IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI (P), NAMBUYE & OUKO, JJ.A)

CIVIL APPLICATION SUP NO. 12 OF 2013

BETWEEN

CHARLES KARATHE KIARIE ……..…..…… 1ST APPELLANT

THOMAS WANYOIKE WAINAINA …….…….. 2ND APPELLANT

KALANG ENTERPRISES LIMITED…..…….....…..... 3RD APPELLANT

AND

THE ADMINISTRATORS OF THE ESTATE OF

JOHN WALLACE MATHARE (DECEASED) ….....…..…. 1ST RESPONDENT

THE ADMINISTRATORS OF THE ESTATE

OF DENNIS WAWERU RIMUI (DECEASED) …….....… 2ND RESPONDENT

THE ADMINISTRATORS OF THE

ESTATE OF JOYCE WANJA GITAU (DECEASED).....… 3RD RESPONDENT

GEORGE HEZRON MWAURA …….....…….. 4TH RESPONDENT

JAMES MAINA …….....….. 5TH RESPONDENT

ERICK MWANIKI …….....……. 6TH RESPONDENT

(*Being an application for grant of leave to appeal from the Court of Appeal to the Supreme Court of Kenya from the judgment of the Court of Appeal at Nairobi (Onyango Otieno, Gatembu and Mohammed JJ.A) delivered on 26th April, 2013*

in

CIVIL APPEAL NO. 225 OF 2006)

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RULING OF THE COURT

This is an application by the three applicants, Charles Karathe Kiarie, Thomas Wanyoike Wainaina and Kalang Enterprises, expressed to be brought under **Article 163 (4) (b)** of the Constitution, **Sections 3A and 3B** of the Appellate Jurisdiction Act, **Rule 24** of the Supreme Court Rules and **Rule 43** of the Court of Appeal Rules for orders that this Court,

> **"…..be pleased to grant the applicants leave to appeal to the Supreme Court against the judgment delivered herein on 26th April 2013."**

In that judgment, this Court, differently constituted, dismissed the applicant's appeal for the reasons we shall shortly state. The facts giving rise to this dispute as they emerge from the record are that sometime in the late 1989, the 4th respondent, ***George Hezron Mwaura*** (Hezron) offered to sell to ***Dennis Waweru Rimui*** (Dennis) and his brother John Wallace Mathare (Mathare) (both are deceased and represented in these and earlier proceedings by the 1st and 2nd respondents) a portion of a bigger parcel of land known as **L. R. 2243/3**, which was registered in the name of his mother, ***Joyce Wanja Gitau*** (Wanja - also deceased). Hezron had informed Dennis that he was entitled to a portion measuring 10 acres of L.R. 2243/3 as a beneficiary of the estate of his late father. Mathare and Dennis commenced negotiations with Hezron to purchase 2.5 acres of Hezron's 10-acre portion of land. Having identified the portion of 2.5 acres on the ground, Mathare and Dennis agreed to purchase it from Hezron at a price of Kshs.667,500.00. An agreement for sale dated 18th September 1990 between Wanja as the vendor, because the portion was still in her name as part of the larger parcel, on the one part and Mathare and Dennis as purchasers on the other part, was executed.

In the year 1991, Wanja obtained the requisite approvals for the subdivision and proceeded to subdivide L.R No. 2243/3. On 26th June 1991 Wanja transferred a subdivision of the original title comprising 10 acres being L.R. No. 13459/5 to her son Hezron. The portion that had been identified by Mathare and Dennis and which was the subject of the agreement for sale dated 18th September 1990 was part of L.R. No. 13459/5. Hezron then further subdivided L.R. No. 13459/5 into four portions. One of the four portions was L.R. No. 13459/41, the suit property comprising 2.5 acres, which was the subject of the agreement for sale between Hezron on the one hand and Mathare and Dennis, on the other hand.

On 2nd June 1992 Hezron further entered into an agreement for sale of the very suit property with the 1st applicant, ***Charles Karathe Kiarie*** (Kiarie) and the 2nd applicant, **Thomas Wanyoike Wainaina** (Wainaina) in which Hezron sold the suit property to Kiarie and Wainaina for a consideration of Kshs.750, 000.00.

