed to the 4th respondent were given as: registering a transfer of the suit property in favour of the appellant while knowing that title to the suit property was under investigations by the CID for alleged fraudulent, illegal and corrupt dealings, variously entering and registering the name of the 3rd respondent and subsequently that of the appellant as proprietors and owners of the suit property pursuant to unlawfully and irregularly obtained court orders, and, failing to register restrictions on the title to the suit property to prevent any further dealings thereon pending conclusion of the criminal investigations by the CID on the illegal, irregular, unlawful, fraudulent and or corrupt dealings attributed against the 2nd and 3rd respondents.
8. The 1st respondent therefore sought declarations that: he was the legal owner of the suit property unprocedurally and illegally divested from him by the 2nd and 3rd respondents, a permanent injunction restraining the 2nd, 3rd respondents respectively and the appellant, their servants, agents, employees or anybody claiming under or through them from entering into, evicting him, depositing materials and or constructing any structures thereon, selling, charging, alienating, disposing off, dealing with or in any way interfering with his quiet possession and/or title to the suit property; an order for the cancellation of the 3rd respondent's and appellant's names from the land register in respect of the suit property and rectification thereof to restore his name as the sole proprietor of the suit property.
9. In the alternative, an order compelling the 3rd respondent and the appellant to execute and deliver up to him for registration a transfer and all other relevant documents in respect of the suit property within 14 days of the order thereof and in default thereof, the land registrar to execute the transfers and other



- documents necessary to transfer ownership of the suit property to him at the 3rd respondent's and appellant's costs, damages for fraud and misrepresentation against the 2nd, 3rd and 4th respondents and appellant respectively, costs of the suit and any other order that the court deemed fit to grant.
10. In rebuttal, the 3rd respondent in its amended defence of 22nd January, 2016 denied the 1st respondent's claim against it in its entirety and put him to strict proof. It averred that it was a stranger to the 2nd respondent. Neither was it party to the proceedings in the High Court suit. It asserted that it purchased the suit property for value through a public auction sanctioned by a court of law in execution of a decree issued in the High Court suit; denied particulars of fraud, misrepresentation, illegality, negligence, unprocedural corrupt scheme and conspiracy attributed to it by the 1st respondent; maintained that it acquired an indefeasible and absolute title to the suit property as a bona fide purchaser for value at an auction at a time when the CID had not initiated any investigations into the 1st respondent's complaint with regard to title to the suit property; maintained that it ensured that it had a legally registered absolute title to the suit property before transferring the same to the appellant.
 11. In the appellant's amended statement of defence, he denied the 1st respondent's claim of entitlement to the suit property and averred that he took possession of the suit property, fenced it off and commenced construction thereon after he had legally, lawfully and regularly purchased it from the 3rd respondent for value and without notice of any defects in the title then held by the 3rd respondent. He had no knowledge of any dealings involving the suit property prior to acquisition of title thereto. He denied allegations of fraud, illegalities and misrepresentations attributed to him by the 1st respondent as more particularly set out in the further amended plaint.
 12. In his notice of claim against the 3rd respondent, the appellant averred, inter alia, that under a sale agreement dated 4th April, 2014 between him and the 3rd respondent, the 3rd respondent warranted to him that it had a good and valid title to the suit property with no competing claim. In the alternative and without prejudice to the foregoing, the appellant sought indemnity against the 3rd respondent in the sum of kshs.82,408,155.00 general damages, and interest at court rates from the date of filing of the suit, mesne profits and costs of the suit.
 13. In response to the appellant's notice of indemnity and or contribution against it, the 3rd respondent denied any liability to the appellant and reiterated that it was a bona fide purchaser of the suit property through a court process with absolute and indefeasible title. In the alternative, that in the event of it being held liable, it was entitled to full indemnity and/or contribution by the Judiciary of Kenya and the Land Registrar against whom it was entitled to institute third party proceedings.
 14. In its rebuttal of the 1st respondent's claim, the 4th respondent's averred, inter alia, that it was a stranger to the 1st respondent's claim and put him to strict proof. That the entries effected by it in respect of title to the suit property were pursuant to a court order issued in the High Court suit. The said entries were therefore not marred by fraud, misrepresentation, illegalities, negligence, corrupt schemes or conspiracy on its part and put the 1st respondent to strict proof thereof.
 15. Further and without prejudice to the foregoing, it would seek indemnity under Order 1 Rule 24 of the *Civil Procedure Rules* (CPR) as against the 2nd, 3rd respondents respectively and the appellant in the event it was found culpable by the court for any loss or damage suffered by the 1st respondent for alleged fraudulent transfer and or registration of the suit property from the 1st respondent to the 2nd, 3rd respondents and the appellant respectively. In the alternative and without prejudice to the foregoing, averred that according to it the 1st respondent's suit offended the provisions of section 13A of the *Government Proceedings Act* and reserved its right to raise a Preliminary Objection (P.O.) to the



