IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KIAGE, & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 298 OF 2014

BETWEEN

DENIS NOEL MUKHULO OCHWADA.....1ST APPELLANT

PATRICK W. OBONYO AGUTU.....2ND APPELLANT

AND

ELIZABETH MURUNGARI NJOROGE.....1ST RESPONDENT

LILIAN WAIRIMU NGATHO.....2ND RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Nairobi (Gacheru, J.) dated 15th July 2014

in

HCCC No. 928 of 2002 (OS))

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JUDGMENT OF THE COURT

This is yet another of those cases involving shameless and egregious fraud at the Ministry of Lands. In the not too uncommon practice, a total stranger obtains false duplicate documents of title to a property duly registered in the name of a citizen. While the genuine owner of the property has his documents of title ensconced in a safe or in some financial institution's strong room, the stranger, mostly with the collusion of Ministry of Lands' officials, surreptitiously and fraudulently transfers the property to another person, who may or may not be party to the fraud. That party subsequently sells and transfers the property to a third party who, more often than not, has no notice of the fraud that resulted in the transfer of the land to him.

Whatever the ultimate result of the judgment in such a dispute, along the chain an innocent party ends up suffering losses and prejudice. At the centre of ***Torrens*** land registration system, on which ours is based, is the basic assumption that meticulous professionals of conscience, absolute honesty and integrity, will superintend over it. In ***Gibbs v. Messer*** ***[1891] AC 247***, the Privy Council stated thus on the registration system:

> ***"The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validly. That end is accomplished by providing that everyone who purchases, in bona fide and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title."***

It is patently clear therefore, that unless and until the registration system is manned by professional officers of conscience, the kind of problems we are dealing with in this appeal will continue as common fare. But we should never tire of reminding the officers at ***Ardhi House*** of that simple truth.

This is how the dispute, the subject of this judgment landed before us. Between 6th November 1958 and 21st September 1994, a person known as ***Wanjiku Njau*** was registered as the absolute proprietor, under the repealed ***Registered Land Act***, of the parcel of land known as ***Dagoretti/Riruta/S.227*** measuring in area approximately ***0.23 acres (the suit property).*** There is a lot of dispute between the appellants and the respondents whether Wanjiku Njau, the registered owner of the suit property, is one and the same person as the deceased whose estate the

respondents are administrators. For the time being and for convenience, we shall refer to Wanjiku Njau as ***the deceased***. We shall later in this judgment explain why we think she indeed is. The deceased died on 9th April 1998 aged about 74 years old as her identity card, ***No. [particulars withheld]*** indicates she was born in 1924. By a grant of letters of administration intestate dated 2nd November 2000, ***the respondents, Elizabeth Murungari Njoroge*** and ***Lilian Wairimu Ngatho*** were appointed joint administrators of her estate. The respondents maintain that the deceased was also known as ***Mary Wanjiku Njau*** and that Mary Wanjiku Njau and Wanjiku Njau refer to one and the same person.

On 1st July 1994, before the death of the deceased, a person claiming to be ***Wanjiku Njau***, the holder of identity card No. ***[particulars withheld]*** entered into an agreement with the ***1st appellant, Denis Noel Mukhulo Ochwada,*** for sale of the suit property for ***Kshs 470,000.00.*** On 22nd September 1994, the suit property was transferred and registered in the name of the 1st appellant as absolute proprietor.

Thereafter the deceased came to know of the dealings with the suit property and complained to the Land Registrar, Nairobi. On 7th July 1995 she registered a caution against the suit property prohibiting any dealing therewith on the ground that the transfer to the 1st appellant was procured by forgery. On 16th July 1998, the 1st appellant filed in the High Court ***Civil Case No. 1587 of 1998*** against the Chief Land Registrar, for an order lifting the caution. It is common ground that the estate of the deceased was not served or otherwise notified of the suit. By a judgment dated 23rd November 1998, ***Githinji, J.*** (as he then was) allowed the suit, after the registrar failed to defend the same, and ordered the removal of the caution. It is also common ground that the judgment was not appealed.

