



Lukutsa v Sebenzia Achitsa Amuti (Suing as the Personal Representative of the Estate of Abraham Mukanzi alias Ibrahim Mukanzi) (Civil Appeal 43 of 2019) [2021] KECA 241 (KLR) (3 December 2021) (Judgment)

Neutral citation: [2021] KECA 241 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 43 OF 2019
RN NAMBUYE, W KARANJA & S OLE KANTAI, JJA
DECEMBER 3, 2021**

BETWEEN

KAITANO ASHIONO EMBALI LUKUTSA APPELLANT

AND

SEBENZIA ACHITSA AMUTI (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF ABRAHAM MUKANZI ALIAS IBRAHIM MUKANZI) RESPONDENT

(An Appeal from the Judgment of the Environment and Land Court, (N. A. Matheka, J.) dated on 24th October, 2018 in Kakamega ELC Cause No. 15 of 2013)

JUDGMENT

1. This is a first appeal arising from the judgment of N. A. Matheka, J. dated 24th October, 2018 in the Environment and Land Court at Kakamega, cause No. 15 of 2013.
2. The background to the appeal is that Sebenzia Achitsa Amuti (the respondent), suing as a personal representative of the estate of Abraham Mukanzi Lukusa alias Ibrahim Mukanzi (the deceased) filed suit against the appellant, Kaitano Ashiono Embali Lukutsa vide a plaint dated 14th July, 2013. In it, the respondent averred, inter alia, that the deceased who was her father was the original owner of land parcel number Idakho/Shivagala/457 (the original suit land). He was involved in a road traffic accident in the year 2000 as a result of which he suffered dislocation of his legs which injuries prevented him from walking long distances. He subsequently became bed ridden as from 2005. She and PW3 were his caregivers at the material time.
3. The litigation resulting in the appeal was triggered by the respondent's conduct of fencing off a portion of the original suit land and constructing houses thereon. The respondent carried out a search in the area Lands Registry on the title to the original suit property, and that is when she discovered



that the original suit property had in fact been subdivided into four (4) portions namely Idakho/ Shivagala/2542 – 2545. The original register was closed and new registration records created for the resulting subdivisions. On 16th January, 2010, LR No. Idakho/ Shivagala/2542 (the contested suit property) was transferred to Kaitano Ashiono Embali Lukhutsa, the appellant while the other resulting subdivisions namely, LR Nos. Idakho/Shivaga 19/2543, 2544 and 2545 were retained in the names of the deceased.