- 1st respondent's claim at an appropriate time based on want of jurisdiction in the court to entertain the 1st respondent's claim against it.
16. The 1st respondent filed replies to the appellant's, 3rd and 4th respondents defences reiterating his claim against them as laid out in the further amended plaint already highlighted above and put them to strict proof on the averments in their respective defences.
 17. The cause was canvassed through the respective parties pleadings, oral testimony and written submissions. The 1st respondent, Francis Kanyanjua Mwangi (PW1) gave evidence basically reiterating and or rehashing the averments in his further amended plaint already highlighted above and which we find prudent not to replicate. His evidence was supported by that of CPL Samuel Kamau, PW2. PW2 stated that he was aware that PW1 lodged a complaint with the CID with regard to alleged interference with is proprietorship of the suit property by the 3rd respondent. PW2 was tasked to carry out investigations into the said complaint. It was in the course of the above investigations that he accessed entries in the green card for the suit property held at the Lands registry. Details of those entries were given as follows: Entry numbers: 1 and 2 were made on 28th November, 1989 when the 1st respondent was registered as proprietor of the suit property and issued with a certificate of lease; 3, was made on 2nd May, 1991 when the certificate of lease was reissued to the 1st respondent through gazette notice number 332 of 28th January, 1991; 4, was made on 29th May, 1992 for the reissue of the certificate of lease vide gazette notice number 1966; 5, was made on 12th November, 2009 when a prohibitory order issued in the High Court suit was registered against the title; 6, was made on 1st August, 2012 for the removal of the prohibitory order; and lastly, 7, was made on the same date of 1st August, 2012 transferring the suit property from the 1st respondent to the 3rd respondent.
 18. PW2 also accessed the record of the High Court suit. He observed that the suit was filed by the 2nd respondent against the 1st respondent through Newton Mungalla Advocates. The claim was over an alleged debt of kshs.13,000,000.00 owed by the 1st respondent to the 2nd respondent. Summons to the 1st respondent was allegedly served through one, Ezekiel Masai, a process server. The affidavit of service in the court file indicated that the 1st respondent allegedly declined to receive the summons resulting in the ex parte judgment being entered against him.
 19. PW2 traced Newton Mungalla, the advocate who had filed the High Court suit on behalf of Julius Mutugi Muchemi. Upon PW2 inquiring from him about the whereabouts of Julius Mutugi Muchemi, Mr. Mungalla allegedly replied that he did not know where his client Julius Mutugi Muchemi was. Mr. Mungalla however handed PW2 an ID Card No. xxxx in the names of Julius Mutugi Muchemi with a view to assisting PW2 trace the whereabouts of Julius Mutugi Muchemi. Armed with the above ID card number, PW2 carried out a search at the Registrar of Persons Registry. He discovered that the true owner of the ID card No. xxxx was not the purported Julius Mutugi Muchemi, but one, Mugo Gitari. He had not traced either Julius Mutugi Muchemi or Mugo Gitari for interview as at the time he was transferred and handed over the investigation file to his bosses to assign another officer to continue with the investigations. He was not privy to the final outcome of those investigations.
 20. Peter Maina Mugambi (DW1) gave evidence as the Managing Director of the 3rd respondent. His testimony was that he came to know the 1st respondent in October/November 2011 when he received summons from the CID through his advocates informing him that the CID were carrying out investigations into the ownership of title to the suit property. He went and presented himself to the CID. He also handed over to the CID all documents he had in his possession in support of the 3rd respondent's legitimate and valid claim of ownership of the suit property. The CID never contacted him over the issue thereafter. Assuming that the matter had been settled by the CID, he on 25th May, 2012 caused the Registrar of lands to issue Kenya Gazette Notice No. 7001 with a view to reissuing



a new title deed for the suit property to facilitate transfer of the title in the 3rd respondent's name. It was his position that the Gazette Notice was accordingly published to which the 1st respondent never raised any objection. Both him and the Registrar of Lands being satisfied that everything was in order, proceeded to issue title in favour of the 3rd respondent on 1st August, 2012. Likewise, being satisfied that the 3rd respondent had good title to the suit property sold it to the appellant five years later.

21. Edward Ndungu Wambui, the appellant, gave evidence on his own behalf as DW2. His position was, inter alia, that he did due diligence over the ownership of the suit property through his advocates. It was only after being satisfied that the 3rd respondent held good title over the suit property that he purchased the same on 4th April, 2014. He paid the full purchase price and caused the title with regard thereto, to be transferred to him on 26th September, 2014. He commenced developments thereon. He was surprised when he was called around April, 2015 by the 1st respondent's advocates who informed him that the property he was developing belonged to the 1st respondent and that he had acquired it unlawfully. It was his position that prior to the aforementioned call from the 1st respondent's advocate, he had no knowledge of what had transpired previously with regard to the said title.
22. At the conclusion of the trial, the learned Judge analyzed the record and identified issues for determination. On fraud attributed to the 2nd respondent, the learned Judge took into consideration the definition of fraud as set out in *Black's Law Dictionary, 9th Edition at page 131* where fraud is defined as:

“a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”

Further, the decision in the case of *Railal Gordhanbhai Patel vs. Lalji Makanji [1957] E.A 314* on the threshold for proof of fraud and applying the above threshold to the record ruled that, in the Judge's opinion, the evidence tendered on record had demonstrated clearly that the 2nd respondent fraudulently filed the High Court proceedings with the sole aim of defrauding the 1st respondent of the suit property, by presenting himself as Julius Mutugi Muchemi holder of ID card No. xxxx. That upon investigation by PW2, it was revealed that the rightful holder of the above ID card number was one Mugo Gitari. It was pursuant to the above falsehood that the 2nd respondent obtained an ex parte judgment through fraud and caused it to be executed through the fraudulent sale of the suit property to the 3rd respondent through a public auction allegedly to recover a debt owed to him by the 1st respondent knowing that it was a fraudulent scheme to defraud the 1st respondent of his property. The Judge therefore ruled that all transactions stemming from the fraudulent High Court proceedings were all rooted on a fraudulent and illegal decree and could not in law be sanctioned by a court of law as they were null and void ab initio and could not therefore bestow any rights to any party either directly or indirectly affected by those proceedings.