By an agreement dated 29th January 1999, the 1st appellant sold and transferred the suit property to the ***2nd appellant, Patrick W. Obonyo Agutu***, for ***Kshs. 650,000.00*** and on 23rd February 1999 the 2nd appellant was registered the absolute proprietor thereof. On 31st May 2002, the respondents took out an originating summons against the appellants and the Attorney General, seeking, in the main, determination of the question whether the suit property comprised part of the estate of the deceased and whether its registration in the name of the 2nd appellant should be cancelled and the suit property transferred back to the estate. They pleaded that the suit property was at all material times registered in the name of the deceased but was fraudulently sold and transferred to the 1st appellant by a person claiming to be Wanjiku Njau, who was not the deceased.

The 1st appellant opposed the suit vide a replying affidavit that he swore on 27th April 2007. His position was that the respondents were mere busy bodies who had no interest in the suit property and that he had purchased the same lawfully from the registered proprietor, Wanjiku Njau. He averred that Mary Wanjiku Njau never owned the suit property and that with Wanjiku Njau they had obtained the consent of the Land Control Board before the transfer of the suit property in his name.

For his part the 2nd appellant opposed the suit by his replying affidavit sworn on 25th February 2008 in which he deposed that he was a *bona fide* purchaser of the suit property for value and without notice, from the 1st appellant, who at the material time was the registered proprietor. Prior to registration of the suit property in his name, he further deposed, he had obtained the consent of the Land Control Board and upon purchasing the suit property, he charged it to ***Standard Chartered Bank Kenya Ltd***, the interested party before the High Court. Subsequently he extensively developed it into a home for himself and his family, and constructed thereon some rental units. He otherwise denied all fraud alleged on his part and prayed for dismissal of the suit.

The Attorney General, who was sued on behalf of the Ministry of Lands also opposed the suit vide a replying affidavit sworn on 28th February 2008 by ***Jane Wanjiru Ndiba***, a Senior Registrar of Titles who deposed that the transactions and dealings involving the suit property were lawful and above board and that no fraud was involved. She maintained that the suit property was registered in the name of Wanjiku Njau and not Mary Wanjiku Njau, who were two distinct persons.

Lastly, Standard Chartered Bank Kenya Ltd, which as we have stated joined the suit as an interested party, confirmed through an affidavit sworn by ***Peter Jenner,*** its account manager, that the suit property was indeed charged by the 2nd appellant in its favour, but denied any or any knowledge of fraud or illegality in the registration of the 2nd appellant as proprietor or in the charge. It contended that it was a *bona fide* chargee of the suit property and prayed for dismissal of the suit against it.

Gacheru, J. heard the suit in which the respondents called 2 witnesses, whilst the appellants testified on their own behalf and the Attorney General and the interested party called one witness each. By a judgment dated 15th July 2014, the learned judge found that the transfer of the suit property to the 1st appellant by Wanjiku Njau, the holder of identity card No***7420314/70,*** was fraudulent; that the 1st respondent was part of the fraud; and that accordingly he could not pass a good title to the 2nd appellant. Ultimately the learned judge issued a declaration that the suit property belonged to the deceased who was also known as Mary Wanjiku Njau; that it formed part of her estate; that its transfer to the 1st appellant and subsequently to the 2nd appellant was null and void and should be cancelled. The learned judge further issued an order directing the Land Registrar to transfer the suit property to the estate of the deceased within three months from the date of the judgment. That is what aggrieved the appellants, leading to this appeal.

By consent of all the parties, the hearing of the appeal proceeded by way of written submissions with limited oral highlights. The appeal was founded on 16 grounds of appeal, a surfeit by any standards, but at the hearing, the appellants' learned counsel, ***Mr. K'Bahati,*** reduced the grounds into five, contending that the learned judge erred by applying provisions of the ***Land Registration Act*** and the ***Registration of Titles Act*** to the dispute; by holding that the deceased was the owner of the suit property; by finding that Mary Wanjiku Njau and Wanjiku Njau were one and the same person; by holding that fraud was proved; and by failing to hold that the 2nd appellant was a *bona fide* purchaser for value without notice.