On the 23rd October 1992 the property was transferred by Hezron and registered in the name of the company, ***Kalang Enterprises Limited*** (the 3rd applicant) in which Kiarie and Wainaina are directors. The company in turn subdivided the property into five subplots and proceeded to register them as L.R. No. 13459/44, 13459/45, 13459/46, 13459/47, and 13459/48. By two agreements for sale dated 29th June 1995 and 3rd July 1995 the company agreed to sell two of the subplots to the 5th respondent, ***James Maina*** (Maina) and the 6th respondent, ***Eric Mwaniki*** (Mwaniki) for a consideration of Kshs. 800,000.00 for each subplot.

Mathare and Dennis considered that they were wrongfully deprived of the property and on 21st July 1995 filed a suit in the High Court at Nairobi, being **HCCC No. 2325 of 1995** against Wanja, Hezron, Kiarie and Wainaina. Maina, Mwaniki and the company were subsequently joined in the suit through a further amended plaint filed in court on 30th May 1997. Mathare and Dennis pleaded that the sale of the property to Kiarie and Wainaina and the subsequent transfer of the property to the company were fraudulent and sought declarations to that effect. They also sought an order for specific performance of the agreement dated 18th September 1990.

In her judgment, the subject of appeal to this Court, the learned trial judge (Ang'awa J) framed 12

issues and found that the sales and transfers subsequent to that of Dennis and Mathare were fraudulent. Based on that finding, the trial court made the following orders:

a. That Mathare and Dennis are entitled to specific performance.

b. That the title in favour of the company be cancelled due to fraud.

c. That the property be transferred to Mathare and Dennis

d. The claim for special damages was not proved.

e. Mathare and Rimui were entitled to costs of the suit.

Aggrieved by the decision, the applicants preferred an appeal to this Court in **Civil Appeal No. 225 of 2006.** After considering the rival submissions and re-evaluation of the evidence, the court (Onyango Otieno, Gatembu & J. Mohammed JJA) dismissed the appeal and in the judgment observed in part that:-

> **"79. In our view the terms of the contract were sufficiently stated. The necessary terms are set out in the agreement for sale. The parties to the agreement are clearly identified. The property sold under the agreement for sale is sufficiently described and clearly identified. The price is also indicated. We are not persuaded, as submitted by counsel for the appellants that the remedy of specific performance was not available to Mathare and Rimui on account of uncertainty as to the property that was being sold……**
>
> **98. We are satisfied that on the evidence, the trial court correctly held that Kiarie and Wainaina were not innocent purchasers for value without notice of Mathare and Rimui's interest in the property. In totality of the circumstances, we do not think the protection accorded under Section 23 of the repealed Registration of Titles Act Cap 281 is available.**
>
> **99. Further, having found as a fact that the company did not exist when it was purportedly registered as owner of the property we think the learned trial judge was right in holding that a nonexistent company could not hold title. We were referred to the case of Haiderali Bhimji Motani v N. K. Thobani & Ano. [1945] 12 EACA 37 for the proposition that a transaction preceding incorporation of a company cannot bind the company."**

The applicants being dissatisfied by the judgment have now returned to this Court with the instant application for a certificate to challenge the aforesaid decision in the Supreme Court. The applicants are relying on four broad grounds in seeking the certificate. These grounds can be summarized this way:-

a. a matter of general public importance is involved in the intended appeal.

b. a substantial miscarriage of justice will occur unless the intended appeal is heard.

c. the intended appeal is arguable, and

d. whether the investor in Kenya has any protection against the actions of a buyer of land who does not use the caveat or possession to protect his or her interest. It was argued in support of these grounds that:-

i. the judgment of this Court dealt with the doctrine of indefeasibility of title to land under Kenya's Torrens System following the promulgation of the Constitution and enactment of the Land Registration Act.

ii. the judgment has greatly watered down the doctrine of indefeasibility of title.

iii. the High Court whose decision this Court upheld in the judgment in question did not discuss the doctrine of indefeasibility of title under Section 23 of the Registration of Titles Act or fraud as defined in that statute.

iv. the applicants were *bona fide* purchasers of the suit property whose value today is Kshs. 100m, and which they stand to lose as a result of the judgment of this Court which upheld the High Court decision.

v. the High Court and this Court misdirected themselves on the evidence of fraud attributed to the applicants.

The applicant's case is captured in Dr. Kuria's oral submissions in the following words:-

> **"What is the nature of fraud that can vitiate a title;……Do people who act innocently get a bad or a good title?.....For the bank and for the ordinary Kenyan, there is need to know when you can have a good title and when the title may not be good."**

Because issues of land go to the heart of the economy of this country, it was argued that the determination of the above points, which the High Court and this Court failed to address, ought to go to the final appellate court, the Supreme Court. Mr. Githinji Mwangi as well as Mr. Kiarie for the 3rd and 4th respondents respectively supported the application and largely agreed with Dr. Kuria's submissions that the Court erred in its finding regarding the applicants' title to the suit property; and that the Supreme Court ought to define fraud and its effect on the indefeasibility of title to land.