23. On the 3rd respondent's assertion that its acquisition of the suit property should be sanctionable by the trial court allegedly for having purchased it innocently at a public auction, which had been sanctioned by a competent court of law; and, without notice of or involvement in the 2nd respondent's alleged fraud committed against the 1st respondent, the Judge construed section 26(1) of the [Land Registration Act](#) and made observation that the section made provision for the indefeasibility of title registered under the said provision. Second, that title acquired under the said provision was sanctionable by a court of law save for fraud, or misrepresentation to which the title holder is proved to be party to, or alternatively in instances where the certificate of title had been acquired illegally, unprocedurally or through a corrupt scheme.
24. The Judge also took into consideration persuasive jurisprudence namely *City of Lufkin vs. McVicker, 510 S.W.2d 141, 144 (Tex. Civ. App. 1973)*; *Jones vs. Willard 224 Va. 602, 607 (Va. 1983)* and *Fritts*



vs. Krugh, Supreme Court of Michigan, 92 N.W.2d 604, 354 Mich. 97 (1958) all on the principles/propositions that a judgment founded on fraud is not a judgment at all. Second, that if an act is void then it is in law a nullity.

25. Further, the Judge also took into consideration the High Court decision in the case of *Alberta Mae Gacie vs. Attorney General & 4 Others [2006] eKLR* as approved by the Court of Appeal in the case of *Arthi Highway Developers Limited vs. West End Butchery Limited & 6 Others [2015] eKLR* for the cumulatively holding, inter alia, that courts should not provide succor for any crook using forgery, deceit or any kind of fraud to acquire a legal and valuable title deceitfully snatched from a legally registered innocent proprietor.
26. Applying the above various thresholds to the 3rd respondent's assertions, alluded to above, the Judge made observations that from the record, there was lack of evidence linking the 3rd respondent to the fraudulent scheme orchestrated by the 2nd respondent against the 1st respondent through what transpired in the High Court suit proceedings. In the Judge's opinion, the 3rd respondent may very well have been a bona fide purchaser of the suit property for value without notice of the fraud perpetrated by the 2nd respondent against the 1st respondent. The position taken above by the Judge with regard to 3rd respondent's assertion notwithstanding, the Judge declined to sanction the respondent's assertions of indefeasibility of title acquired through the public auction. The reasons the Judge gave for reaching the above conclusions were that: the High Court proceedings were fraudulently initiated by the 2nd respondent against the 1st respondent giving rise to the ex parte judgement whose purported execution gave rise to the fraudulent auction of the suit property to the 3rd respondent was not only fraudulent but was also null and void; since the 3rd respondent's claim of entitlement of title to the suit property is rooted on a fraudulent and illegal decree it could not be sanctioned by the Court.
27. The Judge went further to hold that, having termed as a charade, the entire proceedings initiated by the 2nd respondent against the 1st respondent leading to the auction of the suit property to the 3rd respondent, the whole litigation process in the High Court suit was not only fraudulent but was also illegal, irregular and unprocedural. The decree obtained by the 2nd respondent that facilitated him to sell the suit property was tainted with illegality. As a result, the 2nd respondent having attached and sold the suit property illegally the 3rd respondent's title which was acquired through that illegal process was defeasible. Lastly, that the effect of the 2nd respondent's fraudulent sale of the suit property would be the same whether the 2nd respondent sold the suit property directly to the 3rd respondent or through a fraudulent court process which he adopted.
28. On the totality of the above reasoning, the Judge ruled that the 3rd respondent did not acquire a valid title over the suit property.
29. Turning to the appellant's claim that he had acquired a valid title over the suit property from the 3rd respondent, the Judge applied the same threshold enunciated in the case of *Alberta Mae Gacie vs. Attorney General & 4 Others [supra]* as approved by the court of Appeal in *Arthi Highway Developers Limited vs. West End Butchery Limited & 6 Others [supra]* and also declined to sanction the appellant's claim of entitlement to the suit property as a purchaser for value without notice. The reasoning of the Judge was, inter alia, that since the 3rd respondent did not acquire a valid title at the auction sale, it had no valid title which it could pass on to the appellant especially when the record was explicit that as at the time the 3rd respondent sold the suit property to the appellant, the 3rd respondent had notice that the process through which the suit property was sold to him was the subject of inquiry by the CID. According to the Judge, lack of evidence on the record that the appellant was involved in or was aware of the fraud that was at the root of the title to the suit property when he acquired it notwithstanding he could not in law sanction the validity and indefeasibility of that title.



30. On the totality of the above assessment and reasoning, the Judge found the 1st respondent's claim proved to the requisite threshold as against the 2nd and 3rd respondent and the appellant in terms of the further amended plaint. In the result, the Judge proceeded to issue declarations that:
- i. the 1st respondent is the legal owner of the leasehold title comprised in the suit property;
 - ii. the sale of the suit property to the 3rd respondent and further to the appellant was unprocedural and illegal;
 - iii. a permanent injunction to issue restraining the 2nd and 3rd respondents and the appellant, their servants, agents, employees or anybody claiming under them from entering into, evicting the 1st respondent, depositing materials and or constructing any structures thereon, selling, charging, alienating, disposing off, dealing with or in any way interfering with the 1st respondent's quiet possession and/ or title to the property known as Nairobi/Block 93/1257;
 - iv. an order for the cancellation of the appellant's and the 3rd respondent's names from the land register in respect of the suit property and rectification thereof to restore the 1st respondent's name as the sole proprietor of the said land;
 - v. an order for costs to be paid by the 2nd and 3rd respondents. The 1st respondent's claim for damages and that against the 4th respondent were dismissed with no orders as to costs.
31. Turning to the appellant's claim against the 3rd respondent, the Judge took into consideration the pleadings and submission on the issue and made findings thereon, inter alia, that: the appellant's claim against the 3rd respondent was well founded following the 3rd respondent's admission that as at the time the suit property was sold to the appellant, it was aware of the investigations that had been instituted by the CID regarding the circumstances under which the suit property was transferred to the 3rd respondent. The 3rd respondent therefore, gave warranty to the appellant that it had a valid title to the suit property and agreed to indemnify the appellant in the event that its title to the property was found to be wanting. The Judge therefore ruled that the appellant was entitled to be indemnified in respect of the entire loss he had incurred as a result of the 3rd respondent's breach of the said warranty. On that score the Judge found that the appellant had in the circumstances established his claim against the 3rd respondent and allowed the claim in the sum of kshs.78,173,655.00 together with costs and interest at court rates from the date of the judgment.
32. The appellant was aggrieved and is now before this court on a first appeal raising nine (9) grounds of appeal subsequently condensed into three thematic issues, namely whether the learned judge erred in law and in fact by:
1. Ordering the appellant's title to be rectified or cancelled.
 2. Disregarding the Court of Appeal's binding precedents on sanctity of title; and lastly,
 3. Impugning the appellant's right to property and sanctity of title contrary to Article 40(6) of the Constitution.
33. The appeal was canvassed through written submissions orally highlighted by learned counsel for the respective parties. Learned counsel Mr. Muchemi appeared for the appellant, Mr. Lusi for the 1st



