



Miriti v Mutegi; Hassan & another (Interested Parties) (Environment and Land Appeal 7 of 2023) [2025] KEELC 814 (KLR) (20 February 2025) (Judgment)

Neutral citation: [2025] KEELC 814 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO
ENVIRONMENT AND LAND APPEAL 7 OF 2023
JO MBOYA, J
FEBRUARY 20, 2025**

BETWEEN

DOROTHY KANYUA MIRITI APPELLANT

AND

MARGARET KAMBURA MUTEGI RESPONDENT

AND

ABDI IBRAHIM HASSAN INTERESTED PARTY

ISIOLO COUNTY GOVERNMENT INTERESTED PARTY

(Being an appeal from the Judgement of the Hon. Chief Magistrate L. Mutai in Isiolo E & L Magistrate's court delivered on 12th September 2023)

JUDGMENT

1. The Respondent herein approached the subordinate court vide Originating Summons [OS] dated 7th August 2020 and which Originating Summons was subsequently amended culminating into the amended Originating Summons dated 20th November 2020. For coherence, the amended Originating Summons under reference sought the following reliefs;
 - a. Whether the Plaintiff is the allottee on first registration of the leasehold of land parcel No. Isiolo Township/Block 1/269.
 - b. Whether the Plaintiff was the proprietor of the leasehold of land parcel No. Isiolo Township/Block 1/269.
 - c. Whether the Plaintiff passed clean and indefensible leasehold title to the 1st interested party herein of the leasehold of land parcel No. Isiolo Township/Block 1/269.



- d. Whether the Plaintiff is entitled to the costs of these proceedings.
2. The appellant herein [who was the defendant in the subordinate court] filed an amended statement of defence and counterclaim dated 25th January 2021; and wherein the Appellant sought for the following reliefs;
 - a. A declaration that plot No. Isiolo Township/Block I/269 belonged to Sarah Maitha Bernard [deceased] and is part of the estate of Sarah Maitha Bernard (deceased).
 - b. A declaration of the 1st defendant as the owner of land parcel No. Isiolo Township/Block 1/269, is illegal.
 - c. A declaration that the 1st defendant did not have a good title over plot No. land parcel No. Isiolo Township/Block 1/269 to transfer to the 2nd defendant and therefore the transfer of the aforesaid plot to the 2nd defendant was illegal.
 - d. Registration of plot No. land parcel No. Isiolo Township/Block 1/269, in the name of the 2nd defendant, be cancelled and the same be registered in the name of Sarah Maitha Bernard [deceased] for distribution among the beneficiaries, the estate of Sarah Maitha Bernard [deceased].
 - e. Costs of the suit and the counterclaim.
 3. The suit by the Respondent and the counterclaim filed by the Appellant, was heard and disposed of vide judgment rendered on the 12th September 2023 and whereupon the Learned Chief Magistrate found and held that the Respondent had duly proved her claim to the suit property. In this regard, the Learned Chief Magistrate ventured forward and issued the requisite declarations confirming that the suit property was lawfully registered in the name of the Respondents.
 4. Furthermore, the Learned Chief Magistrate also found and held that the transfer of the suit property to and in favour of the 1st Interested party was lawful. Instructively, the trial court returned a finding that the 1st Interested party was a bona-fide purchaser for value and thus same [1st Interested party] acquired a clean title to the suit property.
 5. Additionally, the learned trial court found and held that the Appellant herein had not proved her claim to the suit property. Pertinently, the Learned Chief Magistrate found and held that the suit property had never been allocated to and or registered in the name of Sarah Maitha Bernard [deceased]. In this regard, it was held that the suit property did not constitute part of the estate of the deceased.
 6. Arising from the foregoing findings, the appellant herein felt aggrieved and dissatisfied and thus filed the instant appeal vide Memorandum of Appeal dated 27th September 2023 and wherein the appellant has highlighted the following grounds:
 - i. The learned chief magistrate erred in law and fact in finding that the Respondent herein was the allottee of the suit land on first registration whereas the evidence adduced in the trial renders the said allotment and registration and an absolute anomaly.
 - ii. The learned chief magistrate erred in law and fact by finding that the Respondent herein could in any way have been the rightful proprietor of the suit land despite having a seemingly valid title to it.
 - iii. The learned chief magistrate erred in law and fact by finding that the Respondent herein passed a clean and indefeasible title to the 1st Interested party.



- iv. The learned chief magistrate erred in law and fact in finding that the 1st Interested party ought to be the new proprietor of the suit land despite the lack of evidence to show why the suit land should have been transferred to him in the first place.
 - v. The learned chief magistrate misapprehended the evidence adduced and despite open and glaring facts she failed to take cognizance of the existing nexus between Isiolo Block 1/269 and the family plot belonging to the late Sarah Maitha Bernard the testator.
 - vi. The learned chief magistrate erred in law and fact in dispelling the weight of the respondent's sworn affidavit in which she clearly admitted that the suit land belonged to Sarah Maitha Bernard (deceased) the testator and went ahead to dispose the suit land from the rightful beneficiaries.
 - vii. The learned chief magistrate erred in law and fact in giving credence to a D.C.I report which in itself is completely erroneous and misleading and is based upon completely wrong signatures.
 - viii. The learned chief magistrate erred in law and fact in finding that the balance of probability weighed in favour of the respondent herein, despite the weight of the evidence being clearly to the appellant herein.
 - ix. The learned chief magistrate erred in law and fact in finding as authentic the evidence by the Isiolo County Government that the allocation of the suit land to the respondent was proper whereas their allottee the respondent therein clearly and openly admitted in her sworn affidavits and statements which are in the court records that the suit land belonged to the testator Sarah Maitha (deceased) who had even erected a bungalow therein.
7. The appeal beforehand came up for directions on 27th November 2023, whereupon the parties covenanted to canvass and dispose of the appeal by way of written submissions. In this regard, the Court [differently constituted] proceeded to and circumscribed the timelines for the filing of the written submissions.
 8. Pursuant to the directions issued by the judge the appellant filed written submissions dated 16th February 2024; whereas the Respondent filed submissions dated 7th March 2024. In addition, the 1st Interested party filed written submissions dated 4th March 2024 while the 2nd Interested party filed written submissions dated 5th March 2024.
 9. The written submissions [details in terms of the preceding paragraphs] form part of the record of the Court.
 10. The Appellant herein filed written submissions dated 16th February 2024; and wherein the Appellant has highlighted four [4] salient issues for consideration by the court. The issues raised and canvassed by the appellant are namely; that the suit property was lawfully allocated to and in favour of Sarah Maitha Bernard [deceased] and thus same formed part of the estate of the deceased; the respondent herein acquired the suit property and transferred same into her name by fraud; thirdly the suit property was illegally and fraudulently transferred to the 1st Interested party; and lastly, that the suit property was part of the assets that were captured vide the will of the deceased.
 11. In respect of the first issue, the appellant herein submitted that the suit property was lawfully allocated to Sarah Maitha Bernard [now deceased] when the said deceased was a civil servant. Nevertheless, it was contended that the deceased gave out the documents of the suit property to the Respondent to facilitate the processing of the title in the name of the deceased herein.