Mr. Muriuki Mugambi appearing with Mr. Ayisi Austin for the 1st and 2nd respondents in opposing the application raised preliminary issues to do with the form of the application which we do not intend to go into bearing in mind the view we have taken in the matter at hand. It was counsel's argument that this litigation having been in Court for the last 23 years ought to come to an end. Regarding the law on certification of appeal to the Supreme Court under **Article 163 (4) (b)** of the Constitution, counsel submitted that that provision prescribes only two circumstances for appeals from this Court to the Supreme Court; an appeal as of right if it involves the interpretation or application of the Constitution, and secondly, with leave of this Court or the Supreme Court if it involves a matter of general public importance. He further submitted that **Section 16** of the Supreme Court Act, which provides for a third test, that "**A substantial miscarriage of justice may have occured or may occur unless the appeal is heard"** has no application in this Court and does not flow from the Constitution; that the application does not raise a matter of general public importance as enunciated in the latest Supreme Court decision of **Hermanus Phillipus Steyn V. Giovanni Guecchi Ruscone,** Supreme Court Application No. 4 of 2012. The High Court and this Court having made concurrent findings that the applicants were involved in fraud, counsel argued, that question cannot be the subject of appeal to the Supreme Court as it is not a question of general public importance; that the case was not about the Torrens system of registration.

For absolutely good measure the Supreme Court has now made it mandatory that certification of appeals to it must be originated in this Court. The Court in **Samuel Kamau Macharia & Another V. Kenya Commercial Bank Ltd & 2 others,** Civil Application No. 2 of 2012 said:-

> **" We therefore affirm the principle of good practice laid down in the Sum Model case that those seeking certification to appeal from the Court of Appeal on the basis of Article 163(4) have to originate their application in that court.."** (our emphasis)

The Supreme Court has also finally defined the limits for certification of appeals under **Article 163 (4) (b)** of the Constitution in **Hermus Phillipus Steyn** case (supra) thus:-

> ***"(60)……***

i. ***for a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the Court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;***

ii. ***where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest;***

> ***iii) such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination;***
>
> ***iv) where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;***
>
> ***v) mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, must still fall within the terms of Article 163 (4)(b) of the Constitution;***
>
> ***vi) the intending applicant has an obligation to identify and concisely set out the specific elements of 'general public importance' which he or she attributes to the matter for which certification is sought;***
>
> ***vii) determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court."*** (Our emphasis).

These principles are to be considered in the context of the mischief of **Article 163 (4) (b)** aforesaid as a filter to protect the Supreme Court from being inundated with appeals with no realistic chance of success. The filtering process of the appellant system, its rationale and effect were explained by the Supreme Court in **Peter Oduor Ngoge V. Hon. Francis Ole Kaparo & 5 others,** Supreme Court Petition No. 2 of 2012 (2012) e KLR as follows:-

> **"In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle is to be that the chain of courts in the constitutional set-up, running up to the Court of Appeal have the professional competence and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court."** (Emphasis supplied).

The Court reiterated this position in the case of **Board of Governors, Moi High School Kabarak & Hon. Daniel Toroitich Arap Moi V. Malcom Bell,** Civil Application No. 12 and 13 of 2013 (consolidated) when it said,

> **"Granted that the jurisdiction of the Supreme Court is limited and for good reason, it is a matter of public policy that litigation must come to an end. So if litigation commences at the Subordinate Court, by the time it reaches and is decided by the Court of Appeal, all the issues in controversy should have been adequately addressed. That is what the Supreme Court must have had in mind when it stated in Peter Oduor Ngoge V. Hon. Francis Ole Kapalo & others." (**Emphasis).

There is clear cut allocation of power and responsibility in the system of appellate justice. In the first place, the arrangement of courts into a system of hierarchy dispels any doubt about their exact status in the interactions among themselves. The Supreme Court, sitting at the apex of that hierarchy, is saddled

with an overall leadership position in the administration of justice, wielding the hammer of finality in its judgments. **Article 163 (7)** provides that-

> **"7. <u>All courts,</u> other than the Supreme Court are bound by the decision of the Supreme Court."**

Again, it is not lost to us that the Constitution provides a clear picture of how the filtering process works. As the cases move up the ladder through the filter of the appellate process, there is an increasing shift in focus from the trial of the dispute (issues) between the parties, to the examination of how the dispute was tried and the application of the law. The appellate process is therefore a very significant tool in maintaining institutional sanity, checkmating lower courts and building consensus on the way the system should work in promoting uniformity in the decisions of the courts.