Urging the appeal, counsel submitted that the learned judge did not analyse the evidence properly or at all and erroneously relied on a copy of title deed, a common document, to conclude that the deceased was the registered owner of the suit property. He urged further that the title deed was in the name of Wanjiku Njau and not in the name of the deceased who was known as Mary Wanjiku Njau. In his view, the central issue in the dispute, which the learned judge misapprehended, was who between the deceased and Wanjiku Njau was the owner of the suit

property. We were urged to find that the evidence on record showed that the property was registered in the name of Wanjiku Njau who sold it to the 1st appellant, and not in the name of the deceased, and further that the name Mary Wanjiku Njau alias Wanjiku Njau started to feature only after the petition for grant of letters of administration as a stratagem by the respondents to fraudulently dispossess the appellants of the suit property. The appellants also relied on the judgment by Githinji, J., which lifted the caution on the title to the suit property, and argued that it was conclusive that Wanjiku Njau, who was not the deceased, owned the suit property.

Next, counsel submitted that the learned judge erred by applying the provisions of the Land Registration Act, 2012 and the Registration of Titles Act (repealed), to the dispute whilst the suit property was registered under the repealed Registered Land Act. In so doing, it was submitted, the learned judge had applied the Land Registration Act retrospectively, contrary to the decision of this Court in ***RMM v. BAM (2015) eKLR.*** According to the appellant, the learned judge should have invoked ***sections 27*** and ***28*** of the repealed Registered Land Act, which vested in the owner of property registered under the Act absolute ownership of the property together with all rights and privileges belonging or appurtenant thereto and which could not be defeated. If the learned judge had done so, it was urged, she would have concluded that the appellants' title to the suit property could not be impeached under any circumstances.

The appellants downplayed the fact that the identity card number of the Wanjiku Njau who purportedly sold the suit property to the 1st appellant belonged to a totally different person and submitted that it was possible that Wanjiku Njau gave the wrong identity card number in the agreement for sale as happened in ***Peterson Mokaya Abuta v. Peris Moraa Nyaata [2013] EKLR.*** In any event, they maintained, there is no requirement in law that an identity card number should be included in a sale agreement and that the identity card that the respondents produced in court belonged to Mary Wanjiku Njau rather than to Wanjiku Njau.

Turning to fraud, the appellants submitted that neither was fraud pleaded as required by ***Order 2 rule 10(1)*** of the ***Civil Procedure Rules, 2010*** nor was it proved to the required standard. Relying on the decisions in ***R. G. Patel v. Lalji Makanji [1957] EA 314***, ***Koinange & 13 Others v. Koinange [1986] eKLR*** and ***Mutsonga v. Nyati [1984] EA 425***, the appellants submitted that the respondents were duty bound to prove fraud on more than a mere balance of probabilities, which they failed to do.

Lastly the appellants submitted that no evidence was adduced linking the 2nd appellant, even remotely, with fraud and that the evidence on record shows that he was a *bona fide* purchaser for value without notice, whose ownership of the suit property could not be defeated by the alleged fraud on the part of the 1st appellant. Sections 27 and 28 of the repealed Act were invoked to argue that the 2nd appellant's title was indefeasible.

Although Mr. K'Bahati proceeded on the basis that he was acting for both the appellants the law firm of ***Aming'a Opiyo Masese & Company Advocates*** filed a one-page document headed ***"2nd Appellant's submission"*** in which they indicated that they fully associated themselves with the written submissions and the list of authorities filed by Mr. K'Bahati.

For the respondents, ***Mr. Muchoki***, learned counsel, opposed the appeal and urged us to find that the learned judge did not err in nullifying the purported sale of the suit property to the 1st appellant and cancelling the registration of the suit property in the name of the 2nd appellant. He submitted that as part of the fraud, the 1st appellant deliberately refused to notify the estate of the deceased of the suit for the removal of the caution, yet it was the deceased who had placed the caution prohibiting dealings with the suit property. In addition the respondent's submitted that the alleged Wanjiku Njau who purportedly sold and transferred the suit property to the 1st appellant was a fictitious person who had fraudulently used the identity card of a different person to swindle the deceased, an old and ailing woman, of her property.

To counter the submission that the deceased and Wanjiku Njau were separate and different persons, the respondents submitted that it was not possible because before she died, the deceased had reported to the police interference with the suit property, which was registered in her name, and had placed a caution on its title. All that, it was submitted, could not be acts of a stranger who did not own the suit property. Above all, counsel urged, the administrators of the estate of the deceased were still in possession of the original documents of title for the suit property, bearing her name as Wanjiku Njau.

Regarding the application of the Land Registration Act and the Registration of Titles Act to the dispute, the respondents' curt response was that even under the repealed Registered Land Act, registration acquired by fraud was not protected. As regards fraud and proof thereof, it was the respondents' submission that it was appropriately pleaded and proved to the required standard and that the 1st appellant was part and parcel of the fraud by purporting to purchase the suit property from a fictitious person pretending to be the registered owner of the suit property. That person, it was urged further, used an identity card that belonged to a totally different person, thus clearly demonstrating fraud because two persons cannot hold the same identity card. It was also submitted that in the circumstances of this case, it was incumbent on the appellants to call as witness the Wanjiku Njau they claim was different from the deceased and the owner of the suit property, which they refused to do.

Lastly the respondents submitted that as the 1st appellant's title to the suit property was tainted by fraud, he had no capacity to sell and pass a good title to the 2nd appellant and that the 2nd appellant's remedy lay in a claim against the 1st appellant.

Ms. Ndundu, learned counsel for the Attorney General and ***Mr. Chege,*** learned counsel for Standard Chartered Bank Kenya Ltd, did not file any written submissions and opted to leave the dispute to the Court's resolution.

We have carefully considered the record of appeal, the grounds of appeal, the submissions by learned counsel, the authorities they cited and the law. It bears reminding ourselves that this is a first appeal and therefore we are enjoined to revisit the evidence that was adduced before the trial court afresh, analyze it, evaluate it and come to our own independent conclusion, but always bearing in mind that the trial court had the benefit of seeing the witnesses, hearing them and observing their demeanor and giving allowance for that. *(See* ***Seascapes Ltd. v. Development Finance Company of Kenya Ltd [2009] KLR 384).***

The first issue we shall dispose of is whether the learned judge erred by applying to the dispute before her the provisions of the Land

Registration Act and the Registration of Titles Act (repealed). It is common ground that the suit property was registered under the repealed Registered Land Act. In her judgment, the learned judge relied on ***sections 24(a)*** and ***26(1)*** of the Land Registration Act in concluding that the deceased was the absolute owner of the suit property and ***section 80*** of the same Act to hold that the court had power to order rectification of the register. As regards the Registration of Titles Act, the learned judge invoked ***sections 64*** and ***176*** of that Act while addressing the question of fraud.

To the extent that the land in dispute was registered under the repealed Registered Land Act, the learned judge had no basis for importing into the dispute the provisions of the Registration of Titles Act, which addressed land registered under a different registration system.

We would agree with the appellants too, that the learned judge had no basis for applying the provisions of the Land Registration Act, 2012 to the dispute because of the following reasons. The Land Registration Act, No. 3 of 2012 came into force on 2nd May 2012. ***Section 109*** thereof as read with ***the Schedule*** repealed both the Registered Land Act and the Registration of Titles Act, among others statutes. ***Section 105 (1) (a) (i)*** of the Act provided that a grant or certificate of title under the repealed Acts shall be deemed to be a certificate of title or certificate of lease under the Land Registration Act. Section 105 notwithstanding, the Act made further ***"transitional provisions on rights, liabilities and remedies of parties over land"***.

Notable among the provisions is ***section 106*** which provides thus:

> ***"(1) On the effective date, the repealed Acts shall cease to apply to a parcel of land to which this Act applies.***
>
> ***...***
>
> ***(3) For the avoidance of doubt—***
>
> > ***(a) any rights, liabilities and remedies shall be exercisable and enforceable <u>in accordance with the law</u> <u>that was applicable to the parcel immediately before the registration of the land under this Act..."(Emphasis added).***

Section 2 of the Act defines ***"effective date"*** to mean the commencement date of the Act. ***Section 107 (1)*** of the Act, on ***"savings and transitional provisions with respect to rights, actions and dispositions"*** makes further provisions that are relevant to this appeal as follows:

> ***107 (1) Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable <u>before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.</u> (Emphasis added).***

The rights and the liabilities that the parties were agitating had accrued and the suit before the learned judge was filed on 31st May 2002, long before the commencement of the Land Registration Act. It would follow, therefore, that by dint of the foregoing provisions, the learned judge should have applied provisions of the Registered Land Act, which was the law applicable to the suit property immediately prior to the commencement of the Land Registration Act. (See also ***<u>Ashit Patani & 2 Others v. Dhirajlal v. Patani & 2 Others</u>, CA. No. 316 of 2014)***.

While we agree with the appellants that title registered under the Registered Land Act was sacrosanct, we are not able to agree that the Act protected title registered under it in all and sundry cases, irrespective of how the title was acquired. By section 27 of the Act, the registration of a person as a proprietor of land vested in him the absolute ownership of the land together with all rights and privileges belonging or appurtenant thereto, while section 28 of the Act insulated the rights of a proprietor from challenge ***<u>except in the manner set out in the Act</u>***, which really does not afford the blanket protection that the appellants claim it did.

Section 143 of the Act, which granted the court power to order rectification of the register provided as follows:

> ***"143. (1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.***
>
> ***(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default."***

The effect of the above provision is that the court had power to order rectification, save in the case of a first registration, where the registration was obtained by fraud or mistake to which the registered person was party. The registration at issue in this appeal was not a first registration, which is shielded from challenge even if obtained by fraud or mistake. The first registration of the suit property was not even that of Wanjiku Njau on 11th November 1958, but that of ***Kirui Mutungi*** on 23rd September 1958. Accordingly, if the evidence on record indeed disclosed that the appellants were registered proprietors of the suit property through fraud, the court had power under the Registered Land Act to order rectification of the register.

We now turn to consider whether the respondents proved to the required standard that the suit property was fraudulently registered in the name of the 1st appellant and subsequently in that of the 2nd appellant. For convenience we shall consider that question together with whether, from the evidence, Wanjiku Njau and Mary Wanjiku Njau were one and the same person as contended by the respondents or were two separate people as claimed by the appellants.

The 1st respondent, one of the administrators of the estate of the deceased, deposed in her affidavits, and testified in her evidence in court that the deceased was her aunt and was known as Wanjiku Njau and also Mary Wanjiku Njau, the latter being the name in her identity card No. **[particulars withheld]**. The deceased was not married and did not have any children. She was the registered proprietor of the suit property from 1958 and that she did not sell it to the 1st appellant or any other person. Before she died on 9th April 1998, she had been ailing and when she learnt of interference with the suit property, she complained to the land registrar and a caution was placed on the title, which was removed subsequently after her death without notification to the administrators of her estate. She still had in her possession the original documents of title to the suit property.

Evan Manga Oyori, an officer from the ***Department of National Registration Bureau*** testified that after due investigations, he established that identity card No. **[particulars withheld]** which was used in the sale agreement pursuant to which the deceased purportedly sold the suit property to the 1st appellant, did not belong to Wanjiku Njau, but to ***Electina Odwori*** of ***Funyula, Busia***, born in 1968. Identity card No. **[particulars withheld]**, however, belonged to Wanjiku Njau.

In his evidence and witness statement, the 1st appellant stated that he learnt that the suit property was on sale from a Mr. Kiarie who was acting for the seller, Wanjiku Njau, a resident of Nyandarua. Kiarie subsequently introduced him to Wanjiku Njau after which they entered into an agreement for sale prepared by his lawyer. He was not very clear where he was introduced to Wanjiku or how he paid the purchase price of Kshs 470,000.00; initially saying that he paid a deposit and the balance later, but on cross-examination maintained that he paid all the amount at once. The evidence that he adduced regarding payment of the purchase price was only a voucher for Kshs 100,000.00. Subsequently, he added, they attended the Land Control Board with Wanjiku Njau and members of her family and obtained consent to transfer the suit property. Later on he learnt that Mary Wanjiku Njau had placed a caution on the suit property and he filed a suit against the Registrar for its removal. He maintained that he purchased the suit property from Wanjiku Njau, who was different from Mary Wanjiku Njau, which he later sold to the 2nd respondent.

For his part the 2nd respondent testified that he saw the suit property advertised for sale in a newspaper on 16th January 1999. He was interested and got in touch with the registered owner, the 1st appellant, who agreed to sell it to him for ***Kshs 650,000.00***. After obtaining consent from the Land Control Board, the suit property was transferred into his name. Thereafter he took possession and charged it to Standard Chartered Bank for Kshs 400,000.00, which he used to construct his home and to erect rental units on the suit property.

That is the evidence on the basis of which the learned judge was satisfied that Mary Wanjiku Njau and Wanjiku Njau were one and the same person and that the sale and transfer of the suit premises to the appellants was fraudulent. It is the appellant's case that the evidence does not disclose fraud, or if it does, that they were knowingly part of the fraud.

We would readily agree with the appellants that to succeed on a claim founded on fraud, the fraud must be pleaded and particularized.

Order VI rule 4 of the Civil Procedure Rules that were in force when the suit was filed in 2002 required a party relying on fraud to specially plead it. The suit that led to this appeal was commenced by an originating summons rather than a plaint. Among the issues that the respondents asked the court to determine where:

> ***"4. Whether the 1st appellant in collusion with alleged Wanjiku Njau ID No. [particulars withheld] and the land office staff forged land transfer documents to have the land parcel LR No. Dagoretti/Riruta/S-227 illegally transferred to the 1st defendant,***
>
> ***...***
>
> ***6. Whether the transfer in 1994 of land parcel LR No. Dagoretti/Riruta/S-227 Nairobi should be nullified and cancelled for being tainted with forgery, misrepresentation and fraud,***
>
> ***7. Whether an order by the Honourable court should issue nullifying the transfers to the 1st defendant by the person allegedly named Wanjiku Njau and subsequently by the 1st defendant to the 2nd defendant followed by cancellation of the same on the grounds of illegality,***
>
> ***8. Whether the Honourable court should issue an order to the Registrar to have the Land Title LR No. Dagoretti/Riruta S-227 Nairobi reverted back and restored to the true or real owner, the late Wanjiku Njau and hence to her estate."***

A holistic reading of the summons and the supporting affidavit by the 1st respondent leaves no doubt that the fraud alleged against the appellants was clearly set out. It was pleaded that the 1st appellant, a person claiming to be the deceased, and officers at the Land Registry, conspired to illegally transfer the suit property from the deceased to the 1st appellant by use of a fake identity card; that when the deceased lodged a caution on the suit property, the 1st appellant colluded to have it removed without notifying the estate of the deceased, and that to defeat the claim by the estate of the deceased, the 1st appellant transferred the suit property to the 2nd appellant.

For our part, we are satisfied that the respondents pleaded fraud on the part of the appellants with sufficient particularity for them to know what was alleged against them and the case they had to rebut. As this Court stated in ***Mohamed Fugicha v. Methodist Church in Kenya, CA No. 22 of 2015:***

> ***"We apprehend that the primary purpose of pleadings is to communicate with an appreciable degree of certainty and clarity the complaints that a pleader brings before the court and to serve as sufficient notice to the party impleaded to enable him to know what case to answer."***

In their replying affidavits, the appellants went to great lengths to deny involvement in any fraud as regards the sale and transfer of the suit property, and in our view, the claim that the respondents did not particularize fraud cannot fall from their mouths. Indeed, when the trial court framed the issues, one of the issues for determination was

> ***"whether the transfer of the suit property to the 1st defendant and subsequently to the second defendant was fraudulent and tainted with forgery and collusion."***

We are satisfied that there is absolutely no merit in the claim that fraud was not particularized as by law required.