12. Moreover, the Appellant submitted that upon the suit property being allocated to Sarah Maitha Bernard [deceased] the deceased entered upon and resided on the said property. In any event, it was contended that the Respondent herein was only accommodated on the suit property between the years 1975 and 1977 when the Respondent separated from her husband. However, it was contended that the suit property has never belonged to the Respondent.
13. Secondly, the appellant has submitted that even though the suit property was lawfully allocated to the deceased, the Respondent herein proceeded to and converted the suit property unto her name and thereafter procured a letter of allotment and ultimately a certificate of title in her name.
14. It was submitted that the acquisition and transfer of the suit property by the Respondent herein was fraudulent. In particular, it was contended that the Respondent colluded with various officers and thereafter procured a letter of allotment in her favour. In any event, it was submitted that Sarah Maitha Bernard [now deceased] filed civil proceedings vide Isiolo CMCC No. 6 of 2015; and wherein the deceased sought various orders including eviction as against the Respondent herein.
15. It was the further submission by the Appellant that the Respondent herein filed a statement of defence/ response to the said suit and wherein the Respondent admitted and acknowledged that Sarah Maitha Bernard [deceased] was the proprietor of the suit property. Furthermore, the Appellant submitted that the Respondent herein equally acknowledged that the suit property was part of the estate of the deceased.
16. To this end, the Appellant referenced the statement of defence and counterclaim, which had been filed by the Respondent hereinbefore the court, namely; Isiolo CMCC No. 6 of 2015.
17. In short, the Appellant contended that the transfer and registration of the suit property in favour of the respondent was tainted with fraud and illegality. In this regard, the Appellant contended that the learned chief magistrate failed to correctly appraise and evaluate the totality of the evidence on record.
18. Thirdly, the Appellant submitted that in so far as the Respondent did not acquire any lawful or legitimate title to the suit property, same [Respondent] could not purport to sell and or transfer the suit property to the 1st Interested party. To this end, it was posited that the 1st Interested party did not accrue and or acquire any valid title to and in respect of the suit property. In this regard, the Appellant has contended that the 1st Interested party's title to the suit property is therefore vitiated and thus ought to be invalidated.
19. Lastly, the Appellant has submitted that the suit property was part of the assets that were bequeathed by Sarah Maitha Bernard [now deceased] at the foot of the will dated 4th February 2018. In this regard, the Appellant has submitted that in so far as the suit property was part of the will, same [suit property] lawfully constitutes part of the estate of the deceased and hence ought to be distributed amongst the beneficiaries of the estate of the deceased.
20. In support of the foregoing submissions, the Appellant has cited and referenced the decision of the Court of Appeal in Wambui vs Mwangi & 3 others (2021) KECA 144 [KLR] wherein the Court of Appeal underscored that a certificate of title acquired in contravention of the law is illegal, unlawful and incapable of attracting the seal of indefeasibility under the law.
21. In view of the foregoing submissions, the Appellant has implored the court to find and hold that the appeal beforehand is meritorious and thus same ought to be allowed with costs.



22. In particular, the Appellant has invited the court to impeach, set aside and vary the Judgment of the Learned Chief Magistrate; and thereafter to decree that the suit property belong[s] to and forms part of the Estate of Sarah Maitha Benard [Deceased].
23. The Respondent filed written submissions dated 7th March 2024 and wherein same highlighted two [2] issues, namely, that the suit property was never allocated to Sarah Maitha Bernard [deceased] and that the appellant did not prove the allegations at the foot of the counterclaim or at all.
24. In respect of the first issue, learned counsel for the Respondent has submitted that even though the Appellant had contended that the suit property was allocated to and in favour of Sarah Maitha Bernard [deceased], it was posited that the appellant did not tender and or produce any letter of allotment or any other document, whatsoever, to vindicate the contention that deceased was ever allocated the suit property or at all.
25. It was contended that the suit property previously formed part and parcel of the trust land, which was being administered by the 2nd Interested party. In this regard, it was submitted that the Appellant herein ought to have tendered and produced before the court minutes of the 2nd Interested party [County Council of Isiolo]; if any, authorizing allotment of [sic] the suit property to the deceased. In addition, it was also submitted that the Appellant ought to have tendered a copy of the letter of allotment, which was not the case.
26. Arising from the foregoing, it was submitted that the Appellant herein failed to discharge the burden of proof cast upon her, as pertains to the allegations that the suit property was allocated to the deceased. To this end, the Respondent invoked and relied upon the provisions of Sections 107, 108 and 109 of the *Evidence Act*, cap 80 laws of Kenya.
27. Secondly, the Respondent contended that the suit property was duly and lawfully allocated to the Respondent who proceeded to and tendered various documents including the minutes of the county of Isiolo dated 28th October 1991; which minutes authenticated and confirmed that the suit plot was allocated to the Respondent.
28. Moreover, the Respondent herein submitted that subsequently same [Respondent] was issued with a letter of allotment dated 28th June 2000 by the Commissioner of lands [now defunct]. In this regard, the Respondent invited the court to take cognizance of the letter of allotment issued by the Commissioner of lands, the letter of acceptance dated 3rd July 2000; and the revenue receipt issued upon payment of the standard premium.
29. Additionally, the Respondent herein referenced the part development plan [PDP] relating to the suit property and which part development plan was duly approved. In this regard, the Respondent submitted that the suit property was lawfully allocated unto her and thus same acquired lawful rights thereto.
30. In view of the foregoing, it was submitted that the Respondent was seized of the requisite authority and mandate to alienate, sell and dispose of the suit property. To this end, it was contended that the transfer to and in favour of the 1st Interested party, was lawful and thus valid.
31. To the extent that the suit property was lawfully allocated to the Respondent, the Respondent submitted that the Learned Chief Magistrate reached and arrived at the correct finding to the effect that the suit property lawfully belonged to the Respondent. In addition, it was posited that the Learned Chief Magistrate was also right in finding and holding that the 1st Interested party acquired lawful title to the suit property.



32. Flowing from the foregoing submissions, the Respondent has invited the court to find and hold that the appeal beforehand, is devoid of merits and thus ought to be dismissed with costs.
33. The 1st Interested party filed written submissions dated 4th March 2024; and wherein same [1st Interested party] canvassed four [4] salient issues for consideration by the court. The issues that were canvassed by the 1st Interested party include, whether the learned magistrate rightfully found and held that the suit property belongs to the Respondent; whether the suit property was acquired fraudulently and illegally; whether the 1st Interested party procured/obtained a clean title to the suit property and whether the learned Chief Magistrate misapprehended the evidence on record.
34. In respect of the first issues the 1st Interested party submitted that the Respondent tendered and placed before the court various documents to underpin her [Respondent's] claim to the suit property. In particular, it was contended that the Respondent tendered and produced inter alia the minutes of the county council of Isiolo [now defunct]; the approval of the allocation of the suit plot by the county council of Isiolo; the letter of allotment by the Commissioner of land [now defunct], the letter of acceptance and the revenue receipt attesting to payments of the standard premium.
35. According to the first interested party, the totality of the documents that were tendered and produced before the court underpin the process that was taken by the Respondent towards the acquisition of title to and in respect of the suit property. In this regard, it was contended that the totality of the evidence on record clearly demonstrates that the certificate of title was acquired in accordance with the provisions of the law, inter-alia the [Land Registration Act](#) [2012].
36. Secondly, learned counsel for the 1st Interested party has submitted that the Respondent clearly and lawfully acquired her title to the suit property. In any event, it was submitted that no evidence was tendered and or adduced to demonstrate that the title was acquired illegally, unprocedurally and or vide a corrupt scheme, whatsoever. Furthermore, it was submitted that the burden of proving the ingredients highlighted at the foot of section 26 of the [Land Registration Act](#), 2012, laid on the shoulders of the claimant [person alleging] illegality and or corrupt scheme.
37. Thirdly, learned counsel for the 1st Interested party has submitted that the 1st Interested party undertook due diligence over and in respect of the suit property and confirmed that the suit property was lawfully registered in the name of the Respondent. To this end, learned counsel cited and referenced the certificate of official search, which confirmed/reflected that the suit property was indeed registered in the name of the Respondent.
38. It was the further submission by the 1st Interested party that following the due diligence that was undertaken over and in respect of the suit property, the 1st Interested party acquired lawful title to and in respect of the suit property. In this regard, it has been posited that the 1st Interested party's certificate of title to and in respect of the suit property is therefore lawful and indefeasible.
39. Arising from the foregoing, the 1st Interested party has therefore invited/ implored the court to find and hold that the 1st Interested party was/is a bona-fide purchaser for value, without any notice of defect or at all.
40. In respect of the submissions that the 1st Interested party lawfully acquired title to and in respect of the suit property and thus same [Interested party] is a bona-fide purchaser for value, learned counsel for the 1st Interested party has cited and referenced various decisions including *Tabot vs AG*; *Kalimbula Investments Ltd (2023)*, KEELC 16846 [KLR]; *Doctor Joseph N.K Arap Ngok vs Justice Moijjo Ole Keiwua & 5 others [1997]* eKRL; *Katende vs Harindar & Co. Ltd (2008)* E.A 173; *Weston Gitonga*



& 10 others vs Peter Rugu Gikanga & another [2017] eKLR and Samwel Odhiambo Oludhe and 2 others vs Jubilee Jumbo Hardware Ltd & another [2018] eKLR.