In the scheme of things, it is the business of a trial court to decide disputes by trying cases. It is not the business of an appeal court to reopen disputes by trying cases again. Each party must make the whole of his case in the trial court and call all his witnesses there; he should not be allowed to improve on his case as he travels through the appellate system. In other words, an appellate court will not allow a different case from the one agitated at the trial to be pursued before it by any of the parties.

We have said enough to demonstrate that **Article 163 (4) (b)** enacts philosophical underpinnings behind the constitutional architecture of the appellate process concerning the flow of cases through appellate filters.

We reiterate that the present application is premised on four grounds. The second, third and fourth grounds present no difficulty and we dispose of them thus. This Court in **<u>Green field Investments Limited V. Baber Alibhai Mawji,</u>** Civil Application No. 5 of 2012 has clarified that **Section 16 (2) (b)** of the Supreme Court Act which provides for a third test for leave to appeal to the Supreme Court on the ground that a **"substantial miscarriage of justice may have occurred or may occur unless the appeal is heard"** is a jurisdiction exercisable by the Supreme Court and not this Court.

In considering that test, but without making reference to **Section 16 (2) (b)** of the Supreme Court Act, the Supreme Court itself in the majority decision in **<u>Hermanns Phillipus Steyn</u>** (supra) held as follows:-

> **"IV. APPREHENSION OF A MISCARRIAGE OF JUSTICE**
>
> **[61] Beyond the reliance on the provisions of law for a review of the Court of Appeal's certification, the applicant calls in aid the general principle of the rendering of justice, as contemplated in Article 159 (2) of the Constitution of Kenya, 2010; he avers that "*the intended appeal is necessary as a substantial miscarriage of justice might have occurred or may occur unless the said appeal is heard.*"**
>
> [62] **"***Miscarriage of justice"* is thus defined in Black's Law Dictionary, 8th ed (2004) (at p. 1019):-
>
> > **A grossly unfair outcome in a judicial proceeding, as when a defendant is convicted despite lack of evidence on an essential element of the crime……..also termed <u>failure of justice.</u>**
>
> **[63] From the example thus given, it is clear that "*miscarriage of justice*" is more consistent with failings in the judicial process of a rather glaring nature, and in threshold trial stages, than with the adjudication of complex questions of law at tertiary-level Courts. And in the instance case, as appears from the details set out in the Notice of Motion, from the sets of depositions, and from the submissions, we must consider the merits of the application entirely on the criterion of whether, as prescribed under Article 163 (4) (b) of the Constitution, it raises *"a matter of general***

public importance."

The jurisdiction of this Court to certify an appeal for the Supreme Court is derived from **Article 163 (4) (b)** aforesaid as has been explained in a long line of recent decisions by both the Supreme Court and this Court. We reiterate that **Section 16** is inapplicable to applications presented to this Court. Likewise, grounds 3 and 4 on whether the appeal is arguable and whether the investor in Kenya has any protection in view of the decision under review, have no relevance in terms of this Court's jurisdiction.

That leaves the first ground, that a matter of general public importance is involved, namely, a question of law pertaining to the concepts of fraud and indefeasibility of title in Kenya's Torrens system under the Registration of Titles Act, now repealed by the Land Registration Act. This Court and the High Court have concurrently found that since Hezron, Kiarie and Wainaina were aware of the earlier sale of the suit property to Dennis and Mathare, the subsequent transactions in respect of the same property culminating with the transfer to a non-existent company amounted to a fraudulent dealing. The High Court (*Angawa J)* after making a finding of fact that the appellants were aware of the earlier transaction dealt with the question of the appellants' title thus:-