As regards standard of proof of fraud, the law is quite clear. In ***R.G. Patel v. Lalji Makanji (supra)***, the former Court of Appeal for Eastern Africa stated thus:

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

(See also ***Gudka v. Dodhia*, CA. No. 21 of 1980** and ***Richard Akwesera Onditi v. Kenya Commercial Finance Co Ltd, CA.No. 329 of 2009)***.

Having carefully re-evaluated the evidence, we are satisfied that the learned judge did not err by concluding that fraud was proved to the required standard and that Wanjiku Njau the registered owner of the suit property and the deceased, who was also called Mary Wanjiku Njau were one and the same person. If indeed the Wanjiku Njau who purportedly sold the suit property to the 1st appellant was the genuine owner of the suit property, how come she identified herself in the sale agreement through the identity card of a totally different person from hundreds of kilometres away in Busia? The appellants have tried to downplay this piece of evidence on the grounds that the law does not require an identity card number in the sale agreement, and that the number could have been entered by mistake. In our view this is very serious piece of evidence, which cannot be wished away as easily as the appellants want us to do. Whoever made the mistake, they do not say. And as to how the mistake resulted in exactly the number of an identity card of another and different Kenyan, rather than just any other number, is too much of a coincidence to convince us. In our view, the evidence regarding this false identity card number is the clearest indication that the real owner of the suit property never signed the agreement for sale, which resulted eventually in the transfer of the suit property to the 1st appellant.

The judgment in ***Peterson Mokaya Abuta v. Peris Moraa Nyaata (supra),*** that the appellants relied upon cannot avail them. In that case the appellant who had sold his land to the appellant attempted to resile from the transaction relying among others on the fact that the identity card number on the agreement was not his. The advocate who prepared the agreement testified that he had made a typographical error in the agreement. After considering all the other evidence the court was satisfied that the appellant had indeed sold the land to the respondent.

In the appeal before us, it was not even the appellants' case in the trial court that there was a typographical mistake in the agreement. It is only now that we are urged to find that there was such a mistake, even though the appellants do not say who made the mistake, and neither called as witnesses the purported Wanjiku Njau who signed the agreement, or the advocate who prepared it.

The evidence that convinces us that the deceased is the real Wanjiku Njau who was the registered owner of the suit property is the fact that even after the transfer, she retained the original documents of title of the suit property. If we accept, as the appellants urge us to do, that there was another Wanjiku Njau, different from the deceased, who was the registered owner of the suit property and who genuinely sold the same to the 1st appellant, then they must, by simple common sense explain how the deceased, Mary Wanjiku Njau, came to be in possession of the documents of title of the suit property.

When we take into account the following additional surrounding pieces of evidence, we cannot reach any other conclusion except that reached by the learned judge, namely that the transaction between the purported Wanjiku Njau, holder of identity card No. **[particulars withheld]** and the 1st appellant was tainted through and through with fraud. Consider this: the evidence of the 1st respondent was that her deceased aunt, Wanjiku Njau was also known as Mary Wanjiku Njau. The deceased made efforts to caution the property after she learnt of dealings with it, raising the question why she would do so as the genuine seller. The caution was removed without any notification to her estate. The 1st appellant was conveniently unable to recall where he met the purported Wanjiku Njau who sold the suit property to him or how he paid the purchase price. The 1st appellant claimed to have attended the Land Control Board with Wanjiku Njau and her family, whilst the evidence shows the deceased was not married and did not have any children. Clause 5 of the agreement provided that the suit property was sold free from any charges, but the agreement did not advert to the existence of an encumbrance of Kshs 11,879.25, and when it came to light, it was the 1st appellant rather than the seller, and contrary to what was stated in the agreement, who paid the amount from his own pocket. The purported consent to transfer the suit property to the 1st appellant was applied for on 3rd August 1994; the parties purportedly appeared before the Board the same day; and the Board purportedly granted consent that very day, which we consider to speak to a fraudulent scheme as opposed to uncommon efficiency.

And above all, the 1st appellant failed to call the purported Wanjiku Njau, the holder of identity card No. **[particulars withheld]** as a witness, if indeed such a person existed. He did not give any explanation why he could not call her as a witness. That would have been the easiest way to establish that she was a different person from Mary Wanjiku Njau. By dint of ***section 112*** of the ***Evidence Act***, and taking into account the evidence adduced by the 1st appellant regarding his purported dealings with Wanjiku Njau, the holder of identity card No. **[particulars witheld]**, her existence was especially or peculiarly within his knowledge. If indeed she was different from Mary Wanjiku Njau, the burden was on him to prove her existence. His failure to call her strongly discredited the truth or credibility of his case. (See ***Serraco v. Attorney General, CA. No. 170 of 2014).***

As we earlier adverted, this Court will not differ readily with the trial court, which had the benefit of hearing and seeing the witnesses as they testified, on its findings of fact and impression of the credibility of witnesses who appeared before it, unless those findings are based on no

evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did. (See ***Jaban v. Olenja [1986] KLR 661).*** From the judgment of the High Court, the 1st appellant clearly did not impress the learned judge, and we cannot fault her in that regard.

As regards fraud on the part of the 2nd appellant, we are not able to find any evidence on record in that regard. He purchased the property after it was advertised in the ***East African Standard Newspaper*** of 13th August 2003. He paid to the 1st appellant valuable consideration of Kshs 650,000.00. Prior to registration as proprietor, he conducted a search, which showed that the property was registered in the name of the 1st appellant and was free from all encumbrances. He also obtained the necessary consent from the Land Control Board before the suit property was transferred to him. He took possession of the suit property and developed it with moneys raised by a charge over the suit property in favour of Standard Chartered Bank Kenya Ltd, which we were informed he has fully repaid and the property discharged.

In our view, the conclusion by the learned judge that the 2nd appellant did not obtain a good title from the 1st appellant who himself did not have a good title, was based on her application of section 23 of the Registration of Titles Act, which we have found she should not have applied in the dispute before her. (See ***Ardhi Highway Developer' Ltd v. West End Butchery Ltd & 6 Others, CA No. 246 of 2013).*** For land, which was registered under the Registered Land Act, the applicable provision was section 143(2) which prohibits rectification of the register where the proprietor is in possession and acquired the land for valuable consideration without knowledge of, or having caused by his act neglect or default, the omission, fraud or mistake on the basis of which rectification of the register is sought. This protection, as we have already noted, is informed by the guarantee in the ***Torrens*** land registration system that the entries in the register are correct and members of the public can freely and securely rely on them (See ***Charles Karathe Kiarie v. Administrators of the Estate of John Wallace Mathare (Deceased) & 5 Others, CA No Sup. 12 of 2013***). Unfortunately, as we also noted at the beginning of this judgment, land officers who lack integrity and freely allow themselves to be complicit in fraud and forgery affecting land transactions effectively undermine guarantee given by this registration system.

Under the repealed Act, the remedy for innocent parties like the respondents lay in indemnity under section 144 of the Act, which is the direction to which the respondents ought to look.

In the result, we conclude that we must interfere with the decision of the learned judge to the extent that she ordered the nullification and rectification of the 2nd appellant's title. Her findings as regards fraud on the part of the 1st appellant cannot be disturbed, and must stand. Due to the conclusion we have reached, the 1st appellant shall pay the costs of this appeal and the litigation in the High Court. It is so ordered.

Dated and delivered at Nairobi this 23rd day of February, 2018

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR