



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: ASIKE-MAKHANDIA, KIAGE & ODEK, J.J.A.)

CIVIL APPEAL NO. 118 OF 2017

BETWEEN

ELDORET EXPRESS LIMITED.....APPELLANT

AND

TAWAI LIMITED.....RESPONDENT

AND

NATIONAL LAND COMMISSION.....INTERESTED PARTY

(Appeal from the judgment and decree of the High Court of Kenya at Eldoret (Ombwayo J) dated 16th August, 2017

in

ENVIRONMENT AND LAND CASE NO. 87 OF 2015

(Formerly Kitale Hccc No. 18 of 2008)

JUDGMENT OF THE COURT

A mix of greed, ambition, opportunism, straight-faced perjury, negligence and laziness on the part of various parties and players has made the dispute giving rise to this appeal a sickening swamp of lies, half-truths, selective amnesia and outright impunity that has clouded and obfuscated reality to the point where falsehood passes for truth and truth lies desecrated in a highly contentious fight for some prime land in Trans-Nzoia County. The legal battle royale pits the appellant **Eldoret Express Limited (Express)** against **Tawai Limited (Tawai)** both laying claim to the 640 acre land known as **Land reference No. 5707/6 (the suit land)** that lies to the South West of Kitale town at a place called Kiungani.

It is not in dispute that the suit land was initially part of the larger Land Reference No. 5707 measuring 764 acres and owned by one, **George Alexander Sinclair** as Grantee under **Grant No. I.R.16551** from the Governor and Commander in-Chief of the Colony and Protectorate of Kenya on behalf of Her Most Gracious Majesty Queen Elizabeth the Second, to hold for a term of 999 years from the 1st day of October, 1960. After a few transactions involving that larger land, a transfer was registered against the title on 24th December, 1976 in favour of **Gulamhusein Walji Mulji; Abdul Rasul Walji** and **Tawai**, as tenants in common in equal shares, simultaneously with a charge to Lands Limited to secure a loan of Kshs.240,000.

The shares of Tawai's co-tenants were later transferred to Tawai which in consequence owned the larger land absolutely. It was then that on 16th October, 1981, by Entry No. 16, a charge to Kenya National Capital Corporation (KNCC) to secure the sum of Kshs.900,000 was registered against the title. A caveat was later placed against the title by Brooke Bond Limited on 20th March, 1984 claiming a chargees' interest but the same was withdrawn on 2nd January, 1986 and a charge was simultaneously registered in favour of Brooke Bond to secure some Kshs.1,900,000, subject to the charge to KNCC.

It is what happened thereafter that appears to be shrouded in the mystery that has steeped this matter in controversy and has all the hallmarks of mischief as competing narratives emerge and several rounds of litigation have been gone through revolving around the suit land.

In the particular suit that led to this appeal, Express filed a plaint dated 13th February, 2008 in the High Court of Kenya at Kitale, being **Civil Suit No. 18 of 2008**. That suit was later transferred to the Environment and Land Court at Eldoret and assigned **Land Case No. 87 of 2015**. Express' claim was as follows;

“3. THAT at all material times to this suit the plaintiff is the registered owner of all that parcel of land comprised in title Land Reference Numbers 5707/6 (I.R. No. 43019) measuring 259.1 Hectares (639.9 Acres) situated in Trans-Nzoia District, in the Republic of Kenya;

4. THAT plaintiff shall aver that it has been lawfully occupying, cultivating, planting and developing the said suit property since 2001 when it bought it lawfully from Kaitet Tea Estate (1977) Limited [hereinafter ‘Kaitet’];

5. THAT sometime in December, 2007 the defendant, its agents, servants, members and/or shareholders without any reasonable cause or any colour of right have moved and/or trespassed into part of the plaintiff's said suit land and have unlawfully put up/constructed illegal houses/structures thereon, thus denying the plaintiff quiet and peaceful enjoyment, ownership and possession thereof thus causing loss and damage to the plaintiff. The defendant has unlawfully occupied 250 acres or thereabouts being part of the suit land.”

It pleaded further that Tawai's said agents, servants, members and/or shareholders were determined to not only continue with occupation of the 250 acres of the suit land they had taken over, but had also ignored notice to vacate and threatened to occupy the whole of the suit land yet Tawai had no proprietary interest on and had never been in possession, occupation or use of the suit land or part thereof.

Express pleaded that there was an existing suit being **Kitale HCCC No. 202 of 2006** pending between Tawai and itself but it had not filed a counterclaim thereon since the trespass complained of had not occurred at the time.

The prayers in the plaint were for judgment against Tawai for;

“(a) An order that the plaintiff is the lawful owner of title L.R. No. 5707/6 (I.R 43019) and an eviction order to issue against the defendant, its agents, servants, employees, members, shareholders and/or any other person whatsoever acting or claiming though or on its behalf from the suit land and demolition of all illegal structures/houses erected thereon;

(b) A permanent order of injunction to issue restraining the defendant by itself, its agents, servants, members, shareholders and/or other person whatsoever acting for or through or on its behalf from trespassing upon the suit land L.R. No. 5707/6 (I.R. No. 43019) belonging to the plaintiff;

(c) Costs of the suit;

(d) Any other relief this honourable court may deem fit and just to grant.”

Tawai's response to the suit was by way of a statement of defence dated 12th March, 2008 filed on its behalf by **Zablon Mokuia & Company Advocates**. This pleading was later amended to include a counterclaim and it was to the following effect;

- That even though Express “would have been” (sic) the registered owner of the suit property which was denied, the registration could not hold as the whole of LR No. 5707 registered in its name had been charged to and not discharged by Brooke Bond;
- That its members did not trespass but had been in lawful occupation of the suit land since 1984;
- That it was “the registered owner of the entire LR 5707 which includes land parcels 5707/01 up to and including the purported 6 which is rightfully LR No. 5707/R.”

It then went on to plead specifically as follows;

“6 B That for the plaintiff to claim that it is the registered owner of the purported land reference number 5707/6 then the registration has been obtained by way of fraud.

‘PARTICULARS OF FRAUD’

i. That the transfer documents are fatally and incurably defective;

ii. The transfer document is not executed as legally required;

iii. The entire land discharged by an order of the court and hence and not mention of any portion of land having been transferred to the plaintiff;

iv. That lose of the title was duly advertised in the Kenya Gazzette and the plaintiff did not even raise a finger that

he had any interest in the said title;

v. There could not have been a transfer of part of land reference 5707 without first discharging the same.”

Tawai reiterated in paragraphs 7 and 8 its registered ownership of the suit land and went on to state that “Further the defendant categorically states that it has not and/or it never threatened to occupy the entire (sic) of the plaintiff’s land or any part thereof or at all.”

At paragraph 9 it was pleaded thus;

“9. That has (sic) clearly admitted by the plaintiff herein in paragraph 8 of the plaint there are other cases both criminal and civil between the parties and affecting the subject matter herein and the defendant shall cleave for leave (sic) of the honourable court to refer to the said cases at the hearing of the suit herein. The defendant herein puts the plaintiff herein on notice that the defendant shall apply to the honourable court to strike out and/or dismiss the suit herein with costs to the defendant herein as the same is an abuse of the process of the honourable court.”