respondent, Mr. Mworira for the 3rd respondent and Mr. Oscar for the 4th respondent. There was no appearance for the 2nd respondent who the court was informed never participated in the proceedings at the trial.

34. Supporting the appeal, the appellant relies on section 26(1) as read together with section 80(2) of the Act and the case of *Alice Chemutai Too vs. Nickson Kipkirui Korir & 2 Others [2015] eKLR* in which the holding in the case of *Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & Another (2013) eKLR* inter alia, that “Section 80 may afford a defence against rectification of the register, where the person affected is in possession of the property, and acquired it without any notice of any vitiating factors” was approved and submits that: the import of section 26 of the Act is to raise a rebuttable assumption that a person named as proprietor of the land is the absolute and indefeasible owner of the said land unless rebutted by cogent evidence. According to the appellant there was sufficient unrebutted demonstration through both his pleadings and supporting evidence both oral and documentary exhibits that he followed the correct procedure in acquiring title to the suit property.
35. The appellant relies on *Black’s Law Dictionary 8th Edition* on the definition of a bona fide purchaser namely: “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,” and the case of *Laurence Mukiri vs. Attorney General & 4 Others [2013] eKLR* on the elements/ingredients for qualification of a person as a bona fide purchaser for value without notice namely proof that the claimant:
- i. holds a certificate of title;
 - ii. he purchased the property in good faith;
 - iii. he had no knowledge of the fraud;
 - iv. the vendor had apparent valid title;
 - v. the property was purchased without notice of any fraud; and lastly,
 - vi. that the purchaser was not party to any fraud.

Relying on the above elements/ingredients, it is the appellant’s position that he established all the above elements to the required threshold, both through his pleadings and evidence tendered before the trial court in support of his claim that he was a bona fide purchaser of the suit property for valuable consideration without notice of any prior defects in the 3rd respondent’s title to the suit property, from whom he acquired his title. Second, that, his claim having been well-founded on the above principles it should have been sustained by the trial court. In his opinion, demonstration of existence of the above elements afforded him an absolute, unqualified and valid defence against the 1st respondent as a prior equitable owner, hence his plea to the court to interfere with the trial court’s findings against him on this issue, set them aside and substitute thereto an order sustaining his assertion of entitlement to the suit property as a bona fide purchaser for value without notice.

36. Relying on the case of *Mohammed Eltaff & 3 Others vs. Dream Camp Kenya Limited [2005] eKLR* for the proposition, inter alia, that “an appellate court has mandate to interfere where the trial court has left certain issues unresolved” the appellant invites the court to pronounce itself on a matter which in his opinion the trial court left unresolved. It is the appellant’s position that after the trial court made a finding that it was in agreement with the 3rd respondent’s assertion that it was not linked to any fraudulent scheme and may very well qualify as a purchaser in good faith without notice of fraud that had tainted the transfer of title to the suit land from the 2nd respondent to the 3rd respondent, failed



to resolve the issue as to whether on the basis of the above finding, appellant's assertion of entitlement to title to the suit property was sanctionable by the court considering that he too acquired title without any notice of how the 3rd respondent acquired the same.

37. The appellant has also relied on numerous Court of Appeal/High Court decisions in *Arthi Highway Developers Limited vs. West End Butchery Limited & 6 others* [supra] in which the position taken by the Court of Appeal in the case of *Dr. Joseph N. K Arap Ngok vs Justice Moiwo Ole Keiwua & 5 Others CA No. 60 of 1997* was approved; *Charles Karathe Kiarie & 2 others vs. Administrators of the Estate of John Wallace Mathare (Deceased) & 5 others* [2013] eKLR; *David Peterson Kiengo & 2 Others vs. Kariuki Thuo* [2012] eKLR; *Chauban vs. Omagwa* [1980] eKLR; *Denis Noel Mukbulo Ochwada & Another vs. Elizabeth Murungari Njoroge & Another* [2018] eKLR; *Elizabeth Wambui Githinji & 29 Others vs. Kenya Urban Roads Authority & 4 Others* [2019] eKLR; and lastly, *Alice Chemutai Too vs. Nickson Kipkurui Korir & 2 Others* [2015] eKLR for the holdings/principles and or propositions applicable to land registration under the Torrens System which we find prudent to distill as follows:

- i. The sanctity of title vested in a title holder under sections 25 and 26 of the Act not only takes precedence over all other alleged equitable rights appurtenant thereto but it is also absolute and indefeasible challengeable only on grounds of fraud or misrepresentation to which the owner is proved to be a party.
- ii. Although section 26 of the Act allows for cancellation of a title, its application is subject to section 80(2) of the same Act which protects the rights of a bona fide purchaser for valuable consideration without actual or constructive notice of any defect in the title who is in actual possession of the property.
- iii. Under the Torrens Land Registration System the government as the keeper of the master record of all land and their ownership not only guarantees indefeasibility of all rights and interests shown in the register against the entire world but also guarantees compensation in case of loss arising from any error in the registration system suffered by a person affected.
- iv. If a party acquires interest to property in good faith without notice and did not participate in any fraud, such a title is secure and guaranteed by the State. However, if by any chance the register of the title was inaccurate by reason of malfeasance by land registry officials, any party(ies) deprived of their property by such inaccuracy or malfeasance may bring an action against the State for recovery of damages but not for possession or ownership of the property.
- v. Prerequisites to immunity against rectification of the register of title under the Torrens System is possession.

