



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)

CIVIL APPEAL NO. 316 OF 2014

BETWEEN

ASHIT PATANI ..... 1<sup>ST</sup> APPELLANT

SELINA PATANI ..... 2<sup>ND</sup> APPELLANT

RAMABEN PATANI ..... 3<sup>RD</sup> APPELLANT

AND

DHIRAJLAL V. PATANI ..... 1<sup>ST</sup> RESPONDENT

VIJYA DHIRAJLAL V. PATANI ..... 2<sup>ND</sup> RESPONDENT

AZIZ DEVELOPERS LIMITED ..... 3<sup>RD</sup> RESPONDENT

*(An appeal against the Judgment and Decree of the High Court of Kenya at Nairobi, Milimani Law Courts (P. Nyamweya, J) dated 24<sup>th</sup> July, 2014 in H. C. ELC No. 613 of 2009)*

\*\*\*\*\*

JUDGMENT OF THE COURT

1. The three appellants are the wife, son and daughter of Ramniklal Virpal Vrajpal Patani (**'deceased'**) who died on 6<sup>th</sup> June, 2006. They will hereinafter be referred to as **'the Patanis'**. Before us they were represented by learned counsel **Mr. Gachie** instructed by M/s Gachie Mwanza & Company Advocates. The 1<sup>st</sup> respondent, Dhirajlal Virpal Patani (**'Dhiraj'**) is a brother to the deceased and the husband to the 2<sup>nd</sup> respondent, (**'Vijya'**). They were represented before us by **Mr. Wandago** instructed by M/s Okong'o & Wandago Advocates; while **Miss Christine Githii** instructed by M/s Kiarie kariuki Gathii & Company Advocates, represented the 3<sup>rd</sup> respondent (**'ADL'**).

2. The dispute between the parties relates to the original **LR. No. 1/167** situate on Lenana Road in Nairobi which was sub-divided into **LR. No. 1/681** and **1/682** measuring approximately 0.48 Acres and 0.419 Acres, respectively, (**disputed property**). A bungalow was developed on the former while three maisonettes were developed on the latter subdivision for rental. It is common ground that the disputed property was jointly purchased by the deceased, Dhiraj and a third brother **Mansuklal Virpal Patani (Mansuklal)** who died in 1994, and they were registered as tenants in common in equal shares in 1970. It

is also common ground that the three brothers purchased and owned in common four other properties: LR. 1/520, **Wood Avenue**, Hurlingham; LR. 209/2632/4355 (**Garden Chambers**); LR. 209/3529/5 **Suswa road**, Nairobi; and LR. 209/1765, **Chambers road**, Nairobi.

3. In their pleadings and oral evidence, the Patanis averred that the deceased made a Will in 1995 appointing them the joint executors and listing the disputed property, Wood Avenue and Garden Chambers properties as available for disposition of his interest therein in the event of his death. The grant of probate was issued on 5<sup>th</sup> January, 2007 and confirmed on 3<sup>rd</sup> October, 2007. In November 2009, they heard rumours that Dhiraj intended to sell the disputed property. They attempted to file a caveat which was rejected in December 2009 since the property had already been transferred to another party. They filed suit immediately against Dhiraj and the Principal Land Registrar in an attempt to stop any further dealings but after Dhiraj filed his defence confirming the date of transfer and the details of the sellers and the purchaser, they amended their plaint to enjoin Vijya and ADL. They withdrew the suit against the Principal Land Registrar. In their further amended plaint they alleged and particularized fraud and illegality in the manner the disputed property was transferred through a conveyance purportedly signed by the deceased in 2008 after his death in 2006; and also in the hushed and rushed manner of transfer to ADL.

4. They sought the following reliefs:-

*“(a) A permanent Injunction Order restraining the Defendants whether by themselves, or through their servants, agents and/or workmen from doing any of the following acts that is to say further selling, transferring, disposing of, charging, leasing out and/or in other manner interfering with the Plaintiffs right of ownership and legal interest in all those parcels of land known as Land Reference Number 1/682 (Originally L. R. No. 1/167)*

*b. An Order directing the Principal Land Registrar, Nairobi Lands Registry to cancel and nullify the Sale, and Transfer, of the suit property created by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to the 3<sup>rd</sup> Defendant which was done in a fraudulent manner.*

*c. An Order that the suit properties be valued by an Independent Valuer with a view of ascertaining the true value and share of each of the registered owners and/or their representatives for sharing and/or buying out by the parties.*

*cc. In the alternative to Prayer (b) above, an Order that the Sale proceeds be distributed equally between the earlier Three*

*(3) registered owners and/or their representatives.*

*d. An Order directing the 1<sup>st</sup> Defendant to account to the Plaintiffs for all the rents collected on the maisonettes, on L. R. No. 1/682 since the 6<sup>th</sup> June, 2006.*

*e. A declaration that the 1<sup>st</sup> Defendant was and still is required to pay on prorate basis a third of the Market rent lettable for the bungalow he has occupied on L. R. No. 1/681 since 6<sup>th</sup> June 2006 to the Plaintiffs being a share of their entitlement and to give an account for the same, and make payments thereof.*

*f. Costs and interest of the case.*

*g. Any other relief that the Honourable Court may deem fit to grant.”*

5. On the other hand, Dhiraj contended that all the properties held in common by the three brothers were by mutual agreement entered into on 14<sup>th</sup> February, 1985 shared out and the distribution of the properties was completed and possession taken in 1988. Subsequently, in 1992, the deceased and Mansuklal executed a Deed of Assignment of the disputed property in favour of Dhiraj. The sharing was

confirmed in an affidavit sworn jointly by Dhiraj and the deceased on **25<sup>th</sup> February, 1994** after they were sued by the wife and children of Mansuklal in HCC 210 of 1994 (OS) claiming a share of the properties. He pleaded further that the two brothers in their lifetime executed a conveyance in his favour which was post dated owing to a charge registered against the disputed property. The charge was not discharged until 2008 when on 30<sup>th</sup> April, the conveyance was registered and the disputed properties transferred to him. One month later on 28<sup>th</sup> May, 2008, he transferred half his interest to his wife, Vijya, and she became a joint owner. A year later they sold the property to ADL for Sh. 100 million and the transfer was registered in favour of ADL on 14<sup>th</sup> October, 2009. They denied all allegations of illegality or fraud and called for the dismissal of the suit.

6. For its part, ADL simply said it was looking for property for investment and it found one which it proceeded to purchase between August and October 2009 after carrying out due diligence through searches. It took possession thereof after completion of the transaction and had no knowledge of any dispute relating to the property until it was served with court process. It insisted it was an innocent purchaser without notice and sought protection of the law.

7. The matter fell for hearing and determination before Nyamweya, J. who heard **Ashit Patani** (PW1) on behalf of the Patanis; **Dhiraj** (DW2) on behalf of himself and Vijya and **James Mwangi Kamau** (DW1) on behalf of ADL. Ashit was born in 1966 and did not know how the disputed property and others were acquired, but was of age in 1985 when they were allegedly shared out. He did not know whether the family of Mansuklal was laying any claim to part of the disputed property, but he had the right to pursue the deceased's interest. He faulted the conveyance dated 25<sup>th</sup> April, 2008 which had the deceased's photo and was purportedly signed by him before a lawyer, one V. W. Muriuki, yet the deceased had died in 2006. He also faulted the purported agreement for sharing out made on 14<sup>th</sup> February, 1985 observing that it did not convey the disputed property to Dhiraj. In this case, he testified, they were asking for distribution of the proceeds of sale of the disputed property and for accounts to be taken because it was Dhiraj who was in possession of both properties. As for ADL, Ashit testified that they were aware of the family dispute since they had produced the affidavit sworn on 25<sup>th</sup> February, 1994 filed in HCCC 210 of 1994. According to him, they were not innocent purchasers.

8. In cross examination, Ashit conceded that the Suswa Road property had been registered in the deceased's name and he was in possession, but it had been auctioned. The Chambers Road property was also sold by public auction, while the Garden Chambers property was sold and the proceeds shared out. He was unable to prove, as he contended, that the joint affidavit sworn on 25<sup>th</sup> April, 1994 was not signed by his father. He also confirmed that Dhiraj was not claiming any share in the Wood Avenue property. He confessed that the Patanis did not know that the deceased had an interest in the disputed properties until he died and they found the Will mentioning the property in 2006. Dhiraj had otherwise resided on the property for as long as Ashit could remember.

As for ADL, he was hard pressed to prove the allegation of fraud since he did not know them before and had to admit that he had no solid evidence against them.

9. In his sworn evidence, Dhiraj attempted to explain the registration of the conveyance purported to have been executed by deceased persons by stating that the execution was made in their lifetime but the conveyance could not be registered because it had an unpaid loan and a charge by Kenya Revenue Authority. In unclear fashion, he explained how the conveyance was first prepared by their advocate known as V.M. Patel only to be done again by V.M. Muriuki after the death of his brothers. It talks about a consideration of Sh. 20 million but no money changed hands. He proceeded to explain the sharing agreement of 1985 and what each brother got and that the deceased borrowed money on the two properties allotted to him which were subsequently auctioned for nonpayment of the loans. Mansuklal's family had nothing to claim as they retained their share of Wood Avenue. He had resided in the disputed property since 1977 until 2009 when he sold it in a clean and open transaction to ADL. No one made any claim on it before then.

10. Cross examined, he explained that the sharing of the properties took place in 1985 but possession was

in 1988. The case filed by the family of Mansuklal, HCCC 210 of 94, was withdrawn after all issues were settled between the parties. He denied any fraud and asserted that the Patanis knew they had nothing to claim from him and that he had solely occupied and managed the disputed property since 1977 and the deceased did not lay a claim on it. They only wanted a share of the proceeds of sale unfairly.

11. The trial Judge considered the evidence on record and framed four issues as follows:-

***i. Whether there was a valid agreement as to the sharing of the suit properties as between the 1<sup>st</sup> Defendant and the deceased. R. V. Patani and M. V. Patani.***

***ii. Whether the conveyance dated 25<sup>th</sup> April 2008 between R. V. Patani and M. V. Patani on the one hand and the 1<sup>st</sup> Defendant on the other had is valid.***

***iii. Whether the 3<sup>rd</sup> Defendant has acquired any interests in the suit properties by virtue of the conveyances entered into with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants dated 14<sup>th</sup> October 2009,***

***iv. Whether the Plaintiffs are entitled to the reliefs sought.***

12. In answering the 1<sup>st</sup> issue, the trial Court considered the agreement dated **14<sup>th</sup> February, 1985** between the three brothers for valuation of all the immovable properties held in common, removal of the share of their mother and sharing the balance. It also considered the affidavit jointly sworn by the deceased and Dhiraj on **25<sup>th</sup> February, 1994** in HCCC 210 of 1994 which explained how the properties were shared out between the three brothers. The two documents were exhibited for their full terms and import. The court considered the objections raised against the agreement that it was not valid for enforcement as it was not meant for transfer of the properties; and the affidavit because it was unreliable. It considered the law on tenancies in common and ending of co-ownership as expounded in **Halsbury's Laws of England, 4<sup>th</sup> Edition Vol. 39 (2)** and came to the conclusion that:

***“The agreement dated 14<sup>th</sup> February, 1985 in my view is an agreement that points to a union of interests of the parties thereto in the various properties that they held under a tenancy in common. The replying affidavit sworn by the 1<sup>st</sup> Defendant and R. V. Patani is evidence of the intention of the parties in this regard, and particularly the intentions and agreement between the 1<sup>st</sup> Defendant and R. V. Patani, as to which particular properties that were owned in common were to be solely owned by each of the parties, and which of the properties were to be partitioned.”***

13. In the trial court's view, that finding was strengthened by the conduct of the parties with respect to the co-owned properties subsequent to the execution of the two documents, for example: the taking of loans by the deceased on the Suswa Road and Chambers Road properties; the auctioning of those properties when the loans were not paid; lack of any claim by the Patanis or Dhiraj on the Wood Avenue property which was shared out to Mansuklal's family but was also mentioned in the deceased's Will; and the sale and equitable sharing of the proceeds of Garden Chambers property as stated in the agreement of 14<sup>th</sup> February, 1985. It was evidence of implementation of their agreement and the intention to share the properties. The court held that the effect of the agreement as explained by the affidavit was that there was a valid *inter vivos* agreement and intention between the three brothers as to the union of all the legal and beneficial interests in the disputed property and therefore Dhiraj was the beneficial owner of the disputed property.

14. On the 2<sup>nd</sup> issue, the trial court did not doubt the reasons given by Dhiraj for the late dating and registration of the conveyance but found in law that the conveyance was irregular. However, the court observed that the Patanis did not seek any relief in respect of that conveyance. The court reasoned thus:-

***“This Court has in this respect noted and does not doubt the reasons given by the 1<sup>st</sup> Defendant as to why the conveyance between R. V. Patani & M. V. Patani on the one hand and the 1<sup>st</sup>***

***Defendant on the other hand was dated 25<sup>th</sup> April 2008 and not earlier, as the 1<sup>st</sup> and 2<sup>nd</sup> Defendant brought evidence of the charge over the suit properties that could not have made a conveyance before 2008 possible. The Plaintiff did not bring any contrary evidence. However, the 1<sup>st</sup> Defendant in enforcing the partition agreement between him and his two brothers M.V Patani and R.V. Patani, ought to have dealt with the personal representatives of his late brothers, as it is not disputed that on 25<sup>th</sup> April 2008 M.V Patani and R.V Patani were already deceased. Therefore, the conveyance of 25<sup>th</sup> April 2008 is to this extent irregular.”***

The court further held that Dhiraj was still the sole beneficial owner of the disputed property and therefore the legal estate of the deceased in the property can only be held in a resulting trust for the benefit of Dhiraj.

15. On the third issue, the trial court found that ADL was an innocent purchaser for value without notice and therefore acquired good Title to the disputed property on 14<sup>th</sup> October, 2009. As to the legal effect of the finding that the conveyance of 25<sup>th</sup> April, 2008 was irregular, the court referred to **sections 44 and 47** of the **Transfer of Property Act** (repealed) and found that in a sale of a co-owned property by one co-owner, the transferor acquires the transferees interest in the co-owned property. The Court held:-

***“This Court has already found that the 1<sup>st</sup> Defendant’s was both a legal co-owner and the sole beneficial owner of the suit properties, and to this extent, his transfer to the 3<sup>rd</sup> Defendant was a valid transfer and allowed by law, and was of his sole entire beneficial ownership in the suit properties. The Plaintiffs are also not entitled to any proceeds of the sale as they had no beneficial interest in the suit properties as shown in the foregoing.”***

16. Finally on the last issue, the trial court found the orders sought were not merited in view of the findings made that the Patanis had no legal or equitable interest in the disputed property. The transfer in favour of ADL would not be cancelled or nullified since no fraud or misrepresentation was proved, and even if it had, they were not proved to have been party thereto. The Title thus remained indefeasible.

17. The entire suit was dismissed which provoked the appeal before us premised on 7 grounds but learned counsel chose to urge it in three tranches as follows:-

***a. Whether the agreement of 14th February 1985 was capable of conferring any legal or equitable interest in the disputed property to Dhiraj.***

***b. Whether the conveyance of 25th April 2008 which the trial court found irregular could confer any interest or title to Dhiraj and by extension to Vijya and ADL.***

***c. Whether ADL was a bona fide purchaser for value.***

18. On the first ground, Mr. Gachie in written submissions and oral highlights submitted that an agreement that is not registered cannot confer registerable interest over property. The agreement merely expressed what the parties intended to do and could only have been perfected by the executors of the deceased's Will. The Will itself was clear, asserted counsel, that it had revoked any earlier dispositions but no finding was made on its effect. Counsel referred to **section 43 (2)** of the **Land Registration Act, 2012** which provides for registration of instruments and submitted that the agreement was not exempt from registration. He cited the case of ***Chon Jeuk Suk Kim & Another vs E. J. Austin & 2 Others [2013] eKLR*** where, following the case of ***Souza Figuerido vs Moorings Hotel Co. Ltd [1960] E A 926*** the court held that an unregistered document where there is a statutory requirement for registration is not capable of conferring legal or equitable estate in land. He also referred to **section 99** of the Government Lands Act (repealed) for the same submission. In sum, concluded counsel, the agreement was at best a contract *inter partes*, not an instrument conferring interest.

19. On the 2<sup>nd</sup> issue, Counsel agreed with the trial court that the conveyance executed on 25<sup>th</sup> April, 2008 was irregular for the reason that the deceased was already dead and his personal representatives had not

been involved. He cited **section 61 (1)** of the **Land Registration Act** for the procedure where a proprietor in common dies and the property goes to his personal representative by transmission. In his view, the Patanis were entitled to be registered as co-owners of the disputed property.

Furthermore, urged counsel, upon the finding that the conveyance was irregular, everything flowing from it was void *ab initio*, including the transfer to Dhiraj, the transfer to Vijya and the transfer to ADL. He cited Lord Denning's dicta in **Mcfoy vs United Africa Co. Ltd [1961] 3 All E.R** that an act which is void is a nullity in law and everything founded on it is incurably bad. Counsel concluded that no decision should have been based on such document otherwise the court would be a party to an unlawful act of issuing an order in favour of a wrongdoer and those claiming through him.

20. On the final issue, Mr. Gachie submitted that one of the main characteristics of a bona fide purchaser is payment of valuable consideration. It was therefore necessary for ADL to tender evidence that it paid Sh. 100 million towards the purchase of the disputed property but there was no such evidence. Only the production of receipts, bank statements, copies of cheques or loan application approvals would have satisfied that requirement, contended counsel. He invited us to find that there was no consideration paid for the purchase and that the transaction amounted to the fraud and illegality pleaded by the Patanis. Furthermore, urged counsel, the due diligence required of ADL was to carry out a historical search of the property to know its previous registered owners and how the present owner came to be registered, particularly when they were paying a large amount of money. They would have found that it was previously held in common and enquired about the consent of the other owners, which they did not do. This, in his submission, can be inferred as constructive fraud as held by the High Court (Mbogholi, J.) in the case of **Suleiman Rahemtulla Omar & Another vs Musa Hersi Fahiyе & 5 Others [2014] eKLR**. Counsel relied on several other cases on bona fide purchaser including: **Epaphrus Muturi Kigoro vs William Mukui Nyaga [2015] eKLR**; **Macharia Mwangi Maina & 87 Others vs Davidson Mwangi Kagiri [2014] eKLR**; and **Richard Oduol Opole vs Commissioner of Lands & 2 Others [2015] eKLR**. He concluded that ADL was not protected under **section 80** of the **Land Registration Act**.

21. Mr. Wandago in response, relied on oral submissions only in which he supported the findings of the trial court. He submitted that there was no illegality in the conveyance of the disputed property to Dhiraj because it was based on a clear agreement between the three brothers which was found to be valid. The only failing was an irregularity in registering the transfer which did not render the transaction void *ab initio*. The trial court had a duty to give effect to the wishes of the three brothers and it did so in delivering a just and equitable judgment.

22. As for the allegation that the purchase price was not paid by ADL, counsel submitted that the sale was conceded in pleadings and there was no need of calling evidence beyond the sale agreement and transfer documents confirming payment of the purchase price and receipt of it. The authenticity of the sale agreement was not challenged. He submitted that the sale was above board and ADL had no reason to delve into historical searches as contended. At all events, he observed, there was no pleading alleging fraud on the part of ADL.

23. Ms. Githii in further oral response reiterated that there was no pleading of fraud on the part of ADL and therefore there was nothing to prove. She observed that Ashit had, in his evidence conceded that he had no evidence of any fraud or illegality committed by ADL and, in any event, there was no encumbrance on the property when ADL conducted a search before the purchase. ADL was therefore fully protected under the law as a bona fide purchaser for value without notice, counsel concluded.

24. We have anxiously considered this appeal by re-appraising the evidence on record by way of a retrial in order to arrive at our own conclusions of fact by dint of **Rule 29 (1) (a)** of this Court's Rules. On authority, we should respect the findings of fact made by the trial court especially when they are based on the credibility of witnesses since that court had the added advantage of seeing and hearing them testify. Not so, however, where such findings are based on no evidence or are based on a perverted appreciation of the evidence or it is clearly shown that the court was wrong in principle. See **Mwangi vs Wambugu [1984] KLR page 453** where it was also stated:

*"an appellate court is not bound to accept a trial judge's finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."*

25. The starting point is to determine the statutory law applicable in this matter. We note that the trial court as well as counsel variously and indiscriminately referred to and applied the provisions of the **Land Registration Act, No. 3 of 2012** which came into effect on 2<sup>nd</sup> May, 2012. It was:

*"An Act of Parliament to revise, consolidate and rationalize the registration of titles to land, to give effect to the principles and objects of devolved government in land registration, and for connected purposes"*

In the process it repealed: *The Indian Transfer of Property Act, 1882*; *The Government Lands Act (Cap. 280)*; *The Registration of Titles Act (Cap. 281)*; *The Land Titles Act (Cap. 282)* and *The Registered Land Act (Cap 300)*.

26. The question is whether the provisions of the Act are applicable in this matter, and we think they are not. Firstly because **section 23 (3)** of the **Interpretation and General Provisions Act, Cap 2** says so in relevant part, thus:-

*"Where a written law repeals in whole or in part another written law, then, unless a contrary intervention appears, the repeal shall not –*

*a. ....*

*b. affect, the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed; or*

*c. affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed; or*

*d. ...*

*e. affect .... a remedy in respect of a right, privilege, obligation, liability, and any such legal proceedings or remedy may be instituted, continued or enforced, as if the repealed written law had not been made."*

27. Secondly because the new Act itself so declared in **section 107**, thus:

*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 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.*

*2. Unless the contrary is specifically provided for in this Act or the circumstances are such that the contrary must be presumed to be the case, where any step has been taken to create, acquire, assign, transfer, or otherwise execute a disposition, any such transaction shall be continued in accordance with the law applicable to it immediately prior to the commencement of this Act.*

28. And thirdly because the Supreme Court clarified the law on retroactivity and retrospectivity of legislation in the case of *Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others [2012] eKLR*, thus:-

*"As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie*

*prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature. (Halsbury's Laws of England, 4<sup>th</sup> Edition Vol. 44 at p.570). A retroactive law is not unconstitutional unless it:*

*i. is in the nature of a bill of attainder;*

*ii. impairs the obligation under contracts;*

*iii. divests vested rights; or*

*iv. is constitutionally forbidden.”*

29. In this matter, various rights, obligations and interests had vested in the respective parties before the enactment of the Land Registration Act and in line with the law examined above we shall apply the legislation existing when those transactions took place. The applicable statutory law would therefore be the **Registration of Titles Act (RTA)** and the **Indian Transfer of Property Act (TPA)**.

30. The issues for determination in this appeal are the selfsame ones urged by the appellants' counsel Mr. Gachie. Firstly, whether the partition or sharing agreement entered into by the three brothers on 14<sup>th</sup> February, 1985 was invalid for want of registration. Reliance was made on **section 43 (2)** of the **Land**

**Registration Act** which provides as follows:

***2. No instrument effecting any disposition of an interest in land under this Act shall operate to sell or assign land or create, transfer or otherwise affect any land, lease or charge until it has been registered in accordance with the laws relating to the registration of instruments affecting the land in respect of which the disposition has been made.***

31. That provision was not in existence when the transactions in this matter took place in 1985. **The Law of Contract Act** (Cap 23) as it then existed through an amendment by **Act No. 68 of 1968** allowed a memorandum or note in writing signed by the person to be charged as sufficient to found an action on disposition of an interest in land. Even without such writing, it was sufficient for the beneficiary of the disposition to have performed part of the contract or taken possession of the property or done some other act in furtherance of the contract. We find no compulsion for registration of such document under the Act. There is evidence on record in this matter that such memorandum as envisaged under the Law of Contract existed in the form of the agreement dated 14<sup>th</sup> February, 1985. As correctly found by the trial court, that agreement expressed a clear intention of the parties to share the properties they held in common and that intention was reinforced by physical possession of the properties which were shared out in the manner confirmed by the deceased in the affidavit in evidence dated 25<sup>th</sup> February, 1994. The authenticity of that affidavit was not seriously challenged and it shows the disputed property was shared out to Dhiraj who became the beneficial owner in possession thereof. The deceased did not bequeath his interest to Dhiraj by a Will and could not subsequently purport to revoke the disposition through the Will relied on by the Patanis. We reject the first ground of appeal.

32. On the second ground of appeal relating to the conveyance of 25<sup>th</sup> April, 2008, we agree with the finding made by the trial court that it was irregular. The question is whether it was also void **ab initio** as submitted by the appellant's counsel. The underlying finding of fact was that there was a conveyance of the disputed property which was executed by the deceased during his lifetime but it was neither dated nor presented for registration. The trial court examined and accepted the reasons given for the non-presentation for registration during the deceased's lifetime and accepted it as genuine. It was largely a credibility issue and we defer to the trial court's finding as that court had the added advantage of seeing and hearing the witnesses. On that premise, we think the irregularity was voidable, and not void **ab initio** as contended by the appellants. The dicta of Lord Denning in the **Macfoy case (supra)** was not just about void acts but a distinction between void and voidable acts. We may quote the fuller part of it, thus:

***“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse...But if an act is only voidable, then it is not automatically void. It is only an irregularity which may be waived. It is not to be avoided unless something is done to avoid it. There must be an order of the court setting it aside; and the court has a discretion whether to set it aside or not. It will do so if justice demands it but not otherwise. Meanwhile it remains good and a support for all that has been done under it.”***

A mere irregularity is not void, but voidable. An act that is voidable is valid until it is made or declared void. It ceases to have effect **after** it is declared void; it is not void *ab initio*. What has been done or accomplished before, pursuant to that act, is not affected by the declaration. In this case, as correctly observed by the trial court, no relief is sought in respect of that conveyance and indeed the Patanis appear to acknowledge its validity by seeking a share of the proceeds of sale of the property. We reject the 2<sup>nd</sup> ground of appeal.

33. Finally, was ADL a bona fide purchaser for value? Generally speaking, the innocent purchaser for value without notice of defect of title, is the 'darling of equity', and will be allowed to retain ownership. Under RTA the protection arises from the provisions of **section 23**, which requires the court to consider a certificate of title issued to the purchaser under that Act as conclusive evidence that the person named therein is the absolute and indefeasible owner thereof subject to any encumbrances, easements, restrictions and conditions contained therein. The said section prohibits the challenge to such certificate of title on any ground other than fraud or misrepresentation to which the registered owner is proved to be party.

34. There are numerous authorities which have construed that section but the bottom line is that the protection is for a *bona fide* purchaser for value without notice and who is not privy to any fraud or misrepresentation. 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 advantage 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**” on the part of a person obtaining registration to 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.”**

35. 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. In **Bullen & Leake & Jacobs, Precedent of pleadings 13<sup>th</sup> Edition at page 427** there is this passage:

***“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...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 .. 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 .. 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”.***

Whether there was fraud is, however, a matter of evidence.

36. We have examined the further amended plaint in this case which particularized 'fraud' and 'illegality' and we agree with the respondents that there is no specific pleading directed towards ADL in that regard. The evidence on record, particularly from Ashit (PW1) took the case no further as he conceded that he did not have the evidence of fraud against ADL. Learned counsel for him argued instead that there was a doctrine of constructive fraud which may be inferred. As stated earlier, fraud is a matter of evidence and not inference and we doubt the validity of the so-called doctrine. It is our finding that fraud was neither specifically pleaded nor strictly proved to the required standard in this case and we reject the final ground of appeal.

37. The upshot is that this appeal is lacking in merit and we order that it be and is hereby dismissed with costs.

**Dated and delivered at Nairobi this 30<sup>th</sup> day of June, 2017.**

**P. N. WAKI**

.....

**JUDGE OF APPEAL**

**R. N. NAMBUYE**

.....

**JUDGE OF APPEAL**

**P. O. KIAGE**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**