In the counterclaim Tawai contended that Express’ occupation of the suit land had no legal basis or justification and it should be ordered out or evicted. It asserted that it was “the registered owner of the suit land herein being LR NO. 5707/1, 2, 3, 4, 5 and 6” and that since it (Tawai) had “obtained a discharge of charge of the entire land through court order” the purported purchase of the suit land by Express did not arise at all. It then pleaded as follows at paragraphs 16 and 17;

“16. That the plaintiff could not have been purportedly registered as owner of LR Number 5707/6 without first obtaining a discharge of charge to the suit land;

17. That in any event the statutory powers of sale were not exercisable by the purported seller to the plaintiff and hence the entire land was discharged to the defendant herein.”

Tawai then pleaded that the transfer of the suit land to Kaitet from which Express “purported to have purchased it,” was obtained by fraud because;

“i. The transfer documents are fatally and incurably defective and hence cannot create any legal obligation or at all;

ii. The transfer document not executed as legally required the entire land discharged by an order of the court and hence no mention of any portion of land having been transferred to the plaintiff or to any other person or at all;

iii. That lose (sic) of the title was duly advertised in the Kenya Gazette and the plaintiff did not even raise a finger that he had any interest in the said title;

iv. There could not have been a transfer of part of land reference 5707 without first discharging the same;

v. That there could not have been any such alleged transfer without any survey plan or at all;

vi. That there could not have been such transfer without any computation with the survey office or lands or at all;

vii. That there is no way such transfer could have been effected without any compilation or at all;

viii. That the discharge of charge was done for entry number 16 and 19 were both done in the year 2008 long after the said transfer had allegedly been made;

ix. That there is no trace of any transfer from LR No. 5707/R TO 5707/6 as alleged hence such alleged transfer is illegal, unlawful, null and void and cannot purport to confer any right or title upon the plaintiff as alleged.”

It was pleaded that no Land Control Board Consent was obtained and so, if there was any contract it was null and void; Express was a trespasser from which *mesne profits* were claimed; and a cancellation of the registration in the name of Kaitet.

Tawai pleaded that there was no suit pending between the parties save HCCC No. 202 of 2002 and HCCC No. 15 of 2006 which had both been withdrawn. It prayed for the dismissal of Express’ case and;

“b. That a declaration be and is hereby made declaring that the registration of LR No. 5707/6 in the name of KAITET TEA ESTATE (1977) limited and thereof to the plaintiff is and was illegal, unlawful and the same be cancelled and the same reverts back to the defendant;

b. That the Honourable Court be pleased to grant an order evicting the plaintiff herein by itself, its heirs, servants, agents, employees or any other person acting on its behalf howsoever;

c. Mesnes profits;

d. Costs.”

Express filed an Amended Reply to Amended Defence and Defence to Counterclaim dated 18th May, 2011 in which it pleaded, *inter alia*, as follows;

“2. *IN* reply to the amended written statement of defence herein the plaintiff shall aver that the same is inconsistency (sic) with the defendant’s own pleadings/claims;

3. *IN* response to paragraph 4 of the amended written statement of defence the defendant in its previous pleadings (Kitale HCCC No. 202/06) admits that the plaintiff herein is the legal owner of L.R. No. 5707/6 measuring 259.1 Hectares hence it is estopped in law from alleging otherwise;

4. *IN* response to paragraph 5, 7 and 8 of the amended written statement of defence the plaintiff shall aver that the defendant, its members, agents and/or shareholders have never been in occupation, use or possession of the suit land or any part thereof since 1984 or at any one time at all hence the reasons for it (defendant) filing Kitale HCCC No. 202/06 seeking among others remedy of EVICTION ORDER of the plaintiff from the suit land.”

It went on to deny the allegations and particulars of fraud and to state that it was the registered owner of the suit land since 12th February, 2001 as a *bona fide* purchaser for value. In the defence to counterclaim it averred that it was issued with a certificate of title under the **Registration of Titles Act** upon the relevant authority being satisfied that all the legal documentation was proper and valid. The suit land was initially transferred and registered to Kaitet on 19th July, 1987 in a lawful manner. It had no privity of contract with Tawai and was occupying and working its own land so *mesne* profits due to Tawai did not arise.

It was pleaded that the registration of Kaitet having occurred on 17th July, 1987, Tawai’s claim against it were statute time barred. It was denied that **Martin Nyongesa** who swore the verifying affidavit was a Director of Tawai and Tawai was accused of concealment of material facts as the original/head title LR No. 5707 must have been surrendered to the Commissioner of Lands or Registrar of Titles to pave way for its subdivision No. 5707/6 in 1987. Express contended that it was an abuse of process for Tawai to purport to raise loss of a certificate of title when they had not done so in the previous suits. The claims against Kaitet could not lie as it was not a party to the suit as had been conclusively adjudged in Kitale HCCC No. 15 of 2006 without appeal, and Tawai was therefore estopped from raising the same. It was also stopped from questioning the legality of the subdivision of 5707 having been issued with and taken titles for 5707/1 to 5707/5. Express also pleaded that the alleged particulars of fraud against Kaitet did not amount to fraud; Tawai lacked *locus* as it “*was incorporated sometime in 2004;*” the prayer for declaration was time barred; and, invoked **section 23 and 24 of the Registered Land Act.**

Somewhere along the way the National Land Commission (NLC) applied to be joined in the proceedings as an Interested Party and that application was allowed despite stiff opposition from Express which termed NLC a busybody. It then proceeded to file a curious pleading titled “*Interested Party’s Statement of Defence.*” We say curious because in so far as Express had not made any claims against NLC, and since it was joined as an interested party, what was it defending? Be that as it may, the said document denied Express’ pleading that it bought the suit land from Kaitet which, according to its records, did not exist as having been registered as proprietor. It proceeded to plead at paragraph 7, what it called the “*Factual and Sequential Particularization Concerning the Suit Property*” as follows;

“a) THAT on 16th October 1981, the defendant was registered as the proprietor of land known as LR. 5707;

b) THAT on 16th October 1981 the property was charged to Kenya National Capital Limited for Kenya Shillings 900,000.

c) THAT on 31st January, 1986 the property was charged to Brooke Bond Kenya Limited for Kenya Shillings 1,900,000.

d) THAT on 17th June, 1987 a transfer of 259.1 hactres across comprising of LR No. 5707/6 which was registered as entry No. 20 was done to Kaitet Tea Estate for the sum of Kenya Shillings 7,100,000.

e) THAT entry No. 20 on the grant purports to transfer property which as at the time of making the entry had not been discharged.

f) THAT a discharge of charge to Kenya National Capital Limited was done on 10 July 2008 and the same was registered as entry No. 23 on the grant.

g) THAT the scheme plan in relation to LR 5707 was approved on 21st November 1983 in which the defendant subdivided LR 5707 into five portions and resultants sub plots were LR No. 5707/1; 5707/5 with a remainder 5707/R thus LR No. 5707/6 does not exist as per the plan.

h) THAT the investigations by the interested party have revealed that the purported transfer if any to Kaitet Tea Estate was based on misrepresentation that LR 5707/6 was in existence.

i) THAT Kaitet Tea Estate Limited could not purport to pass a good title to anyone else as the title it had acquired was based on misrepresentation and fraud and the same was irregular.”

Even though at (i) it alleges that Kaitet acquired the title “*based on misrepresentation and fraud and the same was irregular,*” it did not plead particulars of such misrepresentation or fraud. It nevertheless prayed that Express’ suit be dismissed with costs.

To that pleading Express filed a Reply dated 2nd December, 2014 in which it asserted that the suit property was properly and carefully documented as official search at the Lands Office in Nairobi would reveal; it was a *bona fide* purchased for value duly issued with a certificate of title thereto; the NLC's predecessor, the Commissioner of Lands, through whom the registration of the suit land was effected, never raised doubt about it and NLC was estopped from challenging that which the predecessor approved; the claim against Kaitet were against a non-party and time-barred besides being brought by a busybody; and it was not a party to any fraud, which was denied at any rate.

The trial, which had commenced before Ombwayo J in Eldoret whence it had been transferred at Tawai's instance when NLC came on board, proceeded with Express calling two and Tawai calling three witnesses who testified and were examined in full. After submissions, the learned Judge rendered the impugned judgment on 16th August, 2017 and decreed that;

“1. The Plaintiff's suit is dismissed with costs to the defendant and interested party;

2. The defendant's counterclaim is allowed;

3. Declaration that the registration of LR. NO. 5707/6 in the name of Kaitet Tea Estate (1977) Ltd and thereafter to the plaintiff is illegal and unlawful and the same is hereby cancelled;

4. An eviction order to issue of the plaintiff herein by itself, its heirs, servants, agents, employees or any other person acting on its behalf howsoever from the suit parcel of land L.R. No. 5707/6;

5. The plaintiff to pay the defendant Mesne profits of Kshs.11,970,000/=.”

Express was aggrieved and lodged a notice of appeal against the whole of the said decision. It then instituted this appeal complaining in the memorandum of appeal that the learned Judge had erred in law and fact in;

- *Failing to find that fraud was not proved;*
- *Failing to find that the challenge to Kaitet's title was time-barred against a non-party rendering cancellation of its title untenable;*
- *Failing to find that the High Court had in HCCC No. 15 of 2006 found that Kaitet could not be enjoined more than twenty years after transfer of the suit land to itself and the question was res-judicata;*
- *Entering judgment in Tawai's favour on matters not pleaded;*
- *Failing to find that Express had paid consideration and obtained Land Control Board consent with regard to the transaction with Kaitet and had no privity of contract to require any with Tawai;*
- *Granting mesne profit based on submissions without evidence;*
- *Failing to appraise himself of and peruse all the pleadings and documents.*

Express therefore prayed that the judgment of the learned Judge be set aside, judgment be entered for it as prayed in the plaint, and Tawai's counterclaim be dismissed with costs.

The parties filed written submissions together with digests and bundles of authorities. At the plenary hearing of the appeal, learned counsel appearing were **Mr. Onyancha** for Express; **Messrs Okemwa, Ingosi, Teti, Juma, Omboto, Korongo** and **Mokua** for Tawai; and **Mr. Odongo** for N.L.C.

Highlighting his written submissions, Mr. Onyancha first addressed the question of time limitation, which he stated was crucial in the court below. Pointing out that the title of and registration of Kaitet had been given on 17th June, 1987, yet the counterclaim seeking its cancellation was filed on 12th May, 2011, some 24 years later and way too much outside of the 12 year limitation period for a claim for land, counsel submitted that it was a gross error of law for the learned Judge to have entertained the barred claims of fraud instead of dismissing them. Moreover, they were claims made against a third party against the dictates of natural justice. For this he cited this Court's decision of **WAMUKOTA -vs- DONATI [1987] KLR 280.**

He went on to state that a claim based on fraud is a tortious claim which, by reason of **section 4(c)** of the **Limitation of Actions Act**, ought to have been brought within 6 years but was not. Even the counterclaim against Express on account of alleged fraud was filed ten years after the land was transferred and was therefore statute-barred as well.

Regarding fraud, Mr. Onyancha contended that Express was an innocent purchaser and its title was issued under the Registration of Titles Act (repealed) and under **section 23** thereof, such title is conclusive and amenable to cancellation only for fraud in which the holder is implicated. He stated that even if there was any fraud in 1987 when the initial transfer to Kaitet took place, and there was not, Express was nowhere in the picture and was not involved in any fraud or misrepresentation. He pointed to the testimony of **Julius Chacha Moraa (DW3)**, a witness called by the NLC who gave evidence on the root of the titles the learned Judge cancelled. All the relevant and necessary

documents were presented to the Lands Registry in Nairobi and they were all proper so that the transfer to Express was lawful.

Counsel next faulted the learned Judge for holding that the transfer to Express had no Land Control Board Consent yet such consent was in fact obtained. In finding otherwise, the learned Judge misapprehended the evidence and was clearly wrong. He also criticized the learned Judge for holding that the deed plan giving birth to the title issued to Kaitet was not authenticated yet the Land Registrar did produce a Deed Plan duly signed by the Director of Survey. There was no mandatory requirement for authentication back in 1987.

Counsel concluded by urging that Express had a genuine complaint of trespass executed by Tawai through its members and shareholders who took advantage of the tensions surrounding the disputed 2017 Presidential Election to invade land that clearly belongs to Express. The same had been sold to Kaitet by KNCC, a chargee to whom it had been charged by Tawai, and the latter could not be allowed to unlawfully deprive Express of it. He thus urged us to allow the appeal with costs.

Rising to oppose the appeal, **Mr. Okemwa** asserted that Tawai was at all material times the registered owner of the suit land since 1976. The land was charged to Brooke Bond until 2008 when Tawai finished the payments and got a discharge. He thus contended that any transfer and title issued prior to that date was an illegality. He submitted that there was no evidence that the chargee transferred the suit land to Kaitet. He was, however, unable to give a coherent answer when we asked him what he made of Entry Number 20 that is at Page 209 of the record which indicated the registration of a transfer to Kaitet, the transfer itself having been produced as DExh.3 and appearing at page 212 of the record.

Counsel next submitted that Express had not satisfied the criteria laid down in the Uganda case of **KATENDE -vs- HARIDAR & COMPANY LIMITED [2008] 2 EA 173** for being considered a *bona fide* purchaser for value without notice. While stating that the first fraud occurred in the 1987 transaction in which Express was nowhere in the picture, counsel nonetheless made the novel submission that “*an innocent purchaser should look at the entire history of the land,*” presumably to satisfy himself that there was no defect of title anywhere along the way.

He concluded by submitting that **Article 40(6)** of the **Constitution**, which he conceded spoke the same language as **section 23** of the RTA, did not afford protection to property that is illegally obtained. He urged us to dismiss the appeal. So did, each of his co-counsel namely; Mr. Ingusi, Mr. Teti, Mr. Juma, Mr. Korongo, Mr. Omboto and Mr. Mokuia who all supported his submissions.