38. The 3rd respondent supports the appeal. Relying on the decision in the case of *Nancy Kaboya Amadiva vs. Expert Credit Limited & Another* [2015] eKLR; sections 25(1) and 26(1), 53 and 54 of the Act and *Joseph Randell, Alfred Edward* [1920]. *Story on Equity (third English ed.). Sweet and Maxwell. P. 34*, invites the court to vitiate the impugned judgment in its entirety firstly for what the 3rd respondent asserts to be the Judge misdirecting himself on all issues raised before him for determination. Second, for the judge's failure to properly appreciate that by absolving the 4th respondent from any wrong doing with regard to the transactions undertaken by the 2nd and 3rd respondents and the appellant resulting in the divestation of title to the suit property from the 1st respondent to the 3rd respondent and subsequently to the appellant, sanitized the due process followed by the judiciary in the High Court proceedings and the Land Registrar that resulted in the vesting of



the title to the suit property in the 3rd respondent and subsequently in the appellant. Third, for the Judge's failure to appreciate that having failed to attribute any fault against the 3rd respondent and the appellant in the acquisition of title to the suit property, there was no basis for the Judge's refusal to sanction the 3rd respondent's and appellant's claim to indefeasibility of their respective titles to the suit property as asserted then in their respective pleadings and evidence.

39. In the 3rd respondent's opinion, the trial court's failure to resolve the above position rendered the impugned judgment contradictory as the 3rd respondent does not see how the due process vide which it acquired title to the suit property could be sanitized by relieving the 4th respondent from any blame in the role it played in that process that resulted in the title to the suit property being registered in its name and subsequently transferred to the appellant, and at the same time, the same court also faults its acquisition of the suit property through the sanitized process and refuse to sanction its claim of indefeasibility of title to the suit property.
40. The 3rd respondent argues further that the impugned judgment is not only untenable in the circumstances demonstrated above but is also highly arbitrary and prejudicial to the 3rd respondent. It also amounts to an injustice occasioned to the 3rd respondent for the trial court's failure to pronounce itself both on the consideration paid by the 3rd respondent towards the acquisition of the suit property through the court sanctioned public auction and payment of a whopping Kshs.3,672,886.00 towards rates for the suit property. According to the 3rd respondent, failure of the trial court to pronounce itself on the above issue was tantamount to the court sanctioning either an unjust enrichment or an illegal benefit to the 1st respondent which should not be countenanced by this court.
41. Lastly, the 3rd respondent asserts that sections 25 and 26 of the Act were not only misconstrued by the trial court but were also misapplied by the trial court by importing unspecified and unstipulated ingredients therein with the result that the element of fraud as envisaged in the said provisions was applied indiscriminately to the detriment of both the 3rd respondent and the appellant. This Court was therefore urged to fault the trial court for relying on the High Court suit proceedings to vitiate the indefeasible titles as separately acquired by the 3rd respondent and subsequently by the appellant, allow the appeal in its entirety, set aside the impugned judgment and the resulting decree thereof with costs to them.
42. Opposing the appeal, the 1st respondent relies on the case of *Arthi Highway Developers Limited vs. West End Butchery Limited & 6 Others (supra)* in which the Court of Appeal approved the High Court decision in the case of *Alberta Mae Gacie vs. Attorney General & 4 Others (supra)*, the case of *Joseph Muriithi Njeru vs. Mary Wanjiru Njuguna & Another* [2018] eKLR; and *Macfoy vs. United Africa Co. Ltd* [1961] 2 AII ER 1169 [*supra*] all for the holdings/principles and propositions which we find prudent to distill as hereunder, *inter alia*, that:
 - i. no court of law should sanction either the acquisition of title to property in favour of a party (christened crooks by the court) who has acquired such title from a legally registered innocent proprietor using forgery, deceit or any kind of fraud;
 - ii. nor the transfer of title from the person who acquired it through forgery, deceit and or fraud from a legally registered innocent proprietor to a 3rd party even if it were acquired innocently and for valuable consideration for the reason that the person who had acquired it through forgery, deceit and or any form of fraud from the innocent legally registered proprietor had no valid or legally acquired title in the property to pass on to the third party;



- iii. a decree founded on procedure fraudulently crafted by a party(ies) thereto can neither be sanctioned by a court of law, nor can such a decree form a proper basis for transferring property subject to such a decree from one party to another;
 - iv. in law a contrived decree is null and void and any subsequent transactions premised on such a purported decree amount to nothing, null and void and therefore of no legal consequences;
 - v. no court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing the obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court; and lastly, that it is trite law that where an act is a nullity it is void and every proceeding founded on it is also in law a nullity.
43. In light of the above distilled principles/holdings/propositions, the 1st respondent submits that the trial court cannot be faulted on the conclusions reached in the impugned judgment as it not only correctly but also properly considered the procedure in which both the 2nd and 3rd respondents obtained title to the suit property and arrived at the correct conclusion that it was void, the execution of the void judgment, and the sale of the suit property to the 3rd respondent through an auction were not only void abinitio but were also unlawful the same having been obtained fraudulently and therefore amounted to a charade.
44. The 1st respondent also faults appellant's appeal for the appellant's failure to specify the issues not considered by the trial court nor the impact if any a determination of such issue(s) would have had on the conclusions reached by the trial court in the matter. Neither was there any demonstration by the appellant and the 3rd respondent that the trial court's decision was based per se on the flawed auction process and not on the entirety of the vitiated fraudulent, illegal, unprocedural, null and void litigation characterized by the proceedings in the High Court suit.
45. Second, the 1st respondent further contends that the appellant's assertion of entitlement to title to the suit property having been correctly found by the trial court to have been premised on a nullity was devoid of any legitimacy or legality and could not therefore be sanctioned by the court. Likewise, the trial court also having correctly held that the title held by the 3rd respondent having been obtained illegally through a scheme of fraud, any subsequent title founded on it was not only bad but also incurably bad and could not therefore be used as basis for sustaining the appellant's claim over the suit property. Third, the trial court also correctly held that the doctrine of innocent purchaser without notice could not be invoked to provide succor for the appellant's claim to defeat the 1st respondent's valid entitlement thereto in the absence of demonstration of existence of any cogent evidence to rebut the proven fraud against the 2nd respondent. Fourth, in the 1st respondent's opinion, the title issued to the appellant in 2014 could not operate to defeat his title issued first in time to him in 1989 which has neither been impeached, impugned and or overturned to date and therefore had primacy over any other subsequent title.
46. Lastly, the 1st respondent relies on the case of *Kawaljeet Singh Rekhi vs. Peter Wainaina Kamau & 2 Others [2016] eKLR*; in which the case of *Benjamin Macfoy vs. United Africa Co. Limited* [supra] was approved; *Chemey Investment Limited vs. Attorney General & 2 Others [2018] eKLR*; Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura vs. Attorney General & 4 Others [2017] eKLR;



and Arthi Highway Developers Limited vs. West End Butchery Limited & 6 Others [supra] all for the holdings/principles and/or propositions, we find prudent to distill, inter alia, that:

- i. every subsequent act premised on a nullity cannot accrue legitimacy or legality;
- ii. since sanctity of title was never intended or understood to be a vehicle for fraud and illegalities or an avenue for unjust enrichment at another person;
- iii. a court of law cannot protect title to land which has been obtained illegally or fraudulently merely because a person is entered in the register as proprietor;
- iv. a property cannot have two title deeds. Where there is a proven demonstration that the second title is founded either on mistake, misrepresentation or fraud, the first title in time prevails;
- v. the doctrine of purchaser without notice never enabled a purchaser to take free from legal rights as distinct from equitable interests; and lastly,
- vi. the doctrine of purchaser without notice is qualified by a fundamental distinction between legal estates and equitable interests.

47. In light of the above, the 1st respondent submits that the appellant's title seemingly based on an alleged equitable interest could not operate either to subsume or supplant his lawfully and rightfully acquired title.

48. This is a first appeal. Our mandate is as set out in Rule 29(1)(a) of the *Court of Appeal Rules*. It provides:

29(1) On any appeal from a decision of a superior court, acting in exercise of its original jurisdiction, the Court shall have power -

- a. To reappraise the evidence and to draw inferences of fact; and

49. This Court has delineated this mandate in numerous of its decisions. We take it from the case of *Selle vs. Associated Motor Boat Co. [1968] E.A 123* in which the court expressed itself as follows:

"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

See also *Jabane vs. Olenja [1986] KLR 664 at p. 664*, in which Hancox J.A. the Court added as follows:

"I accept this proposition, so far as it goes, and this court does have power examine and re-evaluate the evidence and findings of fact of the trial court in order to determine whether the conclusion reached on the evidence should stand – see (*Peters vs. Sunday Post [1958] E.A. 424*). More recently, this court has held that it will not likely differ from the findings of fact of a trial judge who had the benefit of seeing and hearing all the witnesses, and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular *Ephantus*



Mwangi vs. Duncan Mwangi Wambugu (1982-88) 1 KAR, 278 and *Mwana Sokoni vs. Kenya Bus Service* (1982-88)1 KAR 870.”