41. Finally, the 1st Interested party has submitted that the Learned Chief Magistrate properly appraised and evaluated the evidence that was tendered by and on behalf of the parties. In particular, it has been submitted by the 1st Interested party that the learned chief magistrate indeed analyzed the totality of the evidence on record and thereafter came to the correct conclusion that the suit property was lawfully and duly allocated to the respondent.
42. For good measure, this court has been invited to re-look at the evidence on record and come to the same conclusion that the suit property was never allocated to Sarah Maitha Bernard [deceased].
43. Arising from the foregoing submissions, the 1st Interested party has invited the court to find and hold that the appeal beforehand is devoid of merits. Consequently, the court has been implored to dismiss the appeal with costs to the 1st Interested party.
44. The 2nd Interested party filed written submissions dated 5th March 2024 and wherein same raised and canvassed two [2] issues. The issues that have been canvassed and highlighted by the 2nd Interested party include; whether the Respondent was the lawful proprietor of the suit property; and whether the Learned Chief Magistrate appraised/analyzed the evidence on record correctly.
45. First and foremost, it was submitted that the Respondent herein tendered and produced before the court various documents including the minutes of the county council of isiolo dated 20th October 1991, pertaining to the allotment of the suit plot; the consent by the county Council of Isiolo [now defunct] and directed to the commissioner of land dated 3rd July 2000; the letter of allotment dated 28th of June 2000; the letter of acceptance dated 3rd July 2000 and the revenue receipt issued upon payment of the standard premium.
46. For coherence, it was submitted that the Respondent clearly tendered and produced before the Chief Magistrate cogent, plausible and credible evidence to demonstrate the process leading to the issuance of the certificate of title in her favour.
47. In short, it was submitted that the Respondent duly proved her entitlement to and in respect of the suit property. In any event, it was contended that no evidence of fraud, illegality and or corrupt scheme has been tendered to vitiate/impeach the Respondent's title to the suit property.
48. Secondly, the second Interested party submitted that the Learned Chief Magistrate indeed evaluated the claim by and on behalf of the Appellant herein and correctly came to the conclusion that the Appellant did not tender and or produce any documentation to vindicate the contention that the suit property was ever allocated to the deceased. Moreover, it was submitted that in the absence of any ownership documents to and in favour of Sarah Maitha Bernard [deceased] the Appellant herein cannot lay a claim to the suit property or at all.
49. Additionally, it was submitted that even though the Appellant had contended that the suit property constituted part of the estate of the deceased, the Appellant herein did not tender and or produce any evidence to that effect. In this regard, the 2nd Interested party reminded the court that it was the duty of the Appellant to place before the court plausible and cogent evidence.
50. Nevertheless, the 2nd Interested party posited [contended] that the Appellant did not discharge the burden of proof cast upon her or at all.
51. In support of its submissions, the 2nd interested party has cited and referenced various decisions including Tabot vs AG; Kalimbula Investments Ltd (2023), KEELC 16846 [KLR]; Dixon Okindo



Mageto & another vs Dina Mageto (2022) eKLR and Arthi Highway developers vs West End Butchery & 6 others (2015) eKLR, respectively.

52. Having reviewed the pleadings that were filed by the parties in the subordinate court; the evidence tendered [both oral and documentary] and upon evaluation of the record placed before this court and on consideration of the written submissions; I come to the conclusion that the determination of the instant appeal is dependent on four [4] salient issues, namely; whether the suit property was ever allocated to Sarah Maitha Bernard [deceased] or at all; whether the appellant proved fraud and or illegality against the Respondent; whether the Respondent was duly allocated the suit property; and whether the 1st Interested party is a bona-fide purchaser for value without any notice of defect on the title of the suit property.
53. Before venturing to address and analyze the issues adverted to in the preceding paragraph, it is imperative to underscore that this court in the discharge of its duties as the 1st appellate court, is called upon to undertake exhaustive scrutiny, analysis and evaluation of the totality of the evidence that was tendered and produced before the trial court and thereafter to arrive at an independent conclusion.
54. Nevertheless, even though the court is tasked with the mandate to undertake exhaustive scrutiny and analysis of the evidence and to arrive at an independent conclusion, caution must be taken by the court taking in into account that same [appellate court] did not see and or hear the witnesses.
55. Additionally, it is imperative to state that while discharging its statutory mandate as the 1st appellate court, the court is called upon to exhibit deference to the findings of the trial court, unless it is evident that the factual and evidential findings by the trial court are contrary to the weight of evidence on record, perverse to the evidence on record, contrary to established principles of the law or better still, where the finding is erroneous and constitutes an error of principle. [See section 78 of the [Civil Procedure Act](#), Cap 21 laws of Kenya].
56. The scope and extent of the powers of the first appellate court have been highlighted and demarcated in a plethora of decisions. Suffice it to reference the decision in the case of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, where the Court of Appeal for Eastern Africa [EACA] elaborated on the applicable principle and stated thus;

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

57. Moreover, the powers, mandate and jurisdiction of the first appellate court were also considered in the case of *Mwana Sokoni versus Kenya Business Limited* (1985) KLR 931 page 934,934 where the Court of Appeal stated thus:-

“Although this court on appeal will not lightly differ from the Judge at first instance on a finding of fact, it is undeniable that we have the power to examine and re-evaluate the evidence on a first appeal if this should become necessary. As was said by the House of Lords in *Sottos Shipping versus Sauviet Sohold*, the Times, March 16,1983.

“It is uncertain whether their Lordships should have reached the same conclusion on the evidence, but it is important that, sitting in the appellate court they should be over mindful of the advantages enjoyed of the trial Judge who saw and heard the witnesses and was in a



comparably better position than the Court of Appeal to assess the significance of what was said, how it was said, and equally impotent what was not said”

58. Without endeavoring to exhaust the decisions wherein the scope and the powers of the first appellate court have been elaborated upon, it is also apposite to take cognizance of the decision in the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR; where the Court of Appeal stated and held thus:

This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the Court below and that an appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect. See *Selle and Another v Associated Motor Boat Company Limited and others* [1968] EA 123 and *Williamson Diamonds Ltd. V. Brown* [1970] E.A.L.

As we discharge our mandate of evaluating the evidence placed before the High Court, we keep in mind what the predecessor of this Court said in *Peters –vs- Sunday Post Ltd* [1958] EA 424. In its own words: -

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide ...”

59. Duly guided by the principles enumerated in the decisions [supra], I am now disposed to revert to the subject matter and to analyze the issues that were captured elsewhere herein. Suffice it to underscore that while evaluating and analyzing the issues, the court is called upon to subject the evidence [both oral and documentary] to exhaustive scrutiny and thereafter arrive at an independent conclusion.
60. Regarding the first issue, the appellant herein had contended that the suit property was duly allocated to and in favour of Sarah Maitha Bernard [deceased] on or about the year 1969, when the deceased was working/serving as an assistant community development officer in Isiolo District [now Isiolo county].
61. Additionally, the appellant had contended that upon the allocation of the suit property to Sarah Maitha Bernard [deceased], same entered upon and developed the suit property by constructing a permanent house which is reported to be standing on the suit property today. In any event, it was posited that the allotment of the suit property to the deceased, was never revoked and or cancelled.
62. Moreover, it was submitted that the deceased also constructed residential premises which were rented out to various tenants. Nevertheless, the appellants averred that when the Respondent herein entered onto the suit property and took possession thereof, same [Respondent] chased away the tenants. Furthermore, it was posited that after the Respondent chased away the tenants same [Respondent] procured a certificate of title over and in respect of the suit property.
63. Despite the foregoing averments, it is not lost on this court that the Appellant herein neither tendered nor produced any document, to underpin the contention that the suit property was ever allocated to the deceased. To start with, there is no gainsaying that what constitutes the suit property, was previously



trust land which fell under the administration/auspices of the local authorities, in this case the county council of Isiolo [now defunct].

64. Pursuant to the foregoing, it is imperative to underscore that anyone, the deceased not excepted, who was desirous to be allocated a portion of the trust land, was obligated to apply to the designated local authority [county council of Isiolo] who would thereafter consider the application in accordance with the provisions of Section 53 of the Trust *Land Act*, cap 282 laws of Kenya; as read together with the provisions of Sections 114, 115 and 117 of the retired Constitution, 2010.
65. The procedure for applying for allocation of what was hitherto trust land, was also captured and highlighted vide sections 114, 115 and 117 of the retired constitution. In this regard, it suffices to state that if the deceased ever made any application for allotment, [which is not the case], then same ought to have been in possession of the minutes of the County Council of Isiolo [now defunct], speaking to such application.
66. On the other hand, it is also important to point out that upon the consent and or authorization by the County Council of Isiolo [now defunct], the application would have been escalated to the Commissioner of lands [now defunct] for purposes of issuance of a letter of allotment. However, there is no gainsaying that no letter of allotment was never issued to and in favour of Sarah Maitha Bernard [deceased].
67. Other than the foregoing, it is also worthy to recall that even though the Appellant contends that the deceased was the registered owner of the suit property, no certificate of title/certificate of lease [whichever is applicable], was ever tendered and or produced by the appellant.
68. In the absence of a letter of allotment and the ultimate certificate of title, if any, was ever issued in favour of the deceased, it is difficult to comprehend the basis, foundation and or fulcrum upon which the appellant herein contends that the suit property lawfully belongs to the deceased or at all. For good measure, it is worth repeating and reiterating that title to land only comes into fruition upon the ultimate issuance of a certificate of title.
69. Absent title, one, the appellant not excepted, cannot be heard to stake a claim to ownership of land.
70. To this end, I beg to reference and adopt the decision of the court of appeal in *Wreck Motors Enterprises Ltd vs Commissioner of Land (1997)* eKLR where the court stated as hereunder;

In our view, the endorsement or the appending of his signature by H.E. the President on the applications to the Commissioner of Lands for the suit plot or for that matter any other unalienated Government Land is not sufficient to grant title over any land to anyone. H.E. the President only approves the application for consideration by the Commissioner of Lands for allocation of any such property. It does not amount to the applicants obtaining title to such lands. Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of title document pursuant to provisions held. See *Dr. Joseph N.K. Arap Ng'ok v Justice Moijo ole Keiwua & 4 Others*, Civil Application No. NAI.60 of 1997 (unreported). Sections 23(1) of the Registration of Titles Act reads as follows:-

"Section 23 (1)

The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements,



restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misinterpretation to which he is proved to be a party."

71. I am afraid that the Appellant herein other than making verbal averments and allegations pertaining to allotment of the suit property to the deceased, same [appellant] did not discharge the burden of proof cast upon her. In this regard, there is no basis to fault the Learned Chief Magistrate or at all.
72. On the contrary, I come to the same conclusion as the Learned Chief Magistrate. In particular, I reiterate that the suit property was never allocated to and or in favour of the deceased, whatsoever.
73. Next is the issue of whether the transfer and registration of the suit property in the name of the Respondent was fraudulent and illegal. Pertinently, the Appellant herein contends that the Respondent proceeded to and procured the letter of allotment and the subsequent document[s] in her name by fraud. In this regard, the appellant ventured forward and impleaded particulars of fraud.
74. Nevertheless, it suffices to underscore that whosoever alleges fraud, the Appellant herein not excepted, is called upon to not only plead and particularize fraud, but same must venture forward and specifically/strictly prove fraud.
75. Moreover, it is apposite to state that the standard of proof in matters pertaining to fraud is slightly beyond the balance of probabilities, albeit below beyond reasonable doubt. Simply put, the standard of proof in matters of fraud, has been posited to be the intermediate standard.
76. Regarding the manner of pleading and proving fraud, I beg to cite and reference the decision of the Court of Appeal in the case of *Kuria Kiarie vs Sammy Magera* (2018) eKLR where the court stated and held as hereunder;

The next and only other issue is fraud. The law is clear and we take it from the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR, where Tunoi, JA. (as he then was) stated as follows:

"It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts." [Emphasis added].

The same procedure goes for allegations of misrepresentation and illegality. See Order 2 Rule 4 of the Civil Procedure Rules.

26. As regards the standard of proof, this Court in the case of *Kinyanjui Kamau vs George Kamau* [2015] eKLR expressed itself as follows:-

"...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs Ndolo* (2008) 1 KLR (G & F) 742 wherein the Court stated that: "...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases..."...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."



77. Was fraud strictly proved by the appellant? I am afraid that no fraud was proved by the Appellant as against the Respondent or at all. In any event, the Respondent cannot be accused of fraud as pertains to the suit property which did not belong to the deceased beforehand. Suffice it to state that as against the deceased the doctrine of *nemo dat quod non habet*, would apply.
78. The next issue relates to whether the suit property forms part of the estate of the deceased and whether same [suit property] could be willed away by [sic] the deceased in terms of the will dated 4th February 2018.
79. To start with, it is worthy to recall that a person [testator], the deceased herein not excepted, could only include and by extension, will away a property which was lawful belonging to and registered in his/her name at the time of preparation of the will. In this regard, it would have been incumbent upon the deceased to ensure that the suit property is lawfully registered in her name before endeavoring to will same [property]. [see Section 2 of the *Law of Succession Act* Cap 160 Laws of Kenya].
80. Be that as it may, while discussing issue number one [1], this court has found and held that the suit property was neither allocated to nor registered in the name of the deceased. In this regard, there is no gainsaying that the deceased could not [sic] purport to include the suit property in her [deceased's] will.
81. In any event, I have looked at the will dated 4th of February 2018, which has been referenced by the appellant herein. However, I must point out that the suit property does not form part of the will. For good measure, the will only reference [sic] plot No. Kibirichia/1740 and [sic] Plot in Isiolo town behind St. Kizito Primary School, but which plot is devoid of the requisite specificity. To this end, one cannot state with clarity [specificity] that what is alluded to is the suit property.
82. Either way, there is no gainsaying that the suit property does not belong to the deceased and hence same [suit property] could not have been the subject of the will by and on behalf of the deceased.
83. The last issue which merits consideration is whether or not the 1st Interested party, is a bona-fide purchaser for value without notice of any defect in the title of his predecessor. Namely, the Respondent herein. In this regard, it is worthy to recall the testimony of the 1st interested party that same [interested party] undertook due diligence, including carrying out an official search on the suit property prior to and before entering into a sale agreement.
84. Additionally, the 1st Interested party averred that upon undertaking the due diligence, same [Interested party] entered into and executed a lawful sale agreement with the Respondent herein culminating in the transfer and registration of the suit property in his [First Interested Party's] name.
85. I beg to state that the evidence on record vindicate the 1st Interested party's claim that same [1st interested party] is indeed a bona-fide purchaser for value. For good measure, the 1st Interested party bought/purchased the suit property from the lawful/registered proprietor thereof for value.
86. Without belaboring the point, I come to the conclusion that the 1st Interested party is a bona-fide purchaser for value and thus acquired a clean and valid title to and in respect of the suit property. In any event, the 1st Interested party has met and satisfied the threshold highlighted in the case of *Katende Vs Harindar & Co Limited* (2008) 2 E.A 173; which highlighted the various ingredients to be satisfied by anyone claiming to partake of or benefit from the plea of bona-fide purchase for value.
87. Before departing from the issue of bona-fide purchaser for value, it is instructive to cite and reference the decision of the Supreme Court of Kenya [the Apex Court] in the case of *Dina Management Limited*



v County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (Constitutional and Human Rights) (21 April 2023) (Judgment) where the court stated as hereunder;

The Black's Law Dictionary 9th Edition defines a bona fide purchaser as: "One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims."

91. The Court of Appeal in Uganda in *Katende v Haridar & Company Ltd* [2008] 2 EA 173, defined a bona fide purchaser for value as follows: "For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine he must prove that: 1. he holds a certificate of title; 2. he purchased the property in good faith; 3. he had no knowledge of the fraud; 4. he purchased for valuable consideration;

5. the vendors had apparent valid title; 6. he purchased without notice of any fraud; and 7. he was not party to the fraud."

92. On the same issue, the Court of Appeal in *Samuel Kamere v Lands Registrar, Kajiado Civil Appeal No 28 of 2005* [2015] eKLR stated as follows: "...in order to be considered a bona fide purchaser for value, they must prove; that they acquired a valid and legal title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property..."

88. Flowing from the foregoing, my answer to issue number Four [4] is to the effect that the 1st Interested party procured and obtained a clean title from the Respondent. In this regard, the 1st Interested party is entitled to partake of and benefit from the doctrine of bona-fide purchaser for value.

Final Disposition:

89. Having analyzed and appraised the factual and legal issues [material] to the subject appeal, I come to the conclusion that the appeal beforehand is devoid of merits and thus courts dismissal.

90. In the premises, the final orders that commend themselves to the court are as hereunder;

- i. The Appeal be and is hereby dismissed.
- ii. Costs of the Appeal be and are hereby awarded to the Respondents and the interested parties.
- iii. Such costs in terms of [clause ii] shall be taxed in the conventional manner.
- iv. The Judgment of the Chief Magistrate's court dated 12th September 2023; is hereby affirmed.

91. It is so ordered.

DATED SIGNED AND DELIVERED ON THE 20TH DAY OF FEBRUARY, 2025

OGUTTU MBOYA

JUDGE.



In the presence of

Mr. Mutuma – Court Assistant

Mr. Karanja for the Respondent

Mr. Hassan Abdi for the 1st Interested Party

Ms. Cherop for the 2nd Interested Party

No appearance for the Appellant [who appears in person].