For the NLC, Mr. Odongo also opposed the appeal by first positing that the critical issue is whether the suit property was properly created to pave way for entry No. 20 and the transfer of the same to Express. Focusing on the testimony of the first defence witness **Prescitter Njeri Wango (PW1)**, the Land Surveyor working with the Director of Survey who had taken the trial court through the process by which a number is created under the RTA, he submitted that a title under that regard cannot exist without a deed plan which is itself preceded by a survey, a subdivision scheme, and a Survey Plan: He submitted that whereas Parcel No. 5707 was sub-divided to give rise to other parcels, they did not include the suit property, No. 5707/6.

Regarding the limitation period, Mr. Odongo all but conceded that indeed the action being challenged revolving around Entry No. 20 arose in 1987 as he stated that fraud was pleaded against both Kaitet and Express. He contended that fraud was not a tort subject to statutory time limitations but rather criminal, and was moreover excluded by statute from the operations of the Limitation of Actions Act. He then offered, without providing a basis for it, that Tawai first became aware of the fraud in 2006. Citing this Court’s recent decision of **RICHARD KIPKEMOI LIMO -vs- ATTORNEY GENERAL & OTHERS Eldoret Civil Appeal No. 53 of 2018**, counsel urged that Express as a purchaser had a duty to have produced Kaitet, its vendor, but failed to do so. He added finally that under **section 23** of the **RTA**, a purchaser is without protection if he was “*a party to or had knowledge of the fraud.*” He urged us to dismiss the appeal.

In his reply, Mr. Onyancha submitted that the requirements in the **RICHARD LIMO** case (supra) were satisfied in the instant case because the evidence of Julius Chacha Moraa (DW3), the Lands Registrar from the Ministry of Lands and Planning was fully supportive of Express’ case. His evidence was to the effect that all the relevant documents establishing Express’ title, and that of Kaitet before it, existed and were used by the Lands officials in registering Express as the proprietor of the suit land. He had also specifically stated that a deed plan for the suit property No. 5707/6, which was made heavy weather of by Tawai and NLC, did in fact exist and the resultant title was therefore valid.

Regarding entry No. 20 in relation to the original LR 5707 counsel drew our attention to the judgment of Onyancha J in **REPUBLIC -vs- THE HON. ATTORNEY GENERAL, THE CHIEF LAND REGISTRAR; KAITET TEA ESTATE [1977] LIMITED EX PARTE TAWAI LIMITED, Bungoma HC. MISC. APP. NO. 58 of 2009** in which Tawai’s application to quash that entry by judicial review was rejected. The Judge in the process pointed out that Tawai was “*economical with the truth*” and Tawai never appealed against that decision. Counsel reiterated that the appeal ought to be allowed.

We have given due and careful consideration to the submissions made and have perused the entire record before us in a full and exhaustive manner re-evaluating and re-appraising all the evidence that was before the trial court so as to draw our inferences of fact, and to arrive at our own independent conclusions on the appeal before us. This is our duty as a first appellate court which proceeds by way of a retrial, but alive to the fact that we have not had the advantage, enjoyed by the trial court, of hearing and observing the witnesses as they testified, for which we make due allowance. See **Rule 29(1)** of the **Court of Appeal Rules; PETERS -vs- SUNDAY POST LIMITED [1958] EA 424** and **SELLE & ANOTHER -vs- ASSOCIATED MOTOR BOAT COMPANY LIMITED & OTHERS [1968] EA 123**.

In a first appeal, therefore, the standard of review has to be a deferential one, giving a measure of respect to the findings of the trial court. That is not to say, however, that in appropriate cases a first appellate court will not disagree and depart from such findings. In **SUMARIA & ANOTHER -vs- ALLIED INDUSTRIES LIMITED [2007] KLR 1**, this Court spoke to this when it held as follows (at p.2);

“1. Being a first appeal, the court was obliged to reconsider the evidence, re-evaluate it and make its own conclusions. A Court of Appeal would not normally interfere with a finding of fact by the trial court unless;

a. It was based on no evidence or

b. It was based on a misapprehension of the evidence or

c. The Judge was shown demonstrably to have acted on wrong principle in reaching the finding he did.”

See also MWANGI & ANOTHER -vs- WAMBUGU [1984] KLR 453; [1982-88] 1 KAR 278.

We need only add that the more a decision depends on credibility, the less the latitude to depart; and the more it depends on documentary or affidavit evidence untested by cross-examination, the greater such latitude.

Bearing those principles in mind, and having ourselves considered and re-evaluated the evidence, and the submissions made, we think that the central issues for our determination are the first four of those proposed by the respondent (Tawai) even though they are not mutually exclusive. They are;

- 1) *Whether the appellants title and occupation of the suit property was illegal, null and void;*
- 2) *Whether the appellant was not a bona fide purchaser ...*
- 3) *Whether the matter was **res judicata**, caught up with Limitation or Breached Natural Justice as alleged by the Appellant?*
- 4) *Whether the Court was correct to grant eviction orders, award mesne damages for trespass and costs of the suit?*

The pivotal issue on which turns the fate of this appeal is the legality of Express' title to the suit land. It is worth recalling that the suit in the court below was filed by Express seeking a declaration that it was the lawful owner of the suit land which had been trespassed upon, hence the additional order of eviction of the alleged trespassers and an injunction against the trespassers. It needed to provide proof of ownership to obtain the declaration, and proof of the entry or encroachment to obtain the eviction and injunction orders. It bore the burden of proof and it was required to discharge the same on the civil standard of a balance or preponderance of probability. This is what the **Evidence Act**, requires in **sections 107 and 108**;

“107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

In the present case, Express as plaintiff did call evidence through **Samwel Mbugwa Thungu (PW1)**, one of its directors to the effect that it was the registered proprietor of the suit land. He produced the original title deed and certificate of title. He stated that Express started buying the suit land in 2000 and completed the transaction in 2001. It bought the suit land which was fenced, from Kaitet. The price was Kshs.40 Million and the suit land was free from encumbrances. The complaint leading to the suit was that in December, 2007 members of Tawai invaded the suit land and Express was unable to remove them as the police were overwhelmed by the post-election violence that engulfed parts of the country. All this is well-captured on record and in the judgment.

It would seem to us that, *prima facie*, Express by that evidence had established a case sufficient for success on its title, subject to, the impeachment of it by evidence in support of the matters pleaded by Tawai. One of its directors **Charles Wafula Masinde (DW2)**, stated how Tawai had bought the suit land in 1974 and took possession in October 1974. They later took a loan from KNCC in 1981. He stated as follows;

“We paid the loan. We went to the bank and were given original title. We were given discharge of charge on 19th September, 2008.”

He also spoke of a loan from Brooke Bond which was repaid and the larger property was discharged. He stated thus;

“We paid the debt and our title deed was discharged on 21st February, 2008. I produce the discharge of charge as DEx.5. We obtained the certificate of the land. We registered at the Lands Office. We have the original before the Chief Lands Registrar. We have the provincial certificate. I produce it as DEx.3. The land No. 5707 has been divided. Initially, it was in 1983 to create 5707(1)-5707(5) that was the order of subdivision.”

Regarding LR 5707/6 which is the suit land, his evidence was that it is not legal as the one he knew was 5707/R which was a road reserve. He stated that Express is in occupation of the suit land and should be evicted. Beyond stating that it was not possible for any transfer to have been made while the charges were still subsisting, the witness did not speak to the pleaded particulars of fraud.

While being cross-examined by Mr. Odongo who then, as now, appeared for NLC, the witness first stated that Tawai had never sued Kaitet, but on being shown PExh.5 he conceded that it did indeed file a Judicial Review suit against Kaitet in **Bungoma HCCC Application No. 58 of 2009**, which was dismissed. He also stated that *“Kaitet Tea Estate did not sell the property to Eldoret Express Limited.”* He denied that

Kaitet bought the suit land upon Tawai's failure to pay a loan maintaining that it paid the loan in full and "the bank discharged the whole piece of land." He reiterated in re-examination that Tawai never consented to any transfer to Kaitet and that it repaid its loan fully and obtained discharges on 15th September, 2008 from KNCC and February, 2008 from Brooke Bond.

In the face of those conflicting versions, one would expect that officials from the Ministry of Lands, as the custodians of the records of land transactions would speak with one clear voice to put the matters in proper perspective and beyond disputation. This, alas, was not to be for, from the three formal witnesses called, there emerged conflicting accounts even on matters as simple as procedures to be followed.

Peter Jone Wanyama (PW2), an employee of the Ministry of Lands, Housing and Water Development who had been the District Land Registrar, Trans-Nzoia, testified that a Registrar was sent to the suit land from Nairobi by the Registrar of titles as the court had ordered. That Registrar, one Charles Ngetich "availed copies of title and deed plan. The entire land is 269.1 hectares, equivalent to 640 acres." On a visit to the suit land registered in the name of Express, they found beacons in place and returned any that were missing. Their mandate was to ascertain whether some unwanted structures had been erected on Express' land and they confirmed that such structures comprised some 57.34 hectare, translating to 141.7 acres. He drew a diagram, which he produced in court, showing the encroachment.

In cross-examination, PW2 testified that the suit land 5707(6) "was created by the Director of Survey from data in a process called combination." He was emphatic that "I went to 5707(6). The plaintiff [Express] is occupying 5707(6)."

On her part **Precsitter Njeri Wago (DW1)**, a Surveyor working for the Director of Survey testified that parcel No. 5707 was surveyed on 24th October, 1983 and "subdivided into five parcels thus; 5707/1, 5707/2, LR 5707/3, 5707/4, 5705/5 and 5707/R. This is a remainder of the whole 5707." She went on to indicate the acreage of the parcels 5707/1-5, and to state that the acreage of 5707/R was not given. She testified that; "we did not have any number that is 5707/6 ... 5707/6 is a road reserve ... Parcel of land 5707/6 does not exist as it has no deed plan."

When cross-examined by Mr. Onyancha, she repeated that subdivision of 5707 was done in October, 1983 and confirmed that Entry No. 20 is a transfer to Kaitet for a sum of Kshs.7,100,000. The entry was made on 17th July, 1987 while there was a charge to KNCC. In re-examination she cast doubt on the report by PW2 stating that he had not attached any document from the Director of Survey.

The third witness from the Ministry was Julius Chacha Mora (DW3). He was a Registrar and his duties entailed registration of land. He produced a number of documents and owned a detailed report dated 16th January, 2017 under his hand on behalf of the Acting Chief Land Registrar. The report was prepared in compliance with court order that "the Chief Land Registrar or her appointed agent to prepare a report in respect of all registrations on L.R. 5706." See p.202-3 of the record. He then testified as follows;

"This case was a subdivision by transfer by chargee. The chargee was Kenya National Capital Corporation Limited. The charger was Tawai Limited. The transferee was Kaitet Tea Estate 1977 Limited. The chargee can transfer property to a person who is the charger in two considerations:

(1) Under statutory power of sale;

(2) Under private treaty when the charger has defaulted.

In this case, the transfer was under private treaty. See transfer by chargee."

On being cross-examined by Mr. Onyancha he testified that the transfer to Kaitet was lawful, as follows;

"As per our records, Kaitet Tea Estates 1997 Limited was issued with a title No. IR 43019, LR 5707/6 based on deed plan No. 128587 that was annexed to transfer by charge. There has been no court order challenging these records. The entries I have given out are lawful entries."

Whereas DW2, a surveyor, had indicated in her testimony that the letters 'R/R' appearing against the aforesaid Entry No. 20 in the register "meant rejected," and that "the document was rejected", and "entry No. 20 was rejected," DW3, who dealt with registration of documents, while being cross-examined by Mr. Omboto stated as follows;

"The document under entry No. 20 was not rejected. There was a transfer to Kaitet Tea Estates. It was registered. They complied. The discharge of charge was to Unilever Limited. The transfer was done legally."

In his analysis of the evidence on the issue of whether LR 5707/6 exists and whether it was lawfully created, the learned Judge's reasoning and conclusion was as follows in paragraph 63 to 65.

"63. On the first issue, as whether LR No. 5707/6 exist and whether it was legally created, it is clear from the grant that Title Number 5707/6 was created from 5707 which measured 259.1 Ha. and the same transferred to Kaitet Tea Estate for Kshs.7,100,000 on the 17.7.1987. Kaitet Tea Estate (1977) Limited was registered as proprietors as leases for a term of nine hundred and Ninety-Nine (999) years from the 1.10.1960. The property was charged to Agricultural Finance Corporation on the 12.11.1987. The charge was discharged on 2.11.2000 and ultimately the property was transferred to Eldoret Express Company Limited on 12.2.2001.

64. From the above it is clear that the suit property 5707/6 exists. On the issue, as to whether the same was properly created, I do

find that at the date of transfer, the property was encumbered in favour of Kenya National Capital Corporation till the discharge of charge was effected and registered on 29.9.2008. It is questionable how Kaitet Tea Estate obtained title to property when it was charged. There was no evidence that Kenya National Capital Corporation sold the property in exercise of its statutory power of sale and it is evident that the property was discharged on 29.9.2008. I do further find that LR 5707/6 was not created by a deed plan as DW1 stated that the deed plan attached was not strictly a deed plan and that it did not exist in the records of the Director of Surveys in Kenya. The deed plan produced was not authenticated by the Director of Surveys and was disowned by the said Director.

65. I do agree with the defendant that LR 5707/6 was created illegally, fraudulently and through misrepresentation.”

Was the learned Judge correct in his analysis and was he entitled to arrive at the conclusion he did that LR 5707/6 was created “illegally, fraudulently and through misrepresentation”? With the greatest respect, we do not think so.

It is clear, as the learned Judge found, and quite contrary to Tawai’s case, that the suit land, LR 5707/06, does in fact exist as such. It is also clear that the same was sold to Kaitet which later sold it to Express. Before that, Kaitet had dealt with the suit land as owner, and had in fact charged it to Agricultural Finance Corporation on 12th November, 1987 before discharging it on 2nd November, 2000. It then sold it to Express on 12th February, 2001. A major reason for the learned Judge’s conclusion that LR 5707/06 was created illegally is evident from his reasoning that “there is no evidence that Kenya National Capital Corporation sold the property in exercise of its statutory power of sale.” This, we think with respect, was a serious misdirection.

There was unchallenged evidence from DW3, a witness called by NLC which we have referred to above, that KNCC is the one that subdivided LR 5707 to create and then transfer the suit land by private treaty, in exercise of its statutory power of sale upon Tawai’s default. The witness did produce evidence of this as D.Exhibit No. 3, the transfer dated 17th July, 1987. The learned Judge made no reference to this critical document and seems to have proceeded as if the same did not exist. The transfer which appears at PP 212 and 213 of the record is quite explicit that KNCC was exercising its statutory power of sale under **section 69(1) of the Indian Transfer of Property Act 1882** by private treaty. The land being sold is referred to as LR. 5707/6 meaning 259.1 hectares “being the remainder of the piece of land ... known as LR. No. 5707” and the consideration is KShs.7,100,000 paid by Kaitet and duly acknowledged in the transfer. KNCC thereby transferred to Kaitet “all the right title and interest of the charger on LR. 5707/6 freed and discharged from the charge and second charge registered as I.R.18551/16 and I.R. 18551/19 ...” That transfer was registered as I.R. 18551/20 (Entry No. 20) on 17th July, 1987.

That evidence of transfer by private treaty in exercise of the chargee’s power of sale, which was then duly registered, passed a good title to Kaitet. Indeed, the certificate of title issued to Kaitet, again produced in evidence by DW3, indicated that it was pursuant to a transfer registered as No. 18551/20 in respect of LR. 5707/6.

There appears to us to be nothing on the record to show or suggest, less still prove, that there was any illegality, fraud or misrepresentation in the creation of L.R. 5707/06. Fraud is a serious thing to allege and there is a requirement that it be particularized and then proved to a standard that is higher than a mere balance of probabilities. See **R. G. PATEL -vs- LALJI MAKANJI [1957] EA 314**. The degree of proof must be such as to create a moral certainty though it need not reach the criminal standard of proof beyond reasonable doubt. This has to be so because allegations of fraud in a civil suit carry with them an element of criminality and are referred to as being quasi-criminal in nature. As Esther put it more than a century ago in LE **LEURE -vs- GOULD [1895] 1 & B. 491 at p. 498**,

“a charge of fraud is such a terrible thing to bring against a man that it cannot be maintained in any court unless it is shown that he had a wicked mind.”

Thus, it is not enough that a party should cry “fraud” they must back it up with clear particulars and prove it with satisfactory and solid evidence. Such evidence was spectacularly missing in the present case. In fact, what allegations there are in Tawai’s counterclaim hardly warrant the term “fraud” and do not seem to point a finger at Kaitet. It is common ground that in 1987 when LR 5707/06 was being created, Express was nowhere in the picture. The conclusion that the title was created “illegally, fraudulently and through misrepresentation” was based on no evidence and was therefore plainly untenable.

Regarding the law on the pleading and proof of fraud, we need do no more than reiterate what this Court stated in **ARTHI HIGHWAY DEVELOPERS LIMITED -vs- WEST END BUTCHERY LIMITED & 6 OTHERS [2015] eKLR**;

“52. According to **Black’s Law Dictionary**,

‘Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantages to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.’

Section 2 of RTA also defines ‘Fraud’ as follows:-

‘Fraud’ shall on the part of a person obtaining registration include a proved knowledge of the existence of an unregistered interest on the part of some other person, whose interest he knowingly and wrongfully defeats by that registration.’

53. it is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a

balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from **Bullen & Leake & Jacobs, Precedents of Pleadings 13th Edition at Page 427:**

‘where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune v Occident [1989] 1 Lloyd’s Rep. 305, 308).

The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see Lawrence v Lord Norreys (1880) 15 App. Cas. 210 at 221). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (Davy v Garrett (1878) 7 ch.D. 473 at 489). ‘General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice.’

See Insurance Company of East Africa vs. The Attorney General & 3 Others Hccc 135/1998. Whether there was fraud is, however, a matter of evidence.”

The non-proof of fraud aside, one other matter regarding the allegations of fraud relates to the Statute of Limitation. It was Express’ contention that in so far as the counterclaim seeking to cancel Kaitet’s title was filed on 12th May, 2011, which was 24 years after Kaitet’s registration, it could not be entertained as it was over the 12 years limitation for claims for the recovery of land, and should have been dismissed. The learned Judge was therefore bereft of jurisdiction to entertain the counterclaim and to cancel Kaitet’s registration especially when Kaitet was not a party to the proceedings. Moreover, Express submitted that in so far as the counterclaim was based or founded on fraud, it ought to have been brought within 3 years by virtue of **section 4(2) of the Limitation of Actions Act.**

Having perused the record in totality, we find that this complaint is well-founded. The timelines are quite undisputed and we think the legal consequence is equally plain. In **MARGARET WAIRIMU MAGUGU -vs- KARURA INVESTMENT LIMITED & 4 OTHERS [2019] eKLR**, a recent case that bears close resemblance to the present one as far as timelines are concerned, this Court addressed the issue of fraud and limitation of time as follows;

“31. Based on the plaint and the reliefs sought in the plaint, the appellant, in her capacity as the administrator of the estate of the deceased sought nullification of LR No. 12422/204 and the subdivisions arising therefrom with a view to recovering the property registered in the name of the 1st respondent known as LR 12422/319. Her suit was in effect, an action to recover land. Section 7 of the Limitations of Actions Act provides that

‘An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.’ [Emphasis]

.....

33. The appellant contends that as the action is founded on fraud, time under Section 7 of the Limitation of Actions Act could not, by dint of Section 26 of that Act begin to run until the fraud was discovered, and that fraud was not discovered until when she commenced gathering the deceased’s estate for purposes of administration. The relevant part of section 26 of that Act provides as follows:

‘Where, in the case of an action for which a period of limitation is prescribed, either –

- 1. (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or*
- 2. (b) the right of action is concealed by the fraud of any such person as aforesaid; or*
- 3. (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.’*

34. There is no doubt that under that provision, where the action is based on fraud the period of limitation prescribed does not begin to run until the plaintiff discovers the fraud. (see for instance Kenya Ports Authority vs Timberland (K) Ltd [2017] eKLR). However, having regard to the proviso to section 26 of the Act as highlighted above, it is inconceivable that for 19 years, in the case of the deceased, and 24 years in the case of the appellant, they would have failed to discover, with the exercise of the diligence, the alleged fraud and to act if indeed the acquisition of the property by the 1st respondent was fraudulent.

35. due diligence entails the exercise of care required from a given person in a given situation. It entails proactivity and absence of carelessness or idleness. In the English case of Paragon Finance vs D.B. Thackerar & Co. [1999] 1 All ER 400 at 418B-D, Millett JL of the Supreme Court of England opined that:

“The question is not whether the plaintiffs should have discovered the fraud sooner; but whether they could with reasonable diligence have done so. The burden of proof is on them. They must establish that they could not have discovered the fraud without exceptional measures which they could not reasonably have been expected to take.”

36. Considering that the 1st respondent was registered as the owner of the property on 25th October 1993 and has since been in possession, it is unthinkable that the deceased and the appellant could not for 19 and 24 years respectively, have discovered the alleged fraud with the exercise of the diligence.”

We respectfully accept the reasoning of the Court and express our own incredulity that Tawai, who bought and took possession of the original 5707 way back in October 1974, and who, from the report filed in court by DW2 had in fact entered the suit land and erected structures thereon, did not know of the facts they pleaded as constituting fraud in the creation of 5707/06, for over 24 years. Without a doubt the claim founded on the alleged acts of fraud for the recovery of land was hopelessly out of time and should not have been entertained.

We now turn to the issue of whether Express was a *bona fide* purchaser for value. **BLACK’S LAW DICTIONARY 10TH EDN.** defines a *bona fide* Purchaser thus at (P.1430)

“bona fide purchaser. (18c)1. Someone 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. Generally, a bona fide purchaser for value is not affected by the transferor’s fraud against a third party and has a superior right to the transferred property as against the transferor’s creditor to the extent of the consideration that the purchaser has paid.”

In the Uganda case of **KATENDE -vs- HARIDAL & COMPANY LIMITED** (supra) cited by counsel for Tawai, the court in addressing that purchaser stated as follows;

“ ... it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that:

a. he holds a certificate of title;

b. he purchased the property in good faith;

c. he had no knowledge of the fraud;

d. he purchased for valuable consideration;

e. the vendors had apparent valid title;

f. he purchased without notice of any fraud;

g. he was not party to any fraud.

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

As far as land registered under the RTA, is concerned, such a *bona fide* purchaser for value without notice, who as a result of purchase holds a certificate of title, is accorded express protection under **section 23(1)** in explicit terms;

“23.(1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”

We think that Parliament was very deliberate in enacting this provision of law and the statutory language employed is quite unambiguous, firm and inflexible providing full protection to the proprietary rights acquired by a bona fide purchaser, to the extent of ruling out any challenge. The only ground upon which such purchaser’s title may be impeached is fraud or misrepresentation *to which he is proved to be a party*.

It behoved Tawai, in order to defeat Express’ title, to prove fraud or misrepresentation to the standard we have already adverted to, against Express. Our perusal of the pleadings and consideration of the evidence does not show that any acts of fraud were alleged or proved as against Express and it must therefore follow that the counterclaim was doomed to fail in so far as it sought to impeach the title of Express, over the suit land.

The learned Judge held a contrary view, however. His justification was as follows;

“73. In this matter, the doctrine of innocent purchaser does not apply as the plaintiff has not produced any tangible evidence that consideration was paid. Moreover, Kaitet Tea Estate obtained the title fraudulently, illegally and unlawfully as there is no evidence of transfer by private treaty and consent of the land control board and therefore could not transfer the fraudulently obtained title to the plaintiff. It follows that they had no good title to transfer and the title held by Kaitet Tea Estate was a nullity and that nullities are always nullities.”

We think, with respect, that the learned Judge fell into error on a number of respects. First, it is puzzling that he questioned the payment of consideration by Express when this was never denied or questioned by any of the parties. Moreover, Express' Director (PW1) did testify that they paid Kshs.40 Million to Kaitet for the suit land. He was not questioned or impeached nor was it put to him in the ensuing cross-examination that that sum of money was not paid. Moreover, in the transfer executed by Kaitet on 6th February, 2001 and registered on 12th February, 2001, which was produced in evidence by DW3, who was NLC's witness, there was an express acknowledgement by Kaitet of receipt of Kshs.40 Million as the consideration. Indeed, Entry No. 4 against the title for the suit land clearly reads, "Transfer to Eldoret express for Kshs.40,000,000." The learned Judge therefore had no basis for doubting that consideration was paid, and for ignoring the evidence of the fact that was adduced before him.

The second reason for the learned Judge's conclusion was that Kaitet's title had been obtained "fraudulently, illegally and unlawfully" but, as we have already found earlier in this judgment, that was an erroneous conclusion. We note also that the learned Judge spent some considerable time on the issue of Land Control Board Consent which he concluded was never granted to the transaction between KNCC and Kaitet back in 1987, and between Kaitet and Express in 2001. The learned Judge's finding of paragraph 70 was that "There is no evidence that the plaintiff obtained consent of the Land Control Board for the property to be transferred from Kaitet Tea Estate to the plaintiff." That conclusion was clearly arrived at in error because the very first item on the plaintiff's list of documents filed on 18th May, 2011 was the "Transfer from Kaitet Tea Estate to Eldoret Express Company Limited ... with letter of consent and Land Clearance Certificate." Indeed, the Letter of Consent was issued by the South Kwanza Land Control Board on 22nd November, 2000 in the monthly meeting of the Board held that day. It gave its consent to the sale and transfer from Kaitet to Express for the consideration of Kshs.40,000,000.

In this instance as well, the learned Judge erroneously proceeded on the basis of non-existence of evidence where there was clear and unchallenged documentary evidence adduced before him. It was not the case that the learned Judge doubted or questioned the authenticity of the documents. It was never alleged and or proved that the consent was a forgery. Rather, the Judge misdirected himself in stating that evidence did not exist when in fact it did. And that, too, amounted to irreversible error.

Other than the existing documentary evidence that unmistakably spoke to the validity of Express' title to the suit land, there was yet more and quite significant reason why its claim ought to have succeeded and the counterclaim by Tawai ought to have failed: Tawai's own express and unambiguous acknowledgment of Express' title. In a suit filed in the High Court in **Kitale being Civil Suit No. 202 of 2006**, Tawai sued Express for alleged trespass from which it sought, as against Express the following orders in the amended plaint;

"a. A declaration be and is hereby given declaring the plaintiff the absolute owner of L.R. No. 5707 after the transfer of L.R. No. 5707/6 from the same leaving a balance measuring approximately 96 hectares at Kiminini Trans-Nzoia District and a permanent, order of injunction to issue restraining the defendant by itself, its agents, servants and/or any other person whatsoever acting for or through or on its behalf from trespassing upon the aforesaid land parcel belonging to the plaintiff;

.....

b. An order of eviction do issue against the defendant by itself, its agents and/or servants from land parcel L.R.5707 measuring 96 hectares approximately after L.R. No. 5707/6 has been carved out and transferred from the same and order demolition of all illegal structures erected thereon and the District Land Registrar be ordered to demarcate the boundary between the two land parcels aforesaid."

The basis for those prayers is well captured in paragraphs 3.a, 6.a, 7.a and 10 and 11.a as follows;

3.a. That at all material times relevant to the suit herein the plaintiff is and/was the registered owner of L.R. No. 5707 and that

i. In the year 1987 the aforesaid land parcel L.R. No. 5707 was sub-divided and a portion of the same measuring about 259.1 hectares was transferred to Kaitet Tea Estate (1977);

ii. That in the year 2001 the said Kaitet Tea Estate (1977) transferred the said land parcel measuring 259.1 Hectares to the Defendant herein;

iii. The remaining portion measuring about 96 hectares is to date registered in the name of the absolute and sole proprietors.

6.a. That the plaintiff seeks a declaration that it is the sole and absolute registered owner of and proprietor of the remaining and parcel measuring about 96 hectares of the original L.R. No. 5707 after the transfer of 259.1 hectares to the defendant as aforesaid;

7.a. That it is the plaintiff's case that the defendant be evicted from the plaintiff's aforesaid parcel of land L.R. No. 5707 measuring 96 hectares after the transfer to the defendant of L.R. No. 5707/6;

.....

10. That it is the plaintiff's case that the District Land Registrar should be ordered to demarcate the boundary between the two land parcel aforesaid;

11.a. That the plaintiff seeks for a declaration that it is the sole and absolute owner and/or proprietor of land parcel No. L.R. 5707 after the transfer of Land Parcel LR. No. 5707/6 to the defendant as aforesaid."

Now, even if that suit did not proceed to trial and a determination thereon made, as it was withdrawn mid-way, the plaint was accompanied as required by the Civil Procedure Rules, by a verifying affidavit by Martin Nyongesa in which he swore to “*verify the correctness of the averments in the amended plaint.*” Both the verifying affidavit and the amended plaint were drawn and filed by the firm of **Zablon Mokuwa & Company Advocates** who still represent Tawai herein, a dozen years later.

We are of the firm conviction that the aforesaid amended plaint by Tawai was an express acknowledgment of Express’ title. It is also corroborative of Express’ case as to how the title to the suit land came into being. It is evidence that constitutes an estoppel against Tawai’s belated denial and challenge to the legality and efficacy Express’ title. It is curious that the learned Judge made no mention whatsoever of this aspect of the case. We should think that had he considered the same as he ought to have, he could have arrived at a different conclusion in his determination of the case before him.

Having given full consideration to the record, we think that unlike in our recent decision of **RICHARD KIPKEMOI LIMO -vs- HASSAN KIPKEMOI NGENY & 4 OTHERS [2019] eKLR**, where the holder of a title failed to lead evidence establishing the validity of the root of his title, the case at bar has ample evidence showing quite conclusively, as we have held, that Kaitet did hold and did pass on to Express a good, valid and effective title.

We do not at all think that from the evidence on record, Express is a party deserving of the characterization, which might well be accusations in the mirror, of “*The Devil who visited Tawai Farm*” and “*Hell Broke Loose*” or that it engaged in “*Robbery with Violence*,” employed by Tawai’s learned counsel in written submissions, citing this colourful excerpt from Onyancha J’s judgment in **ALBERTA MAE GACII -vs- ATTORNEY GENERAL & 4 OTHERS [2006] eKLR**;

“Cursed should be the day when any crook in the streets of Nairobi or any town in this jurisdiction, using forgery, deceit or any kind of fraud, would acquire a legal and valid title deceitfully snatched from a legally registered innocent proprietor. Indeed, cursed would be the day when such a crook would have the legal capability or competence to pass to a third party, innocent or otherwise, a land interest that he does not have even if it were for valuable consideration. For my part, I would want to think that such a time when this court would be called upon to defend such crooks, has not come and shall never come.”

We think that it was incumbent upon Tawai to lead evidence that Express fitted such description beyond merely quoting the words. Evidence of mischief, fraud, theft, deceit and connivance was wholly lacking. None was led to show that this was a case deserving of what Maraga J (as he then was now Chief Justice) stated in **REPUBLIC -vs- MINISTER FOR TRANSPORT & COMMUNICATION & 5 OTHERS Ex Parte WAA SHIP GARBAGE COLLECTOR & 15 OTHERS [2006] 1 KLR (E&L) 563**; “*Courts should nullify titles by land grabbers who stare at your face and wave to you a title of the land grabbed and loudly plead the principle of the indefeasibility of the title deed ...*”

We have said enough to show that the suit land belongs to Express without having to go into further analysis that will show quite easily that a lot of mischief seems to have been set afoot from around the year 2008 with the aim of reversing and undoing a genuine and effectual sale that had passed good title to Kaitet two decades before in 1987, which was then properly passed on to Express for good consideration without fraud or misrepresentation. Onyancha J recognized that mischief in his judgment in **Bungoma High Court Misc. Appl. No. 58 of 2009** (supra) filed by Tawai, as applicant, when he made this perspicacious observation;

“It does not escape the attention of this Court that facts about the above mentioned transaction are very scarce. The ex-parte applicant was very economical with information, probably deliberately to deny this Court sufficient information to make an informed decision. For example, although the applicant must have realised that the date of the decision or action that he challenges herein was vital he deliberately failed to mention it both in this application and in the leave proceedings stage.”

Nor was Onyancha J alone in applying a keen judicial mind laser-like into the discovery of the mischief that parties do. W. Karanja, J. (as she then was) also saw that Tawai was up to no good when in a ruling refusing joinder of Kaitet in Kitale **HCCC No. 15 of 2006** aforesaid filed by Tawai. She stated as follows precisely thirteen years ago on 29th November, 2006;

“I have seen the certificate of the title herein in respect of the suit property. According to the said certificate, the plot in question was transferred to the intended defendant way back in 1987. If the plaintiffs herein had any problems with that transfer, they should have sued the intended defendant then. It is almost 20 years since that transfer. When the intended defendant transferred the suit land to the defendant herein in year 2001, it transferred to him (sic) a clean Title. There is no evidence whatsoever that the said transfer was fraudulent and if it was, the plaintiff did not have to wait for almost 20 years to discover it. I have seen the letter dated 9/2/2004 from the Minister for Lands and settlement where he acknowledges that ‘both Tawai Limited (Plaintiff) and Eldoret Express (defendant) were purchasers for value.’ The defendant did purchase the land from the intended defendant and good Title was passed on to him. There is no fraud whatsoever established between the defendant herein and the intended defendant. I have looked at the “Particulars of fraud” listed under paragraph 10 of the draft amended plaint. The same do not actually amount to particulars of fraud e.g. ‘Misinforming the land registry’ - what misinformation did the intended defendant give to the land Ministry? - Receiving a transfer from the 2nd defendant while knowing that the 2nd defendant had no authority to transact on the said land.’

The intended defendant did have authority to transact with his land - so what was fraudulent there??

As we stated earlier of this judgment, this case turned on a construction of documents placed before the Court and it is those documents that led W. Karanja J to make those findings. Tawai never appealed against that ruling but instead beat a hasty retreat and withdrew that suit. The ruling remains good law and the findings made therein accord fully with what our thorough analysis of the record has come up with. If anything, we are left with a plethora of questions about Tawai’s conduct in a frenetic 2008.

How for instance did Tawai purport to be obtaining discharge in 2008 variously through unstated court orders and full payment of unstated sums? How did it purport to create sub-divisions 5707/1-5 in 2008 yet its evidence was that it sub-divided the same in 1983? If it received its

title on discharge in February and September, 2008, when did it lose it to justify the alleged provisional certificate of title issued on 21st May, 2008? And how is it that the purported discharge of charge from KNCC to Tawei dated 15th September, 2008 purports to have been re-entered on 10th June, 2008 at 12.45p.m.-more than three months before it was prepared? Such are the acts bearing the hallmarks of bold turpitude that recall the quip in Shakespeare's **Hamlet, Prince of Denmark** that "*something stinks in the state of Denmark.*" We say no more.

The upshot is that this appeal is eminently meritorious and we allow it. We set aside the judgment and decree dated 16th August, 2017 in entirety and substitute therefor an order allowing the appellants' suit with costs and dismissing the respondents counterclaim with costs.

The appellant shall have the costs of this appeal from both the respondent and the interested party.

Orders accordingly.

DATED and delivered at Eldoret this 28th day of November 2019

ASIKE MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

OTIENO ODEK

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.