



**Gitau v Githinji & another (Environment and Land Appeal E058 of 2023)  
[2024] KEELC 13456 (KLR) (20 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13456 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL E058 OF 2023**

**JG KEMEI, J**

**NOVEMBER 20, 2024**

**BETWEEN**

**JOHN MICHUKI GITAU ..... APPELLANT**

**AND**

**MARY NJERI GITHINJI ..... 1<sup>ST</sup> RESPONDENT**

**JOSEPH MUTURI MUNENE (SUED AS TRUSTEE OF GLORIOUS JOY  
CHURCH NDARASHA) ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. This Appeal arises from the decision and Judgment of the Hon J A Agonda in MCECL No. E065 of 2021, Ruiru on 20/1/2022.
2. The Plaintiff's (now Appellant) claim was contained in the plaint dated the 30/4/2021 in which he avers that at all material times to the suit, the Plaintiff was the beneficial owner of parcel No Ruiru/RuiruEast Block 2/2580 (suit land). That her mother namely Nyaguthii Gitau alias Pilis N Gitua (Nyaguthii) acquired the suit land in 1976 through her membership with the Nyakinyua Investments Limited (Nyakinyua). Upon her death on 3/7/1989 the property devolved to the Plaintiff vide a confirmation of grant issued on the 17/10/2017. It was his averment that he discovered that the Defendants had acquired the suit land through fraud, trespass and commenced developments including the construction of a church without any lawful justification. He sought the following orders;
  - a. A declaration that he is the beneficial owner of the suit land.
  - b. An order directing the Land Registrar to cancel the registration of the 1<sup>st</sup> Defendant as the owner of the suit land and to register the Plaintiff as the proprietor thereof.



- c. An order of permanent injunction restraining the defendants from occupying charging carrying out developments or dealing in any way with all or any portion of the suit land in any manner whatsoever prejudicial to the interests of the Plaintiff.
  - d. General damages for trespass and unlawful interference with the Plaintiffs property rights pursuant to the provisions of Section 75 of the *Land Registration Act*, 2012
  - e. Costs of the suit and interest till payment in full.
3. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants denied the Plaintiff's claim and faulted the Plaintiff for not obtaining the consent of the other beneficiaries of the estate of Nyaguthii before distributing assets of the deceased. Admittedly they conceded that Nyaguthii was a member of Nyakinyua but deny that she was allotted the suit land. The 1<sup>st</sup> defendant averred that she is a bonafide purchaser for value and that she has since subdivided the suit lands and sold to prospective purchasers which she did not disclose save for one , the 2<sup>nd</sup> defendant who has since established a church on parcel 34308, the subtitle.
4. Upon hearing the case the Hon. Trial Magistrate pronounced herself as thus;

“Although there was no evidence adduced that pointed out to the 2<sup>nd</sup> Defendant as being parties to the fraud or misrepresentation and that he might have been an innocent purchaser for value, I am satisfied that the conditions provided for impeachment of a title as per the provisions of Section 26(1)(b) have not been met. I find that the title of the 1<sup>st</sup> Defendant having been obtained legally, procedurally and/or not through a corrupt scheme, the same is not liable to be cancelled. The doctrines of estoppel and equity would apply in the present instance.

On the issue of costs, since it generally follows the cause, and bearing in mind that the Defendants herein has been inconvenienced with the Plaintiff's actions, I will award the Defendants the costs of the suit.

In the foregoing reasons, I find that the Plaintiff's herein has not proved his case on a balance of probabilities and I proceed to make the following orders:-

- a. A declaration that the 2<sup>nd</sup> Defendant is the bona fide and lawful registered proprietor of suit property Ruiru/Ruiru East Block 2/2580.
  - b. A permanent injunction restraining the Plaintiff by himself, his servants, agents or otherwise howsoever from trespassing, disposing, selling, constructing or in any other manner whatsoever interfering with the Plaintiff's quiet possession of all that parcel of land known as L.R. No. L.R Ruiru/Ruiru East Block 2/2580.
  - c. The costs of the suit awarded to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to be paid by the Plaintiff.”
5. Aggrieved by the said Judgment, the Appellant filed this appeal on the following grounds;
- a. That the Learned Trial Magistrate erred in law and fact and misdirected herself in finding that the Appellant had not proven fraud in the sale of Ruiru/Ruiru East Block 2/2580 (the suitland).
  - b. That the Learned Trial Magistrate erred in law and fact and misdirected herself in determining that there was no fraud by the Respondents based on a single issue despite the Appellant



having brought out a myriad of irregularities in the alleged purchase of the suitland by the 1<sup>st</sup> Respondent.

- c. That the Learned Trial Magistrate erred in law and fact and misdirected herself by concluding that by the time the suitland was transferred to the Plaintiff, succession had been done in respect to the estate of Phyliss Nyaguthii, yet the transfer was never effected to the Plaintiff as evidenced by the green card and the transfer to the 1<sup>st</sup> Respondent was done over two year before the confirmed grant was issued.
- d. That the Learned Magistrate erred in law and fact by totally confusing the timelines of the transfer to the 1<sup>st</sup> Respondent and the issuance of the confirmed grant and further totally disregarding the greencard produced.
- e. That the Learned Trial Magistrate erred in law and fact in failing to consider the evidence that the suitland was sold between 2009-2010 when the suitland was still vested in the estate of the late Phylis Nyaguthii and as such Agnes Wamaitha could not pass good title.
- f. That the Learned Magistrate erred in law and in fact by failing to acknowledge that the alleged sale was done in 2009-2010 yet the suitland was transferred to the 1<sup>st</sup> Respondent in 2015 as per the greencard, over 5 year from the alleged sale.
- g. That the Learned Magistrate erred in law and in fact and misdirected herself by concluding that the provisions of 45 and 55 of the Law of Succession Act had been complied with yet the land was transferred to the 1<sup>st</sup> Respondent prior to completion of Succession proceedings.
- h. That the learned Magistrate erred in law and in fact and misdirected herself by holding that Agnes Wamaitha had proprietary rights to sell the suit land despite her not being the registered proprietor and not holding a Power of Attorney from the Respondent.
- i. That the learned Magistrate erred in law and fact by failing to distinguish spousal interest from actual proprietary interest and wrongfully inferred that the property was matrimonial property.
- j. That the Learned Magistrate erred in law and fact by failing to consider that at the time of the sale of the suitland by Agnes Wamaitha, spousal interest had not arisen as shares had not yet been established between the stated beneficiaries.
- k. That the Learned Magistrate erred in law and fact by stating that Agnes Wamaitha was a beneficiary of the Estate of the late Phylis Nyaguthii contrary to the provisions of Section 29 of the Law of Succession Act.
- l. That the Learned Magistrate erred in law and fact by failing to find that a spouse cannot sell another spouse's property without the spouse owner executing necessary transfer documents of Power of Attorney.
- m. That the Learned Magistrate erred in law and in fact by implying that the Appellant gave Agnes Wamaitha rights to sell the suit land yet no document was produced to that effect and further the alleged consent by Samuel Gitau was never produced.
- n. That the Learned Magistrate erred in law and in fact in finding that Samuel Gitau could give consent to Agnes Wamaitha to sell the Plaintiff's land yet the Plaintiff had not issued the said Samuel Gitau with a Power of Attorney.



- o. That the Learned Magistrate erred in law and in fact in failing to consider that the Appellant could not have signed transfer or consent documents to sell the land as he was abroad and as such any document allegedly executed by the Appellant was a forgery.
  - p. That the Learned Magistrate erred in law and in fact in failing to consider that any documents of transfer could only be executed upon the completion of Succession proceedings and the property vesting in the name of the Appellant which did not happen.
  - q. That the Learned Magistrate erred in law and in fact by failing to consider that no explanation was given as to how the land was transferred directly to the 1<sup>st</sup> Respondent from the original owner, Nyakinyua Investments Ltd who wrote a letter in 2017 confirming that the suitland still belonged to Nyaguthii Gitau Alias Phyllis Nyaguthii.
  - r. That the learned Magistrate erred in law and in fact in failing to consider that the transfer to the 1<sup>st</sup> Respondent was fraudulent and any subsequent transfers could not produce good title and as such the transfer to the 2<sup>nd</sup> Respondent was void.
  - s. That the Learned Trial Magistrate erred in law and in fact by failing to find that the 1<sup>st</sup> Respondent and Agnes Wamaitha were guilty of fraud as set out in Section 26 of the [Land Registration Act](#).
  - t. That the Learned Magistrate erred in fact and law by dealing with irrelevant issues such as the alleged neglect of Agnes Wamaitha and her children which was not proven and completely misdirected herself from the facts and documents on record.
  - u. That the Learned Magistrate erred in law and fact by sanitizing two fraudulent titles issues to the 1<sup>st</sup> and 2<sup>nd</sup> Respondent which as was clearly shown at trial were illegally obtained through fraud.
  - v. That the Learned Magistrate erred in law and in fact by failing to consider that transfer of the suitland was done even before the shares between the beneficiaries of the Estate of Phyllis Nyaguthii had been established.
  - w. That the Learned Trial Magistrate erred in law and in fact and misdirected herself by failing to consider the testimony of the Appellant.
  - x. That the Learned Magistrate erred and misdirected herself by failing to consider submissions and quoted authorities by learned Counsel for the Appellant when arriving at her decision.
  - y. That the decision of the Learned Trial Magistrate is against the law and weight of the evidence and material on.
6. Ultimately the Appellant sought the following orders on appeal;
- a. That the appeal be allowed
  - b. That the Judgment and Decree of the Hon. J. A. Agonda delivered in Ruiru SPM's ELC Civil Suit No. E65 of 2021 on 20<sup>th</sup> January 2022 and all consequential orders be set aside.
  - c. That the prayers in Appellant's Plaintiff filed in Ruiru SPM's ELC Civil Suit No. E65 of 2021 be allowed as prayed.
  - d. Any further or other award this Honourable Court may deem fit to grant in the circumstances.
  - e. The costs of the Appeal and costs in the Trial Court be awarded to the Appellant.



## The Written Submissions

7. Counsel for the Appellant framed 4 issues for determination; On the question whether was there was a valid sale, Counsel answered in the negative. That Wamaitha acquired the suit land in the period 2002-2003 way before the succession of the Estate of Nyaguthii was petitioned in 2015. Counsel relied on the provisions of Sections 55 and 82 of the *Law of Succession Act*.
8. Counsel submitted that the sale of the suit land was in contravention of the Law of Succession and was therefore vitiated by an illegality. That the 1<sup>st</sup> Respondent cannot rely on an invalid transaction to maintain any defence such as a bonafide purchaser for value without notice. The 1<sup>st</sup> Respondent purchased the suit land in the absence of any apparent title.
9. On the second issue counsel submitted that the 2<sup>nd</sup> Respondent failed to proof the elements of a defence of a bonafide purchaser in form of an agreement for sale or evidence of payment for the plot and stamp duty receipts interalia. That the transaction having been contrary to Section 3(3) of the Law of Contract, the same cannot found a valid title.
10. In summary counsel stated that the transaction between Wamaitha and the 1<sup>st</sup> Respondent was tainted with fraud and illegality and the same could not confer upon the 1<sup>st</sup> Respondent a valid interest.
11. The Respondents on the other hand framed three issues for the determination by the Court. On whether the Appellant proved his case to the required standards in the trial, counsel for the Respondents answered in the negative. That the Appellants suit is fueled by a vendetta against Wamaitha which he hopes to achieve using the Respondents who are innocent third parties. That as at the 20/12/2010 the suit land did not belong to the Appellant. Furthermore, properties from Nyakinyua were exclusively for women and that is why the Appellant sanctioned in consultation with his family members the suit to be registered under the name of Wamaitha, his wife and further sanctioned the sale to the 1<sup>st</sup> Respondent. The suit land was sold to the 1<sup>st</sup> Respondent in 2010 way before the succession of the estate of Nyaguthii was petitioned. The family were aware that the property belonged to the Appellant and his wife and that explains why he instructed his own brother to write a letter introducing Wamaitha to Nyakinyua to pave way for the change of particulars in the membership register.
12. As to whether the Respondents fraudulently acquired the suit land, Counsel cited numerous cases on the subject of fraud being; Insurance Company of East Africa Vs The AG & 3 Others; Arthi Highway Developers Limited Vs West End Butchery Limited & Others; Dr Joseph Arap Ngok Vs Justice Moiwo Ole Keiwua & 5 Others.
13. It was further submitted that an allegation of fraud calls for detailed evidence that must pass muster the threshold of proof. See the case of RG Patel Vs Lalji Makanji (1957) EA where the Court stated that allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require prove beyond reasonable doubt, something more than a mere balance of probabilities is required. Counsel submitted that the Appellant fell short of proving fraud.
14. It was further submitted that the suit land was given to the Appellant while his mother was alive and that was his residence and therefore the provisions of Section 42 of the *Law of Succession Act* is applicable to the case in that the property shall be considered in determining the share of the net intestate estate finally accruing to the child, grandchild or house (in this case the Appellant and his family). That this fact was known to his family members; the Appellant approved the transfer of the land into her name and even sent the money to facilitate the registration; the Appellant never raised any objection on his return from America; he did not raise any objection when he was informed by



Wamaitha that she had sold the land and used the money to pay school fees for their children and build a house in Juja; despite being in the know about the land the Appellant only filed suit in 2021 after the suit land had been long sold by his wife; it is only after his marriage with Wamaitha failed that he acted; Lastly that the particulars of fraud are mere allegations.

15. On whether the Respondents were bonafide purchasers for value without any adverse notice, counsel submitted and relied on a number of case law Elizabeth Wambui Githinji & 29 Others Vs Kenya Urban Roads Authority; Lawrence P Mukiri Mungai , & Anor Vs AG & 4 Others and Katende Vs Haridar & Company Limited (2008) EA 173 in support of the proposition.
16. Counsel submitted that the Respondents carried out due diligence on the properties; were satisfied with the records at the Land Registry and were not aware of any fraud.
17. Lastly that the Appellant failed to adduce sufficient evidence in support of fraud to impugn the titles of the Respondents; the suit land had been gifted to the Appellant prior to the death of his mother; his wife Wamaitha and children resided on the suit land while the Appellant was away in America.

### **Analysis and determination**

18. Having considered the record of appeal, the grounds thereof , the rival written submissions and the material placed before the Court, the issues for determination are; whether the sale between Wamaitha and the 1<sup>st</sup> Respondent was valid; whether the sale between the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent was valid; whether the Respondents were bonafide purchasers for value without notice; whether the Hon Learned Magistrate disregarded the evidence of the Appellant in the trial Court; costs of the appeal.
19. As a first appellate Court, this Court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing a conclusion from that analysis. The Court has however to bear in mind the fact that it did not have an opportunity to see and hear the witnesses first hand. This duty is enunciated by Section 78 of the *Civil Procedure Act* which espouses the role of a first appellate Court which is to:

‘..... re-evaluate, reassess and re-analyze the extracts of the record and draw its own conclusions.’

20. Besides, that duty has been affirmed in numerous decisions of the superior Courts. Notably in the case of *Selle & Another Vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was pronounced 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...”

### **Validity of transactions**

21. The Appellant led evidence that the suit land belonged to her mother Nyaguthii by virtue of her membership in Nyakinyua. That she was allocated the land in 1976 and by the time she passed away on 3/7/1989 she had not processed the title in her name. The Appellant stated that he was married to one Agnes Wamaitha between 1986- 2001 when he left for America. Then upon his return he filed for



succession for the estate of his mother and vide the confirmation of grant issued on the 17/10/2017 the suit land and another parcel devolved to him as an inheritance from his mother. That he embarked on the process of seeking title for the land, obtained a clearance certificate from Nyakinyua dated the 7/4/2017 and paid title processing fees. Armed with the documents he visited the lands Registry and discovered that the land had been registered in the name of the 1<sup>st</sup> Respondent and to secure his interests he lodged a caution on the register. He proceeded to the land and found the 2<sup>nd</sup> Respondent who had constructed a church. He denied authorizing Wamaitha to sell the suit land and asserted that Wamaitha sold the land fraudulently.

22. Mary Njeri testified and stated that she purchased the suit land from Wamaitha. That Wamaitha informed her that the land belonged to her deceased mother in law and that the Appellant had left for America leaving her behind with two children. That she purchased the land from Wamaitha in 2010 in the absence of the Appellant who was said to have relocated to America. She stated that the Appellant never consented to the transaction. That the estate of the late Nyaguthii had not been succeeded either. That Wamaitha swore an affidavit on 1/10/2014 deponing that she was the owner of the suit land. That she never dealt with the Appellant or any of the members of his family.
23. Agnes Wamaitha Gatimu stated that she got married to the Appellant in 1986 through Kikuyu Customary law and that he left for America in 2000. That the suit land belonged to her mother in law Nyaguthii, deceased. That between 2002-2003 the Appellant asked her to transfer the land into her name at Nyakinyua and sent her the money to facilitate the transfer. That the Appellant's brother one Samuel Gitau gave her a letter authorizing her to effect the transfer at Nyakinyua. Armed with the death certificate and the letter she went to Nyakinyua and caused a transfer of the land from Nyaguthii to herself. The Appellant came back to Kenya in 2006 but left for America without raising any concerns with the transaction. That she lived on the land with her children and due to difficulty in raising upkeep for the children coupled with the loan she had taken from a bank, she decided to sell the land to the 1<sup>st</sup> Respondent in 2009 -2010. She used the proceeds to pay fees for the children, repay the loan at the bank and built a house in Juja Farm. That the Appellant knew in 2011 that she had sold the land.
24. In cross she stated that she transferred the land to her name with the consent of the Appellant. That she is a beneficiary of the estate of Nyaguthii by virtue of her marriage to the Appellant. That he never involved the Plaintiff in selling the land to the 1<sup>st</sup> Respondent.
25. Joseph Muturi Munene testified and stated that the church purchased a portion of the suit land from the 1<sup>st</sup> Respondent after conducting due diligence which showed no encumbrances on the title. That thereafter the church was constructed on the land.

**Whether the sale between Wamaitha and the 1<sup>st</sup> Respondent was valid; whether the sale between the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent was valid**

26. I will answer both questions together. It is not in dispute that the suit land belonged to Nyaguthii having been allotted based on her membership in Nyakinyua vide ballot No 1069 and payment receipts dating as far back to 1976 and 1983 respectively. It is also not in dispute that Nyaguthii was the mother of the Appellant among other children. That she died on 3/7/1989 at the age of 55 years is attested by the death certificate dated the 22/9/1989. It is also not contested that her estate remained unsucceeded until 2015 vide Succ Cause No 3017 of 2015. Her husband had predeceased her on 23/8/1986.
27. It was the case of the Appellant that the Respondents acquired the suit lands through fraud and illegality and for that reason the title should be cancelled and registered in his name. The 1<sup>st</sup> Respondent led evidence that she purchased the land from Agnes Wamaitha Gatimu who informed her that she is the wife of the Appellant and that the land belonged to her deceased mother in law.



28. Evidence was led by Wamaitha that she caused the transfer of the land into her name with the consent of the Appellant through a letter written by his brother Samuel Gitau. There was no evidence placed before the Court in support that the Appellant authorized the actions of Wamaitha. The supposed letter by his brother introducing her to Nyakinyua and authorizing her to transfer the land was also not produced in evidence. There was also no evidence of monies sent by the Appellant from America to Wamaitha to facilitate the transfer of the land to herself at Nyakinyua. The Court finds that Wamaitha transferred the land to her name at Nyakinyua without the consent of the Appellant and his family. The actions of Wamaitha were illegal invalid null and void as she held no proprietary interest in the land.
29. Section 45 of the *Law of Succession Act* provides as follows;

- “(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
- (2) Any person who contravenes the provisions of this section shall—
- (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
- (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

30. The effect of the above provision of the law is that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorised to do so by the law. Such authority emanates from a grant of representation and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence.
31. Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. In the case of *Re Estate of M’Ngarithi M’Miriti* [2017] eKLR it was held that:

“... it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the *Law of Succession Act*..... any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under section 45 of the *Law of Succession Act*. That is why the law has taken a very firm stance on intermeddling and has clothed the Court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) of protection of the estate against any person.”



32. As at the time that Wamaitha transferred the land into her name in 2002-2003 the estate of Nyaguthii was yet to be succeeded and the actions of Wamaitha were purely that of an intermeddler and therefore illegal null and void.
33. The fact of the demise of the real owner was clearly manifest to the 1<sup>st</sup> Respondent by the clearance certificate that was issued to them by Nyakinyua in the name of Nyaguthii. That was sufficient to put the 1<sup>st</sup> Respondent on notice that Wamaitha was an intermeddler in the estate of Nyaguthii and that she held no title in the suit land.
34. Evidence was led that Wamaitha sold the land to the 1<sup>st</sup> Defendant vide the sale agreement dated the 22/12/2010. At this time no grant of administration had been obtained in the estate of Nyaguthii. Wamaitha led evidence that she did not inform the Appellant about the disposal of the land. She stated in evidence;

“I decided to sell the land and I sold the land in 2009 -2010 to Mary Njeri... I never involved the Plaintiff in selling the land.

35. Going by the provisions of Section 45 of Law of Succession Act above, it mattered not if the Appellant had authorized the transfer and the disposal of the land of his deceased mother. In both scenarios it would still have amounted to intermeddling. The approval of the Appellant would not have sanitized the illegal actions of Wamaitha. Though no proof was placed before the Court, it would not have mattered even if she obtained authorization from the family.
36. Did the Appellant prove fraud? It is now settled law that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. At page 427 in Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition quoting with approval the cases of Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd’s Rep. 305, 308, Lawrence V Lord Norreys (1880) 15 App. Cas. 210 at 221 and Davy V Garrett (1878) 7 ch.D. 473 at 489 it is stated that: -

“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 (see). 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 (I). “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”.

37. As regards standard of proof in respect to a charge of fraud, the law is quite clear. In R.G. Patel Vs. Lalji Makanji(1957) EA 314 the former Court of Appeal for Eastern Africa stated thus:

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



38. In the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR, 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.”

39. Section 26 of the *Land Registration Act* provides two instances where a title can be challenged. The first is on the ground of fraud and/or misrepresentation to which the person is proved to be privy to and/or a party and secondly where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

40. In this case the actions of Wamaitha in transferring the land to herself, selling the land to the Respondent when she knew very well that she held no proprietary interest in the land and before the estate was legally succeeded and administered were not only deceitful, fraudulent and intended to illegally disposes the estate of Nyaguthii and her beneficiaries.

41. Had the 1<sup>st</sup> Respondent carried out due diligence at Nyakinyua, she would have discovered that Wamaitha was not the owner of the land. Wamaitha had no single document to evidence proprietorship in the land and the disclosure that she was selling land that belonged to a deceased person was notice enough not to proceed with the transaction. The 1<sup>st</sup> Respondent had full knowledge that Wamaitha had no proprietary interest in the land but went ahead to purchase it nevertheless.

42. Save for the sale agreement, the 1<sup>st</sup> Respondent failed to produce any documents to support a valid sale such as land control board consent, clearance certificate from Nyakinyua, transfer of the suit land, evidence of payment for the stamp duty and registration fees.

43. The 1<sup>st</sup> Respondent having acquired title through a fraudulent scheme and process, she did not acquire a valid interest in the suit land. Similarly, she did not pass a good title to the 2<sup>nd</sup> Respondent. I rely on the case of *Lawrence P. Mukiri Mungai Vs. Attorney of Francis Muroki Mwaura* (2017)eKLR where the Court of Appeal held that a party cannot claim to be a bona fide purchaser for value while the vendor did not have a valid title.

44. The Court answers the issue in the negative.

45. On the question whether the Respondents were bonafide purchasers for title, the Court in *Katende Haridar & Company Limited* (2008) 2 EA 173 stated as follows;

“... a bona fide purchase for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchase to successfully rely on the bona fide doctrine, he must prove the following:

- a) He holds a certificate of Title;
- b) He purchased the Property in good faith;
- c) He had no knowledge of the fraud;
- d) The vendors had apparent valid title;
- e) He purchased without notice of any fraud;



f) He was not party to any fraud.

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

46. Having held that the Respondents illegally and fraudulently acquired title to the suit land, the question of bonafides is unfounded for the simple reason that fraud and illegality destroys any aspect of bonafides.
47. Having considered and analyzed the whole Judgment along the evidence tendered during the trial, it is clear that the learned Magistrate misapprehended the same leading to a wrong decision. There is another reason why the Appeal should succeed. The Hon. Magistrate went ahead to issue declaratory orders of ownership of the suit land in favour of the Respondents yet the same were never pleaded/ sought. The Statement of Defence filed in the trial Court did not contain any counterclaim to lay a basis for granting such orders, if at all.
48. In the end the appeal succeeds and I enter Judgement as follows;
- a. That the appeal be allowed.
  - b. The Judgment and Decree of Hon J A Agonda delivered in Ruiru SPMCC No 65 of 2021 on the 20/1/2022 and all consequential orders be and are hereby set aside.
  - c. That the prayers in the Plaint filed in SPMCC No E65 of 2021 be and are hereby allowed as prayed.
  - d. Costs in the trial Court and on appeal shall be in favour of the Appellant.
49. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 20<sup>TH</sup> DAY OF NOVEMBER, 2024 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

Delivered online in the presence of;

Kuria HB Eboso for Appellant

Macharia for 1<sup>st</sup> and 2<sup>nd</sup> Respondents

Court Assistant – Phyllis