> **"Issue No. 8. Did the 2nd defendant fraudulently transfer the parcel of land known as LR No. 13459/41 to the 7th defendant?**
>
> **The 2nd defendant transferred the parcel of land to the 3rd and 4th defendants. I believe that this was his intention to do this. This he nonetheless did when he was fully aware that his mother, also defendant No. 1, had entered into an agreement with the plaintiffs. He was also aware of this when he received moneys from the said plaintiffs. At the time of the transfer of property the 2nd defendant transferred the same on the 19th October 1992 to M/S Kalanga** (sic) **Enterprises and signed the same. This act is indeed fraudulent if the 2nd defendant had not officially communicated to the plaintiffs that the agreement has been broken by the 1st defendant himself. ……..**
>
> **Unfortunately, he had through defendant No. 1 and himself kept the proceeds of both sale transactions. This amounts to fraud.**
>
> **Issue No. 9. Was the 7th defendant in existence when the parcel of land known as LR 13459/41 was transferred to it by the 2nd defendant?**
>
> **At the time of transfer of the property on 19th October 1992 and registered on the 23rd October, 1992, the 7th defendant M/S Kalang Limited was not in existence. It was originally a business name by the name of M/S Kalang Enterprises. It was this business name that the 2nd defendant was aware of and signed in the transfer document.**
>
> **There is evidence on record that shows that the 3rd and 4th defendants went alone with the said document and met their witnesses DW3, the land registrar. This land registrar advised them to change the name from a business – name to a limited liability company. The document dated 19.10.92 was then registered on 23.10.92. ……..**
>
> **The transfer document was taken to the lands department by the 3rd and 4th defendant. They were not with the 2nd defendant who may have not known of the alteration.**
>
> **What actually occurred is that the alteration which was done should not have been done without first having the company**

registered…… This in itself is unprocedural and fraudulent.

The effect of such transaction is that the limited liability company had no legal status to transact business. There was no legal entity in existence and as such, the transaction be and is hereby void. (sic)**"** (Emphasis supplied).

For its part, this Court concluded that:-

"86. Based on the record of proceedings, Hezron does not come across as a truthful and credible witness. The record is replete with instances in which Hezron seeks refuge on 'his poor English' and 'limited education' when failing or refusing to answer direct questions put to him. In one instance when his testimony appeared to go against an earlier sworn statement he tried to explain away the apparent contradiction by stating that he swore the affidavit 'under confusion.'

89. There was evidence before the trial court of acknowledgments of payments by Hezron from Rimui received from Mathare and Rimui 'being part of the purchase price of a portion of land measuring 2.5 acres to be excised from L.R. No. 2243/3 currently registered in the name of Joyce Wanja Gitau.'

92. We think there was overwhelming evidence before the trial court on the basis of which the trial court found that Hezron not only knew of the sale agreement but also actively participated in its consummation and execution.

93. The upshot is that we are satisfied that Hezron was privy to the negotiations leading up to the agreement for sale dated 18th September 1990 and was the beneficiary of and received payments towards the purchase price under that agreement.

96. Turning to the question whether Kiarie and Wainaina are innocent purchasers for value without notice, based on the evidence before the trial court, when Kiarie and Wainaina entered into an agreement for sale to purchase the property from Hezron, they knew that Mathare and Rimui were in possession, as the property was fenced and under cultivation. Indeed it was Rimui's testimony that Kiarie and Wainaina were aware of the transaction between the purchasers and Wanja and Hezron and assisted in the survey and sub division of Wanja's property.

98. We are satisfied that on the evidence, the trial court correctly held that Kiarie and Wainaina were not innocent purchasers for value without notice of Mathare and Rimui's interest in the property. In the totality of circumstances, we do not think the protection accorded under Section 23 of the repealed Registration of Titles Act Cap 281 is available." (Emphasis).

What was before this Court on appeal, was *inter alia* whether the applicants' title was not indefeasible on account of fraud as found by the High Court. **Section 23** of the repealed Registration of Titles Act provided that a title issued by the registrar to a purchaser of land shall be taken by all courts as conclusive evidence of that purchaser's absolute and indefeasible ownership thereof. That ownership, apart from conditions that may be contained in the certificate of title, can only be challenged on the ground of fraud or mispresentation to which the purchaser is proved to be a party. This is an elementary statement of the law and has been the subject of a long line of cases.

Fraud is defined in **Section 2** of the repealed Act 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."

We shall revert to this definition shortly.