4. It was the respondent's position that all the transactions leading to the closure of the original land register for the original suit property upon subdivision of the said original suit property into four (4) resulting portions aforementioned was fraudulent and/or marred with irregularities instigated by the appellant herein. The particulars of fraud irregularities attributed to the appellant were given as "causing the original suit property to be subdivided and create new titles without the knowledge of the deceased and or the respondent, laying claim to part of the deceased's original suit property knowing that he had no valid claim to any part of the original suit property, taking advantage of the deceased to carve off part of his land when he knew that the deceased was at all the time bedridden and unable to move out of his house to witness any transactions, obtaining a title in respect of the deceased's parcel of land when he knew that the deceased was hospitalized and at the verge of his death, presenting forged documents to the Land Control Board and the lands office thereby inducing them to give him a title to part of the deceased's parcel of land and, lastly, forging the deceased's signature as well as giving a wrong passport size photograph at the lands office purporting the same to be for the deceased so as to gain hidden advantage with the sole purpose of defrauding the beneficiaries of the deceased's estate."
5. By reason of the matters complained of above the respondent sought an order for cancellation of title to all the resulting subdivisions of the original suit property and order restoration of title to the original suit property in the names of the deceased for succession purposes, an order of eviction to issue against the appellant evicting him from the contested suit property, costs and any other relief that the Court would deem fit to grant.
6. In rebuttal, the appellant filed a defence dated 21st March, 2013, asserting, inter alia, that on 1st July, 2009, he procedurally, regularly and lawfully entered into a sale agreement with the deceased, for the sale of the contested suit property. He paid the full purchase price, took immediate possession, settled thereon during the lifetime of the deceased and had lived thereon ever since with the full knowledge of the respondent. He denied particulars of fraud, irregularity and unprocedurality attributed to him and put the respondent to strict proof thereof. He conceded that the passport size photograph on the transfer form transferring the contested suit property from the deceased to him did not belong to the deceased but explained that the error arose from a mix up in the lands registry which upon its discovery he tried to correct but he was unsuccessful in concluding that process because of the presence of a caution placed against the contested suit title by the respondent prohibiting any transactions on the said title. He also conceded that the amount of kshs.300,000.00 indicated in the sale transaction agreements differed with that indicated in the land transfer form of kshs.50,000.00 but gave no plausible explanation for that discrepancy.
7. The cause was canvassed through oral testimony and written submissions. The respondent gave evidence as PW1, supported by Andrew Shivali Anumba, PW2 and Edwin Imbali, PW3. Cumulatively, their concurrent testimonies were, inter alia, that to their respective knowledge of the deceased, he was illiterate and could only therefore thumb print documents. The deceased was involved in a road traffic accident which subsequently rendered him bedridden, and could only move from one location to the other with the help of his caregivers who were in this respect PW1 and PW3. They were not aware of any land sale transactions for the sale of any portion of the original suit property to the appellant. PW1 and PW3 as the deceased's caregivers at the material time did not recollect not



only aiding but also carrying the deceased to any office and witnessing him execute any land transaction documents in favour of the appellant, hence their position that all the transactions alluded to by the appellant with regard to how he got registered as proprietor of title to the contested suit property were fraudulent and urged that the Court vitiates that title.

8. In rebuttal, the appellant gave evidence as DW1, supported by the evidence of Kaitano Olando Imbali DW2, John Paul Mbololo DW3, and Isaac Lusuhi Shitsama, DW4. Cumulatively, their evidence was that there were three sale agreements executed between the appellant and the deceased, for the sale of 0.25Ha out of the original suit property for KShs.300,000.00. Two of these were thumb printed while one was allegedly signed by the deceased. The appellant did not have evidence of a document examiner confirming that indeed, it was the deceased who signed and thumb printed those sale agreements. DW2 and DW3 stated, inter alia, that the agreements of sale between the deceased and the appellant witnessed by them were thumb printed by the deceased. DW2 and DW3 also said that they come from the same locality as the deceased and the appellant. To their knowledge, the deceased never went to school. He was therefore illiterate and could only thumb print.
9. DW4, stated he was the surveyor who carried out the survey and subdivision of the original suit property into four resulting portions but had nothing to show that he was a licensed surveyor. DW4 also confirmed that the passport size photograph affixed on the transfer form purportedly transferring the contested suit property to the appellant, did not belong to the deceased. He explained that it had been delivered to his office by a son of the deceased who when it was brought to his notice that it was wrong he (the son) promised to bring a replacement but he never did so. They reported the matter to the CID for investigations in respect of which DW4 never made any follow-up to find out the outcome of those investigations. DW4 conceded that the purchase price on the sale agreements differed with that on the transfer form.
10. At the conclusion of the trial, the trial Judge analyzed the record, construed, took into consideration, and applied to the record the provisions of law in sections 24(a) and 26(1) of the [Land Registration Act](#) and expressed himself thereon as follows:

“The law is clear that, the Certificate of Title issued by the Registrar upon registration 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 and the title of that proprietor shall not be subject to challenge except – on the ground of fraud or misrepresentation to which the person is proved to be a party; or where the certificate of title has been acquired illegally, unprocedurally or through corrupt scheme.”

11. The Judge also took into consideration the decision in the case of *Elijah Makeri Nyangw'ara vs. Stephen Mungai Njuguna & Another* [2013] eKLR in which the High Court construed and applied section 26(1)(a) and (b) of the [Land Registration Act](#) and rendered himself thereon as follows:

“It is not in dispute that Idakho/Shivagala/2542 being the subdivision of Idakho/Shivagala/457 is registered in the name of the defendant herein. The plaintiff avers that all transaction leading to closure and subdivision of parcel of land No. Idakho/Shivagala/457 were fraudulent and/or moved with irregularities cause by the defendant herein. It is the plaintiff's evidence that her father Ibrahim Mukanzi was too sick at the time of the sale agreement to participate in the same. I have perused the documents adduced as evidence in this matter. It is curious to find that the purchaser signed one agreement and used a thumb print on the other. PW2 a clan elder testified that the late was illiterate and could not have signed the agreement. I believe him. Looking at the sale agreement it is not disputed



that the photo of the purchaser is not the one of the seller Ibrahim Mukanzi and the surveyor states that this is the photo that he was given by the seller's son. Indeed, he confesses that the transfer documents were brought to him already signed. It is clear to me that the said Ibrahim Mukanzi was not party to this agreement. There is also a contradiction on the purchase price. The sale agreement stated it was 300,000/= Kshs while the transfer documents state it was 50,000/=kshs. Lastly from the minutes of the land control board dated 13th May 2010 it appears that consent to transfer the suit land was never given or discussed as indicated in the letter of consent PEx5. I find that all transactions leading to closure and subdivision of parcel of land No. Idakho/Shivagala/457 were fraudulent and/or moved with irregularities caused by the defendant herein. I find the defence frivolous and I reject it. I find that the plaintiff has proved beneficial interest of the suit land together with other family members. I find that the plaintiff has proved her case on a balance of probabilities and grant the following orders;

1. Cancellation of title No. Idakho/Shivakala/2542 registered in the defendant name cancelled and all subsequent title created out of the deceased parcel of land No. Idakho/Shivakala/457 cancelled and the same reverted back to the deceased name to enable smooth succession of the deceased estate.
 2. The defendant is to vacate from parcel of land No. Idakho/ Shivakala/457 and/ or any title created therefrom to wit; L.R. IDAKHO/SHIVAKALA/2542 within the next 6(six) months and in default eviction order to issue forthwith.
 3. Costs of this suit to the plaintiff.”
12. The appellant was aggrieved. He has appealed to this Court raising six (6) grounds of appeal. In summary, these are that the learned Judge erred in law and in fact when she failed to properly evaluate the evidence tendered before her; failed to consider material issues especially the fraud allegedly committed by the appellant, the weight of the evidence on the record does not support the learned Judge's final findings; the Judge failed to evaluate and analyze the evidence in support of the appellant's case; the Judge misdirected herself by finding in favour of the respondent contrary to the overwhelming evidence in support of the appellant's case.
13. The appeal was canvassed through the Go-To-Meeting platform due to the ongoing Covid-19 pandemic challenges. When called out only the appellant was in attendance. The court being satisfied that the advocate on record for the respondent had been served electronically with a hearing notice on 28th April, 2021 at 3.38pm and had neither filed written submissions in response to the Deputy Registrar's directions in the said hearing notice by the Deputy Registrar of the Court nor attended court for the hearing allowed the appellant to prosecute the appeal.
14. The appellant fully adopted his lengthy homegrown submissions drawn in a layman's format and or style. Supporting the appeal, the appellant, submitted that LR No. Idakho/ Shivakala/457 which originally was registered in the names of Ibrahim Mukanzi (the deceased) was subsequently subdivided into four (4) portions of which LR No. Idakho/Shivakala/2542 comprising 0.25Hectares was sold and transferred to him by the deceased during his (deceased's) lifetime vide minute No. 991/10 of the Ikolomani Land Control Board on 13th May, 2010, matters that the Judge not only misapprehended but also failed to properly evaluate and appreciate.
15. It was also submitted by the appellant that the respondent failed to prove fraud as pleaded in the plaint. There was therefore no basis for the Judge's ruling in her favour on the ground of the alleged fraud. That the respondent neither in her pleadings nor evidence disputed that the deceased thumb



printed and signed the sale agreements and variously acknowledged receipt of Kshs.300,000/= from the appellant for the purchase of the contested suit property during his life time, as all that the respondent and her witnesses stated to court according to the appellant, was that the deceased was illiterate and could only thumb print. The appellant also complains that the respondent failed to call the Land Registrar to confirm that the documents relied upon by her in support of her claim against the appellant did not originate from the land's office which default in the appellant's opinion casts a shadow of doubt on the respondent's case.

16. The Judge is also faulted for her failure to properly appreciate the surveyors' testimony that he witnessed the deceased as the seller and the appellant as the purchaser sign the mutation form and that the deceased's son, Silvanus Mukanzi is the one who brought to him the passport size photograph. Lastly, that on the totality of the above submission, he had sufficiently demonstrated at the trial and now on appeal that he was the lawful purchaser of the contested suit property and was therefore lawfully entitled to it. He therefore asks this Court to find merit in his appeal and allow it with costs.
17. This being a first appeal, our duty 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

See also the exposition of the same as set out in *Selle vs Associated Motor Boat Company Ltd [1968] E.A. 123*. It is simply that the Court is invited to consider the evidence, evaluate it and draw out its own conclusions. In so doing, the Court must however bear in mind that it neither heard nor saw the witnesses testify and should therefore make due allowance for that.

18. We have considered the record in light of the threshold for the exercise of our mandate set out above in light of the appellant's sole submissions. According to us, the issues that fall for our consideration are whether:

1. The learned Judge misapprehended the facts of the case.
2. The learned Judge misapprehended and/or misdirected herself on the law.
3. The contested suit property was legally and procedurally acquired by the appellant.
4. The title to the contested suit property should be cancelled.
5. The learned Judge rightly issued an order for eviction of the appellant from the contested suit property.

19. On issue number (1), we adopt the rival factual position of the litigation assessed above. We have considered it in light of the appellant's complaint on this issue and which we find the Judge properly appreciated and considered was that the substratum of the suit at the trial and now on appeal before us was the contested subdivision of the original suit property namely, LR No. Idakho/ Shivagala/457 originally registered in the name of the deceased into four resulting subdivisions one of which forming the contested suit property and which upon subdivision was subsequently registered in the names of the appellant.

20. It is also common ground from the same rival factual position assessed above, a position also properly appreciated by the trial Judge and correctly so in our view that documents of sale and transfers resulting in the contested suit property being vested in the names of the appellant also had issues. For example,



the sale agreements gave a total aggregate of kshs. 300,000.00 as the full consideration paid by the appellant to the deceased for the sale of the contested suit property while the transfer document only indicated kshs.50,000.00 as consideration for the sale. Further, the photograph on the transfer document did not belong to the deceased. DW4, the surveyor who prepared the transfer documents admitted he had nothing to show that he was a licensed surveyor. Neither did he seek leave of the Court to produce his licence at a later stage of the proceedings to prove that he was indeed a licensed surveyor. DW4 also conceded that indeed the photograph affixed to the transfer form did not belong to the deceased, and although he alleged that the photograph was brought to him by a son of the deceased who when informed that it did not belong to the deceased promised to bring a replacement but failed to do so, DW4 allegedly reported the matter to the CID for investigations, but he never followed up to find out the outcome of those investigations.

21. No explanation was given to the trial court either by DW4 or the appellant as to why no follow up was made to find out the outcome of the investigations lodged with the CID if at all there was such a report made to CID by them. Nor why no summons were ever applied for by the appellant to summon the alleged son of the deceased to come to court and explain the circumstances under which the wrong photograph purporting to be that of the deceased was affixed on the transfer form. Nor alternatively to call the CID to shed light on the outcome of the alleged investigations. The conduct displayed above by both the appellant and DW4, his witness is one that gives rise to an inference that there was no truth in what they were asserting before the trial court.
22. The above being the correct factual position of the litigation as appraised by us, we find no misapprehension or misdirection of the facts on the part of the trial Judge as alleged on appeal by the appellant. Our take thereon is that the facts analyzed by the Judge as set out in the impugned judgment is what the appellant has analyzed at length in his submissions. We therefore find no merit in this complaint. It is accordingly rejected.
23. On alleged misapprehension and misapplication of the law, it is evident from the record that the Judge took into consideration the provisions of sections 24(a) and 26(1) of the Act as construed by a court of co-ordinate jurisdiction in the case of *Elijah Makeri Nyangw'ara vs. Stephen Mungai Njuguna & Another* [supra]. These provide:
 - 24(a) Interest conferred by registration Subject to this Act - the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.
 - 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.
24. The guiding principle/propositions to be distilled from the above enunciation by the High Court is that title registered under the above provisions of the Act falls for challenge in circumstances where there is proof that the same was acquired through fraud, misrepresentation or a corrupt scheme all of which the Judge properly appreciated and applied borne out by the content of the rendition highlighted above.



25. The foregoing being the position we have taken on this issue as being the correct position on the record before us, we find nothing to suggest that there was misapprehension or misapplication of the law to the issues in controversy as between the respective parties herein.
26. On the legality of the transfer of the contested suit property to the appellant, it is evident from the record that the respondent pleaded irregularity, unprocedurality, illegality and fraud attributed to the appellant. She was therefore in law obligated to prove those allegations. The normal standard or burden of proof in civil litigation is that provided for in sections 107, 108, 109, 110 and 112 of the Evidence Act, Cap 80 Laws of Kenya which we find no need to set out in extenso. It is sufficient for us to state that our cumulative construction of the above provisions of law and as numerously stated above by this Court is that the burden of proof in civil litigation is not fixed. It is two pronged. The first party to assert which in this appeal was the respondent had the burden to prove the allegations of illegality, unprocedurality, irregularity and fraud attributed to the appellant. Once the above threshold was satisfied by the respondent, the burden shifted on to the appellant to disprove those assertions.
27. In the instant appeal, the respondent as the first asserting party as supported by PW3 and partially by DW2 and DW3 who were appellant's witnesses proved that at the material time the deceased was bedridden and could only transact business with the help of his caregivers who were the respondent and PW3. Both PW1 and PW3 and as partially supported by appellant's own witnesses, were categorical that at the material time, the deceased was illiterate and could only thumb print but not sign a document. PW1 and PW2 were categorical that they did not recollect witnessing the deceased undertaking any transactions with regard to the sale of the original suit properties or taking him to any office or any place and witnessing him execute any documents for the transfer of the contested suit property in favour of the appellant. They were unshaken in their testimony on this aspect of the case and the trial Judge found their testimony cogent, plausible and credible. That is why he acted upon that evidence to fault the process by which the appellant acquired the contested suit property.
28. The above being the correct position on the record and which we affirm, the burden shifted to the appellant to prove either that PW1 and PW3 were not truthful in their assertion and in fact did witness the deceased undertake the transactions, thumb print and sign the transfer documents in his favour. Alternatively, that any other named person or persons assisted the deceased to do so which he failed to do. In the absence of the appellant discharging, the burden of proof shifted on to him, in law, firstly, before the trial court and now before this Court on appeal, the only plausible and logical conclusion to be drawn by the trial court and now this Court on appeal is that the entire process leading to the appellant's acquisition and registration of the contested suit property in his favour was tainted with fraud, illegality, irregularity, unprocedurality and therefore a product of a corrupt scheme hatched by the appellant and persons known to him with the sole purpose of defrauding the deceased a portion of the original suit property.
29. On proof of fraud, we adopt *Black's Law Dictionary, 9th Edition at page 131*, fraud is defined as follows:

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

The legal threshold for proof of fraud and which we fully adopt is that set by the predecessor of this Court in *Railal Gordhanbhai Patel vs. Lalji Makanji [1957] E.A 314*, that the burden of proof of fraud is slightly above that applicable in ordinary civil suit namely, that of balance of probabilities but not as high as beyond reasonable doubt applicable in criminal cases. In the case of *Elizabeth Kamene Ndolo vs. George Matata Ndolo [1996] eKLR*, this Court reiterated that where a party makes a serious



charge of forgery or fraud, the standard of proof required of such a party is obviously higher than that required in ordinary civil cases namely, slightly higher than proof upon a balance of probabilities but certainly not one beyond a reasonable doubt as in criminal cases. See also the position taken by Tunoi, J.A (as he then was) in the case of *Vijay Morjaria vs. Nansingh Madhusingh Darbar & Another [2000] eKLR* for the holding, *inter alia*, that:

“first, fraud must be specifically pleaded. Secondly, particulars of the fraud alleged must be stated on the face of the pleading. Third, the facts alleged to be fraudulent must of course be set out. Fourth, it must be expressly stated that these facts were done fraudulently. Fifth, fraudulent conduct must be distinctly alleged and as distinctly proved. Sixth, it is not allowable to leave fraud to be inferred from the facts.”

30. Applying the above threshold to the rival position herein, we reiterate our position already taken above that the appellant’s failure to discharge the burden of proof shifted upon him to demonstrate the legality, regularity and procedural nature of the processes undertaken to vest him with title to the suit property was sufficient proof of fraud to the required threshold.

31. On cancellation of title to the contested suit property, the position in law as correctly appreciated by the trial Judge is that a proprietor of a registered title to property holds an indefeasible title to the property protected under the law vitiated in the manner provided for in the Act. *Black’s Law Dictionary, 8th Edition* defines a bona fide purchaser as follows:

“A bona fide purchaser is one who buys something for value without notice of another claim to the property and without actual or constructive notice of any defects nor 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.”

32. Elements and or ingredients for qualification of a person as a bona fide purchaser for value without notice and which we fully adopt are as were distilled by the court in *Lawrence Mukiri vs. Attorney General & 4 Others [2013] eKLR* 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.

33. We have applied the above threshold to the appellant’s claim. Our take thereon is that element (i) is satisfied as the appellant holds title to the contested suit property. Ingredient (ii) of purchase of the contested suit property in good faith does not provide succor for the appellant’s claim for reasons given above. In addition, it is also our position that neither the finger prints nor the signatures on the sale agreements tendered in evidence by the appellant purporting these to be in support of the sale transactions between him and the deceased were ever proved to be those of the deceased. Secondly, the appellant failed to discharge the burden of proof shifted upon him by law as already set out above and which we find no need to repeat here.



34. The sale agreements and purported agreements for purported payments and receipt of the purchase price by the deceased in satisfaction of the sale transaction are also suspect, firstly, for lack of proof that the deceased indeed endorsed them. Second, for the appellant's failure to explain how those documents, apparently demonstrating that the purchase price that changed hands between him and the deceased indicated as kshs.300,000.00 did not tally the amount in the transfer form of kshs.50,000.00. Neither did the appellant give any reasons as to why he took no steps to rectify the anomaly in the transfer form upon his discovery of the said anomaly.
35. Neither DW4 nor the appellant gave any reason as to why the alleged son of the deceased who allegedly gave a wrong photograph purporting to be that of the deceased was never summoned to court to shed light on what actually transpired leading to him giving a wrong passport photograph to DW4 as opposed to that of his deceased father. The appellant also gave no explanation as to why he never pursued the issue with the CID, considering that it was him who stood to lose out on his assertion of entitlement to the contested suit property if the said documents were to be faulted. In light of all the above, it is our position that as long as the transfer form stands faulted, there is no way the appellant can claim to be a lawful transferee of the contested suit property.
36. Although the appellant asserts in his submission that it is the respondent who should have called the Lands Registry staff to disprove his claim, our position on that assertion is that, since it is the appellant who asserted and alleged that he had a valid claim to the contested suit property, it was incumbent upon him to call Lands Registry staff to confirm that the process undertaken by them to vest him with title to the contested suit property was regular, legal and procedural.
37. As for knowledge of fraud and we add irregularity and unprocedural in the acquisition of title to the contested suit property, our position is that the appellant was privy to all that we have alluded to above, both in reality and also by conduct in the approach he has taken with regard to the entirety of the transaction resulting in him being vested with title to the contested suit property on the basis of both the assessment and reasoning given above.
38. Nothing much turns on ingredient (iv). Our position on this ingredient is that the totality of the assessment and reasoning carried out above is explicit that the appellant got himself registered as a beneficiary of the contested suit property with full knowledge that the entire process leading to the subdivision of the original suit property into four (4) resulting subdivisions, one of which being title to the contested suit property being registered in his favour was flawed to his knowledge and full participation.
39. Ingredient (vi) does not also aid the appellant's claim as the assessment and reasoning on the other elements/ingredients for proof of a bona fide purchaser for value highlighted above all go to demonstrate that the appellant's hands were tainted with irregularity, unprocedural, illegality and fraud with regard to the manner in which he got himself vested with title to the contested suit property.
40. On the role of the trial court in the first instance and now this Court on appeal in the second instance, in instances where there is demonstration like in the instant appeal, that a rightful proprietor of title to land was either illegally, irregularly, unprocedurally or fraudulently divested of title to his property is as set out in sections 24(a) and 26(1) of the Act already set out above. Also falling for consideration is section 80 of the same Act. It provides:

“(1) Subject to subsection (2), 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, 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.”

41. The position we take in the application of the above provisions of law to the issues in controversy before us on this issue in the appeal before us is that taken by the High Court 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*. The holdings/principles and propositions distilled from the above decision are, *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.

42. We have accordingly applied the above threshold to the totality of the record. We find no error in the conclusion reached by the trial Judge vitiating the appellant’s entitlement to the contested suit property as in our view there was sufficient demonstration as we have likewise demonstrated in our assessment and reasoning set out above that the appellant’s hands were tainted not only with illegality, irregularity and unprocedurality but also with fraud. The title therefore stood vitiated. We therefore affirm the trial Judge’s finding that the appellant’s purported entitlement to the contested suit property was acquired, illegally, irregularly, unprocedurally and fraudulently and was liable for cancellation, a position we affirm.

43. Before we conclude, we find it prudent to express ourselves on the appellant’s attack on the respondent’s locus standi to initiate the suit whose determination resulted in the appeal under consideration. The appellant’s complaint relates to the regularity of the probate and administration proceedings vide which the respondent was capacitated to initiate the litigation resulting in this appeal.



Our take on that complaint is that it should have been raised as a preliminary objection either in the succession proceedings themselves or at the trial for the trial Judge to rule upon. The record is explicit that those issues were never raised before the trial court, which did not therefore pronounce itself thereon. Our hands are therefore tied. We can neither interrogate or pronounce ourselves thereon.

44. On second complaint of the trial Judge appraising and relying on documents annexed to the respondent's submissions and not tested on cross-examination, we have revisited the record and find that indeed there were some documents that were annexed to the respondent's submissions. We have however found nowhere in the Judge's judgment where there is any indication that these were ever taken into consideration and therefore formed basis for the conclusions reached in the impugned judgment.
45. In the same vein, we reject the appellant's invitation for us to scrutinize the documents he has annexed to his written submissions and form our own impressions thereon. The position in law is that we confine ourselves to the record as laid and ruled upon by the trial Judge.
46. The upshot of the totality of the above assessment and reasoning is that we find no merit in the appeal. It is accordingly dismissed.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF DECEMBER, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