50. We have considered the record in light of the above mandate. The issues that fall for our consideration are the same as those condensed by the appellant in his written submissions and as supported by the 3rd respondent also in its written submissions.
51. Issue number 1 and 2 are interrelated and will be addressed as one. Our position upon evaluation of the record is that the appellant’s complaint on the two issues stems from the trial court’s conclusions drawn on the determination of issues as to whether: the sale of the suit property to the 3rd respondent at a public auction in execution of a decree that was issued in the High Court suit in favour of the 2nd respondent was lawful; the 3rd respondent acquired a valid title over the suit property and, lastly, whether the appellant acquired a valid title over the suit property from the 3rd respondent. The trial court assessed the record as laid before it, made observations and findings thereon and gave reasons for drawing out the conclusion that the appellant’s title to the suit property was tainted with fraud, nullity, illegality, and unprocedurality and was therefore unsanctionable by the trial court.
52. The approach we take in determining whether the conclusion reached by the Judge on the establishment of the above elements are sustainable or otherwise is to adopt both the facts and the law on the issues in controversy as between the respective parties herein as already assessed above without having to rehash the same for purposes of our reasoning in the disposal of the appeal.
53. Starting with the establishment of the element of fraud, the Judge took into consideration the definition of fraud as set out in Black’s Law Dictionary, 8th Edition at page 731, and the threshold for proof of fraud as enunciated by the predecessor of this Court in the case of *Railal Gordhanbhai Patel vs. Lalji Makanji* [*supra*].
54. Also taken into consideration by the Judge was the fact that as at the time the 1st respondent lodged his complaint with the CID about interference with his proprietorship of the title to the suit property, title had not been divested from him in favour of the 3rd respondent. This is borne out by the uncontroverted testimony of DW1 who gave evidence on behalf of the 3rd respondent that he recalled being summoned by the CID through the 1st respondent’s advocate over the issue. He is on record as saying that in obedience to the summons from the CID he not only presented himself to the CID but also recorded a statement and handed over all the documentary proof of the 3rd respondent’s entitlement to the suit property. It was also his position that he did not seek clarification from the CID with regard to the outcome of the investigations he had knowledge of before selling the suit property to the appellant.
55. Further proof of fraud that the Judge addressed and took into consideration is the uncontroverted evidence that PW2’s investigations revealed that Julius Mutugi Muchemi in whose name the 1st respondent was sued in the High Court proceedings was in fact a fictitious character. A search conducted by PW2 at the Registrar of Persons Registry with regard to the authenticity of the ID card number used by the 2nd respondent in the High Court proceedings revealed that the correct holder of the said ID card No. xxxxxxxx was one, Mugo Gitari whom the 1st respondent also neither knew nor had any dealings with.
56. We have on our own considered the conclusions reached above by the Judge in light of the totality of the record assessed above and find no basis for faulting the Judge’s conclusion that Julius Mutugi Muchemi was a fraudster and therefore the entire proceedings purportedly initiated in the said High Court against the 1st respondent were fraudulent especially when it is evident from the record that there was no basis for initiating the same against the 1st respondent.



57. The Judge's finding on the element of nullity was also well founded both in law and in fact. On the law, the record is explicit that the Judge took into consideration persuasive jurisprudence among these the often cited case of *Macfoy vs. United Africa Co. Ltd* [supra] whose cumulative legal position is that a judgment founded on null and void proceedings is a nullity and any action stemming from it or rooted thereon is also null and void ab initio.
58. On the facts, the Judge took into consideration and rightly so in our view that the root cause of the fraudulent divestation of title from the 1st respondent to the 3rd respondent and subsequently to the appellant were the High Court proceedings subsequently declared a nullity. It is common ground that it is those same proceedings that gave rise to a fraudulent ex parte judgment in favour of the 2nd respondent against the 1st respondent. That fraudulent ex parte judgment resulted in a decree whose execution by way of auction is what led to the suit property being sold to the 3rd respondent as the highest bidder at an auction conducted in pursuance thereof and subsequently sold to the appellant.
59. The appellant as supported by the 3rd respondent have argued that they were not party to the High Court proceedings subsequently declared a nullity. They were therefore not bound by the orders resulting therefrom. Neither should those orders have been used as basis for vitiating their entitlement to the suit property as purchasers for value without notice.
60. Our take on the appellant's above complaint as supported by the 3rd respondent is that the legal position is as was properly comprehended and appreciated by the Judge that once the High Court proceedings were declared a nullity, no sanctionable benefits could flow therefrom. We therefore affirm the Judge's position that the appellant's title was tainted with nullity
61. Appellant's complaint, on the element of illegality and unprocedurality, stems from the alleged Judge's misconstruction and misapplication of sections 26 and 80 of the Act. These provide:
- 26(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, unprocedurally or through a corrupt scheme.
- 80)(1) The court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
2. The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.
62. The record is explicit that upon construction of section 26(1) and considering it in light of the totality of the record before the court, the judge found nothing in the said section 26(1) of the Act and correctly so in our view that would have mandated him to sanction as valid a title acquired illegally, unprocedurally or through a corrupt scheme especially when it was evident from the record that the fraudulent factors presented in the facts that the judge assessed on the record before him were explicit



that these stemmed from the High Court suit that was subsequently vitiated and declared null and void.

63. Section 80 was however not construed by the Judge. We have construed it on our own. Our position is that it does not provide succor for the appellant's claim over title to the suit property. This is because in our view the appellant's claim to title to the suit property cannot be considered as a standalone issue. It was imperative for the trial court at the trial as it did and now this Court on first appeal to interrogate the root of the appellant's title to the suit property namely that it stemmed from the 3rd respondent who was aware that events leading to the auction vide which his acquisition of title to the suit property albeit on paper as at that point in time was under investigation by the CID. Instead of awaiting for the conclusion of the investigations or alternatively seeking their blessings before proceeding to process title in its favour, went ahead and had the same vested in its name without clearance from the CID and subsequently disposed it off to the appellant. The Judge cannot therefore be faulted for finding that the title was also tainted by reason of the conduct on the part of the 3rd respondent in the manner he acquired title which operate to affect subsequent transactions affecting the said title.
64. The jurisprudence relied upon by the appellant and which we find prudent not to replicate are as already highlighted above. We have given due consideration to them in light of the record as assessed herein by us. Our take on the same is that the jurisprudential thread running through all of them is that no court of law should sanction and pass as valid any title to property founded on: fraud; deceitfulness; a contrived decree; illegality; nullity; irregularity, unprocedural or otherwise a product of a corrupt scheme.
65. We have applied all the above elements to the record as assessed herein by us on this issue and find no error in the judge's decision to vitiate the appellant's title based on the totality of the above elements. Our reasons are as follows: first, the 1st respondent never divested himself of title to the suit property. In fact, he still holds title that had legally, procedurally and lawfully been issued to him. Misplacement of the original title that had been issued to him upon allocation of the suit property to him and which he undisputably alleged that it had gotten lost alongside others was reported to the 4th respondent who caused the publication of a Kenya Gazette notice to that effect and upon satisfaction that the due process of the law had been followed issued a replacement.
66. Second, the undisputable existence of title to the suit property in favour of the 1st respondent as at the time title over the same property was issued to the 3rd respondent and subsequently to the appellant in essence created two titles over the same subject property. The position in law as assessed above is that no property can in law have two parallel titles. In such an instance the earlier title prevails even assuming that the subsequent title was also procedurally acquired. Herein, notwithstanding that the appellant may have had no notice of the irregularity, unprocedural, unlawfulness, deceitfulness and fraud attendant to the process that led to the acquisition of the title to the suit property by the 3rd respondent, the position in law and which we are bound to uphold having been enunciated by this Court is that the earlier title held by the 1st respondent has primacy over that held by the appellant which in our view was therefore rightly vitiated by the judge.
67. Third, deceitfulness that tainted the 3rd respondent's holding of title to the suit property and which subsequently operated to taint that of the appellant arose from the undisputed fact that a fictitious Julius Mutugi Muchemi using a fictitious ID card bearing his names when in fact the correct holder of the said ID card was one Mugo Gitari not only initiated fictitious litigation over a fictitious claim against the 1st respondent but also failed to bring the fictitious litigation to his (1st respondent's) notice resulting in an ex parte judgment being issued against him on the basis of which the suit property was auctioned to the 3rd respondent. There is therefore no way the resulting title registered in the names of the 3rd respondent and subsequently transferred to the appellant could have been delinked from its



anchor or basis rooted on the deceitful proceedings initiated by the fictitious Julius Mutugi Muchemi and made a standalone issue so as to provide anchor for a valid claim by the appellant.

68. Fourth, the reasoning and sequence of deceitful events we have alluded to in holding number 3 above operates to taint the appellant's title with fraud in that the sole aim of the said fictitious Julius Mutugi Muchemi initiating the High Court suit proceedings was solely for purposes of defrauding the 1st respondent of title to the suit property vide which he purportedly succeeded in causing the suit property to be fraudulently, auctioned to the 3rd respondent.
69. Fifth, on a contrived decree, it is explicit from the record that the decree in the High Court suit on the basis of which the 3rd respondent purportedly acquired title to the suit property through a public auction was contrived in that it was founded on both fraud and deceit and was therefore unsanctionable by a court of law.
70. Sixth, the title was also tainted with nullity in that the court process on the basis of which the title to the suit property was anchored was subsequently declared null and void abinitio. The position in law as we have already highlighted above is that anything founded on nullity is also null and void and of no consequence. The title allegedly vested in the 3rd respondent and subsequently passed on to the appellant having stemmed from court proceedings that were subsequently declared null and void also stood vitiated by the same nullity and of no consequence. The Judge cannot therefore be faulted for stating the correct position in law in the manner done.
71. Seventh, section 80 of the Act is explicit that any title founded on irregularity, unprocedurally or a corrupt scheme stands vitiated. The title purportedly acquired by the 3rd respondent and subsequently passed on to the appellant having been demonstrably shown to have been tainted with fraud, deceit and nullity fits the description of title that has been acquired not only irregularly and unprocedurally but also through a corrupt scheme. The corrupt scheme herein arises from the facts informing the vitiated High Court proceedings which we find no need to rehash but adopt as already highlighted above.
72. In light of all the above, we reiterate that the Judge's reasoning as to why appellant's title to the suit property was vitiated was well founded both in fact and in law and is therefore unassailable.
73. On the alleged trial court's failure to sanction protection of the appellant's title, firstly, under Article 40(b) of the Constitution and second, under the Torrens Land Registration System, our take thereon is that we were not addressed on the constitutional aspect of this complaint. We, therefore, find no basis for pronouncing ourselves thereon. We were, however, addressed on the Torres Land Registration System. We, therefore proceed to pronounce ourselves thereon. Under the Torrens Land Registration System, all that the land registration under this system provides for as expounded by the case law assessed above is that a party suffering prejudice arising from such a party acting on the entries made in a register kept by the Government and held out by the Government as correct for all intends and purposes to his/her detriment is entitled to compensation for any loss as a result of acting on such entries to his/her detriment. It is our position that it is explicit from the record that the judge properly appreciated and applied that position in law to the appellant's complaint. That is why he sustained the appellant's claim against the 3rd respondent for compensation in respect of which neither the appellant nor the 3rd respondent have challenged.
74. Before concluding the matter, we find it prudent to address and express ourselves on the 3rd respondent's complaint that sustaining the impugned judgment would be tantamount to conferring an unjust enrichment and or benefit to the 1st respondent for the trial court's failure to express itself on the whopping amounts of money paid in terms of the consideration and rates paid by the 3rd respondent over the suit property.



- 75. Our take on this complaint is that the Judge at the trial and now this court on appeal are bound by the record as laid before both forums. It is explicit from the record that the 3rd respondent neither raised a counter claim for the whopping sums against either the 1st respondent or the 2nd respondent who was the beneficiary of those sums. Nor did he file a cross appeal herein. The trial court’s hands were tied as the trial court’s mandate was limited to the consideration of issues raised in the pleadings and evidence on the record as laid before that court. Likewise, those of this Court are similarly tied. We can only appreciate, express and pronounce ourselves on issues raised in the condensed grounds of appeal as submitted thereon by the respective parties herein. None of which as already highlighted above, touch on the 3rd respondent’s above complain. We cannot therefore be called upon to confer a relief or pronounce ourselves on an issue not properly laid before us. We accordingly reject this complaint.
- 76. The upshot of the above lengthy assessment and reasoning is that we find no merit in this appeal. The same is dismissed with costs to the 1st respondent both on appeal and the High Court proceedings.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF NOVEMBER, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

M. K. KOOME

.....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