The Registration of Titles Act is entirely a product of the Torrens system of registration. The word *'Torrens'* is derived from Sir Robert Torrens, the third Premier of South Australia and pioneer and author of a simplified system of land transfer which he introduced in 1858. This is a system that emphasizes on the accuracy of the land register which must mirror all currently active registrable interests that affect a particular parcel of land. Government, as the keeper of the master record of all land and their owners, guarantees indefeasibility of all rights and interests shown in the land register against the entire world and in case of loss arising from an error in registration the person affected is guaranteed of Government compensation. This statutory presumption of indefeasibility and conclusiveness of title under the Torrens system can be rebutted only by proof of fraud or misrepresentation in which the buyer is himself involved. The object of this philosophy was summarized in the classic Privy Council decision in **Gibbs V. Messer** [1891] AC 247 P.C. at pg 254 as follows:-

> **"The main object of the Act, and the legislative scheme for the attainment of that object, appear to them to be equally plain. 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.".**

We have taken this long route in order to explain that it has always been the law under the Registration of Titles Act and based on the Torrens system, that the title of a *bona fide* purchaser for value and without notice of fraud could not be impeached. This is what the judges in the Uganda case of **Lwanga V. Registrar of Titles,** Misc. Cause No. 7A of 1977 (1980) HCB 24, called the paradox of registered conveyancing – that the registration obtained by fraud was void and yet capable of becoming a good root of title to a *bona fide* purchaser for value. Because of the seriousness of allegation of fraud, a criminal act, the burden of proof is on the party who alleges it and the standard of proof is more than a mere balance of probabilities. Fraud, for that reason, is treated as matter of evidence.

It follows from what we have said that there has never been any controversy with regard to the application of **Section 23** of the Registration of Titles Act and even though the phrase *"Torrens system"* may not have been expressly used, there are numerous decisions in this country where it has been applied as demonstrated in cases following, **Moya Drift Farm Ltd V. Theuri** [1973] E.A. 114 where in reversing the High Court the predecessor of this Court held that the appellant was the absolute and indefeasible owner of the suit property and was entitled to take proceedings in trespass. **Mutsonga V. Nyati** H.C. Msa 295/1976 sets out the standard of proof for an allegation of fraud. In **Hannah Wangui Ithebu &Ano. V. Joel Ngugi Magu & 2 Others** Civil Appeal No. 86 of 1999 [2005] e KLR the High Court relied on the decision of the Court of Appeal in **Permanent Markets Society & 11 Others V. Salima Enterprises & 2 others** Civil Appeal No. 185 of 1997 that even where it is shown that past registrations were obtained illegally the title of the last *bona fide* purchaser for value was indefeasible under **Section 23 (1)** of the RTA. This position was restated by the Court in **Dr. Joseph Arap Ngok V. Justice Moijo ole Keiwua & 5 others,** Civil Appeal No. Nai. 60 of 1997 where this Court categorically declared that:-

> **"Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be**

placed in jeopardy."

See also **Njilux Motors Ltd V. KP&L & Nairobi City Commission** Court of Appeal Civil Appeal No. 206 of 1998, **Job Kipnandi Chebon V. Makana Transporters Ltd & 3 Others**, **Edwin Wambua & Others,** Mombasa HCCC No. 274 of 2009,**Russel & Co. Ltd. V. Commercial Bank of Africa Ltd.** [1986] KLR 633, **Wreck Motors Enterprises Ltd V. Russet Co. Ltd V. Commercial Bank of African Ltd & Ano.** [1986] KLR 633, **Rose Njoki Kingau & Ano. V. shaba Trustees Ltd. & Another** Civil Application No. Nai 111 of 2010 and **Elijah Arap Bii V. Samuel Gitau & KCB,** Civil Appeal No. 155 of 2006. With this plethora of authorities, it is erroneous to argue as learned counsel for the applicants did that there is need for the Supreme Court to settle the law on fraud and indefeasibility of titles, that *'fraud"* ought to be defined by that court.

Both this Court and the High Court considered the evidence of fraud in the context of the Registration of Titles Act which was the law applicable at the time of the trial. And since fraud is a question of evidence both courts found evidence of attendant circumstance and primary facts giving rise to a proper inference of fraud on the part of the applicants, in terms of the definition in **Section 2** set out earlier.

The question intended to be raised in the Supreme Court, in our view, does not constitute a matter of general public importance but is rather a protracted multiple sale transaction of one parcel of land to different parties the effect of whose determination does not and is not likely to go beyond the parties.

There is no uncertainty in the law as regards what would constitute fraud and indefeasibility of title, as Dr. Kuria, Mr. Kiarie and Mr. Githinji skillfully stretched the argument to persuade us that there was substance in the intended appeal to warrant certification to the Supreme Court.

In the result we find no merit in the application dated 13th May 2013 which we accordingly dismiss with costs.

Dated at Nairobi this 8th day of November 2013.

P. KIHARA KARIUKI

……

PRESIDENT,

COURT OF APPEAL

R. NAMBUYE

…….

JUDGE OF APPEAL

W. OUKO

……..

JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR