



REPUBLIC OF KENYA



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**Onyancha v Republic (Criminal Appeal E019 of 2023)  
[2024] KEHC 7671 (KLR) (28 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7671 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
CRIMINAL APPEAL E019 OF 2023  
WM MUSYOKA, J  
JUNE 28, 2024**

**BETWEEN**

**VERONICA NYANCHAMA ONYANCHA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from conviction and sentence by Hon. EA Nyaloti, Chief Magistrate,  
CM, in Busia CMCCRC No. 1792 of 2020, of 9<sup>th</sup> October 2023)*

**JUDGMENT**

1. The appellant, Veronica Nyanchama Onyancha, had been charged before the primary court, of 4 counts, under the Penal Code, Cap 63, Laws of Kenya; the *Law of Succession Act*, Cap 160, Laws of Kenya; and the *Land Registration Act*, Cap 300, Laws of Kenya. The offences related to fraudulent procurement of a land title deed, intermeddling with the property of a dead person, obtaining money by false pretences, and forgery. The appellant denied the charges, and a trial ensued, where 8 witnesses testified.
2. PW1, Elijah Wafula Nakoli, bought Bukhayo/Bugengi/1051 from the appellant and another, and he paid to them, separately, a total of Kshs. 2,500,000.00. They executed a land sale agreement before an Advocate. PW1 never got to use the land, as a family in occupation, the Wanderas, referring to the family of the previous registered proprietor of the property, Tom Buxton Wandera, claimed ownership of the land. He also never got the land transferred to his name. He later learnt that the sellers had allegedly bought the land from the Standard Chartered Bank, at an auction. The land ended up charged with Equity Bank, for a loan, while still in the names of the sellers. PW2, Joseph Oluoch, was the one who procured the appellant and the other to sell the land to PW1, after the 2 were introduced to him by another. He knew that the land belonged to the Wanderas, and he informed them of the planned sale. He understood that the appellant, and the other seller held a title deed for the property.



3. PW3, Wandera Jeronimo, was one of the Wanderas. He said that Bukhayo/Bugengi/1051 belonged to his father, who died in 2005, and the same was subject to probate and administration proceedings in Busia HCSC No. 84 of 2010. He explained that the deceased never sold the land to anyone, as the title was held by the Standard Chartered Bank on a charge. He stated that he learnt of the sale of Bukhayo/Bugengi/1051 in 2018, when valuers visited the land, on instructions from Equity Bank, after PW1 allegedly failed to repay a loan, secured by that title. In 2019, a Dr. Wanga also deposited material on the land, ready to develop it. It was after that that he learnt PW1 had bought the land from the appellant and others. He made a report to the police. He claimed that the police established that the original title deed was still held by the Standard Chartered Bank, as it had never been discharged. When shown certain documents, which included transfer forms from the Standard Chartered Bank to the appellant and another, he conceded that those were post-auction documents that the land registrar could act upon. PW4, Benedict Nicholas Namulembo Wandera, was also a member of the Wandera family. He averred that PW1 was the one who reported the Wanderas to the police, on grounds that they were hindering his access to Bukhayo/Bugengi/1051, which he, PW1, was alleging to have had bought from an auction. PW4 asserted that Bukhayo/Bugengi/1051 belonged to his father, and the original title to it was being held by the Standard Chartered Bank. He stated that he was not privy to the sale of the land to PW1 and a Dr. Wanga. He confirmed that there were succession proceedings to the estate of his father.
4. PW5, Fridah Wandera, was another member of the Wandera family, a surviving spouse of the deceased. she said she had heard that Bukhayo/Bugengi/1051 had been sold to PW1. She said that the title to that property was with the Standard Chartered Bank, hereafter referred to as the Bank, as a security for a loan taken by her late husband. She thought it was with the Bank, only to learn that it was with PW1. PW6, Shemu Balongo, was the Advocate who handled the sale transaction between PW1, the appellant and others. The 2 women had said that they had land, Bukhayo/Bugengi/1051, to sell to PW1. The purchase price was agreed at Kshs. 4,500,000.00, part of which was paid at the date when the sale agreement, which he had drafted, was signed, and the balance was paid later through his office. The land was later conveyed to the name of PW1, who later complained that there were individuals who were in occupation, who were saying that they had not sold the land to anyone. PW7, Caroline Achieng Oduor, was either a spouse or girlfriend of PW1. She got a loan to raise part of the purchase money for Bukhayo/Bugengi/1051. She got the money from Family Bank, and when she had difficulty servicing the loan, the bank disposed of the land, to a professor. She stated that she and the said professor had difficulty accessing the land, as there were persons in occupation, who claimed to be the owners.
5. PW8, No. 76743 Police Sergeant Koech, was the investigating officer. He received a complaint from PW1, about persons who were in occupation of his property, Bukhayo/Bugengi/1051, and who were making life difficult for him as an owner. He went to the ground, and met those people, the Wanderas, who told him that that was their land, which they had not sold. He did searches at the lands registry, obtained a sale agreement from PW6, and evidence of payment of the purchase price by PW1 to PW6 and the appellant and another. The records from the lands registry indicated that the land had been sold by public auction, to the appellant and another, by the Standard Chartered Bank. He obtained documents from the Standard Chartered Bank, which indicated that title to the land was held by the Bank as security for a loan, and that it belonged to a Tom Buxton Wandera. He said that the Standard Chartered Bank informed him that they had not sold the land, but he conceded that he did not have a document which said so. He further conceded that he had no witness from the Standard Chartered Bank, and that he had not recorded a witness statement from anyone in that Bank. He said that he had also not recorded a statement from the land registrar. He said that he saw documents from the land control board, Nambale, which the board had not renounced.



6. The appellant was put on her defence, vide a ruling that was delivered on 15<sup>th</sup> June 2022. She made a sworn statement, on 5<sup>th</sup> April 2023. She denied the charges. She denied any knowledge of the money allegedly paid to her, about the title deed allegedly issued in her name, and about the deceased. She said that she never worked at the lands office, never presented herself at the land control board and the money in question never passed through her account.
7. The defence called a land registrar, Nicholas Obiero, as DW3. He testified that Bukhayo/Bugengi/1051 was registered in the names of the appellant and another on 23<sup>rd</sup> January 2014, and that there was a land control board consent to support the land transfer application. He stated that the title had been surrendered by the Bank. He stated that the land registrar does not go beyond the documents presented.
8. In its judgment, delivered on 30<sup>th</sup> August 2023, the trial court found the appellant guilty, on the counts on fraudulent procurement of a title deed and obtaining money by false pretences, as all the elements for the 2 offences had been positively proved. She was sentenced, on 30<sup>th</sup> August 2023, on the first count, to pay a fine of Kshs. 500,000.00 or serve 3 years imprisonment, and on the second count to a fine of Kshs. 300,000.00 or in default to serve imprisonment for 2 years.
9. The appellant was aggrieved, and brought the instant appeal, revolving around the trial court not properly analysing the evidence to ascertain the authenticity of the sale agreement relating to Bukhayo/Bugengi/1051; not analysing the evidence to ascertain who had made the application for the transfer of the property; failing to find that the offence of fraudulent procurement of the title deed was not distinctly alleged and distinctly proved, and it was not allowable to leave fraud to be inferred from the facts; failing to find that the offence of fraudulent procurement of the land title deed was not proved against the appellant; failing to find that the complainant was not candid and truthful; misunderstanding and misapplying section 313 of the Penal Code, and failing to consider the evidence and submissions of the defence; the findings of the trial court being against the weight of the available evidence; failing to appreciate that the issues raised at the trial were issues that could not be entertained in criminal proceedings; and the sentence being harsh and excessive.
10. Directions were given on 15<sup>th</sup> February 2024, for canvassing of the appeal by way of written submissions. Only the respondent filed written submissions, dated 13<sup>th</sup> May 2024. The issues identified for determination are 8: whether the authenticity of the land sale agreement was considered, whether the person who presented the transfer application at the lands registry was identified, whether the offence of the fraudulent procurement of the land was proved, whether the complainant was a truthful and candid witness, whether the offence of obtaining by false pretences was established, whether the findings of the court were against the weight of the evidence, whether the issues raised were not capable of being tried in criminal proceedings, and whether the sentence was harsh and excessive.
11. On the first issue, on the authenticity of the sale agreement, it is submitted that when the same was presented, it was not objected to, and it was produced by its maker. On the court not considering who had placed the application for transfer, it is submitted that the property was proved to have been transferred to the name of the appellant, and the burden was upon her to explain how it came to be so transferred. On the matter of the fraudulent procurement of the suit land, it is submitted that PW1 paid the purchase price money to the appellant, but the title document was never transferred to him, and that the appellant was closely connected to the other accused person, who was a land registrar. On whether the complainant was candid and truthful, it is submitted that the trial court had the opportunity to observe the demeanour of the witnesses who appeared before it, and could pass judgment based on that, and whether there were inconsistencies, the same did not render the



prosecution inadequate. Richard Munene vs. Republic [2018] eKLR (Ouko, P, Sichale & Kantai, JJA), is cited.

12. On obtaining by false pretences, it is submitted that the appellant was positively identified as holding herself out as the owner of the subject property, and as offering it for sale, and was in fact paid for it. Francis Mwangi & another vs. Republic [2015] eKLR (Ngenye-Macharia, J), is cited, on the elements of that offence. On the issues raised not being capable of handling in criminal proceedings, it is submitted that the issues were about conduct that was criminal in nature. On the verdict being against the weight of the evidence, the appellate court is urged to re-evaluate the evidence and arrive at its own conclusions, in line with Mark Oiruri Mose vs. Republic [2013] eKLR (Onyango Otieno, Azangalala & Kantai JJA). It is further submitted that the trial court considered the defence, and found that it did not displace the prosecution case. On the sentence being harsh and excessive, it is submitted that the penalty for a fraudulent procurement of registration is a maximum of a fine of Kshs. 5,000,000.00, or 5 years in jail; and obtaining by false pretences, the penalty is a fine of up to Kshs. 300,000.00, or imprisonment for up to 2 years in jail. It is submitted that sentencing discretion was properly used, and Wanjema vs. Republic [1971] EA (Trevelyan, J) is cited.
13. Of the 4 counts charged, the appellant was convicted of 2, relating to fraudulent procurement of a land title deed, and obtaining money by false pretences. The principal consideration herein should be whether the material on record was sufficient to sustain a conviction on the 2. The 2 counts are related, in the sense that the fraudulent registration facilitated the obtaining by false pretences. So that if there was no fraudulent registration, then there could not possibly be any obtaining falsely.
14. Let me start by considering whether there was evidence to support the conviction of the appellant on the fraudulent registration or procurement of a title deed. The charge was premised on section 103(1)(c)(i) of the *Land Registration Act*, Cap 300, Laws of Kenya, which states as follows:

“103. Offences

  - (1) A person who—
    - (a) ...
    - (b) ...
    - (c) fraudulently procures—
      - (i) the registration or issue of any title or certificate of title or certificate of lease, or any other document or instrument relating to the land;
      - (ii) ...
      - (iii) ...
      - (iv) ...
    - (d) ...”- 15. So, the issue here would be whether the appellant procured the registration of a title deed or similar instrument, and whether that procurement was fraudulent.
- 16. Was there a procurement of a title deed on 21<sup>st</sup> January 2014, by the appellant? I see from the record a certificate of official search, dated 2<sup>nd</sup> December 2014, with respect to Bukhayo/Bugengi/1051. It indicates that on 23<sup>rd</sup> January 2014, the appellant herein and another were registered as proprietors of that parcel of land, and on 24<sup>th</sup> January 2014 a title deed was issued. I also see a certificate of official



- search, dated 21<sup>st</sup> January 2014, which reflects Tom Buxton Wandera as proprietor of the property, with encumbrances noted, being a charge, in favour of the Standard Chartered Bank.
17. The registration, of 23<sup>rd</sup> January 2014, was supported by paperwork or documentation that was placed on record. There was an application for consent of the land control board, referenced LCR No. 1157/013, bearing the signature of the owner/lessor/mortgagor/chargor/authorised agent, and bearing the stamp of the Standard Chartered Bank. It sought transfer from Tom Buxton Wandera to the appellant and another. On the face of that document, approval was given on 18<sup>th</sup> December 2013, and there is a signature against that endorsement. There was a letter of consent, dated 18<sup>th</sup> December 2013, from the Municipality Land Control Board, Busia, Kenya, addressed to the Standard Chartered Bank Limited, signed by the Chairman of the Land Control Board, consenting to the transfer of Bukhayo/Bugengi/1051, from the Standard Chartered Bank Limited to the appellant and the other. There was a transfer by chargee in exercise of power of sale document, dated 10<sup>th</sup> January 2014. The document was at the instance of the Standard Chartered Bank, and the transfer was executed by a bank attorney, known as Gichuki Kirui, of Nairobi, on behalf of the Bank, in the presence of the appellant and the other. At the bottom of the transfer document, there is indication that the transfer was registered on 23<sup>rd</sup> January 2014, according to the land registrar, GO Ondigo, who signed the document in that capacity. The said land registrar was the co-accused of the appellant at the trial court. The title deed was then issued the following day, 24<sup>th</sup> January 2014.
  18. From the material above, my understanding is that the transfer of the property was at the instance of the Standard Chartered Bank as chargor, in exercise of the statutory power of sale. It was the Bank which applied for the consent of the land control board, to have the transfer effected to the appellant and the other individual. It was for that reason that the letter of consent, from the land control board, serial number 663199, dated 18<sup>th</sup> December 2013, was addressed to the Standard Chartered Bank, consenting to the transfer of the land from the Bank to the appellant and the other. Thereafter, the Bank generated a transfer document, dated 10<sup>th</sup> January 2014, which was signed by its attorney, transferring the property to the appellant and the other. The transfer was effected on 23<sup>rd</sup> January 2014, by the land registrar, paving way for the issuance of a title deed on 24<sup>th</sup> January 2014. The process was driven by the Standard Chartered Bank, going by the documents placed on record. Of course, the Bank would have had no interest in the title deed, subsequent to that transfer, and the issuance of the title deed on 24<sup>th</sup> January 2014, probably had nothing to do with the Bank, and must have been an exercise done by the new proprietors, the appellant herein and her co-proprietor. So, my understanding is the transfer and registration of the land, in the names of the appellant and her co-proprietor, was procured by the Standard Chartered Bank, according to the documents, and upon that registration, the appellant and her co-proprietor procured the issuance of the title deed to themselves.
  19. It should be of note, that the procurement of the title deed did not happen on 21<sup>st</sup> January 2014, as alleged in the charge, but on 24<sup>th</sup> January 2014. As at 21<sup>st</sup> January 2014, the property was still registered in the name of Tom Buxton Wandera, and no title deed could be procured in favour of anybody else. The procurement of a title deed by the appellant and her colleague only happened on 24<sup>th</sup> January 2014, after the property was transferred from Tom Buxton Wandera, at the instance of the chargor, the Standard Chartered Bank, to and was registered in their favour, on 23<sup>rd</sup> January 2014. I have not seen any evidence, on the record, that any title deed was issued to the appellant and her colleague on 21<sup>st</sup> January 2014, as alleged in the charge, and, in view of that I am not persuaded that a case had been made out against the appellant. I have not come across any order, by the trial court, permitting the prosecution to amend the charge sheet, to reflect that the procurement and issuance of the title deed happened on 24<sup>th</sup> January 2014. In any event, a copy of the title deed that the appellant allegedly procured, on 21<sup>st</sup> January 2014, was not produced in court, neither is there any record, from the



lands registry, indicating that the records had been altered, on or before 21<sup>st</sup> January 2014, to facilitate issuance of a title deed on 21<sup>st</sup> January 2014.

20. Was the procurement of the title deed fraudulent? Fraudulence is about deceit and dishonesty, according to the Concise Oxford English Dictionary, Oxford University Press, 2011. A fraudulent act is conduct involving bad faith, dishonesty, lack of integrity or moral turpitude, according to Black's Law Dictionary, 10<sup>th</sup> edition, 2014. So, the question is whether the appellant and her co-proprietor, in getting the title deed issued to them on 24<sup>th</sup> January 2014, acted deceitfully, dishonestly, or in bad faith. Superficially, going by the documents placed on the record, there could not have been any fraud, for on 24<sup>th</sup> January 2014, the appellant and her co-proprietor were registered proprietors of the property in question, having been so registered on 23<sup>rd</sup> January 2014, on the basis of a transfer lodged at the lands registry by the Standard Chartered Bank. On the basis of that, it could not be, that their asking to be issued with the title deed was fraudulent, or even that the document issued was a fake or false.
21. The case by the prosecution, which pointed to fraud, was that the said property had been offered by its original owner/proprietor, Tom Buxton Wandera, as security for a loan advanced to him by the Standard Chartered Bank, and that the Standard Chartered Bank had not foreclosed on it, ostensibly upon default, and that it still held the original title. If that narrative were to be true, then there would have been a problem with the registration of the appellant and her co-proprietor as owners of that property, the said registration, of 23<sup>rd</sup> January 2014, would have been fraudulent, and the issuance of the title deed thereafter would equally have been fraudulent.
22. The question begging answering after that then is whether there is evidence to support the narrative by the prosecution, that the original title was being held by the standard Chartered Bank, the Bank had not foreclosed on the property, and it had not disposed of it by auction. The material, that I have analysed above, was allegedly generated by the Standard Chartered Bank, being the application to the land control board and the transfer document, which facilitated the registration of the appellant and her colleague, as proprietors of the subject land, opening the way for the issuance of the title deed. The process of impeachment of their registration, and the issuance of the title deed to them, could not possibly be undertaken without involvement of the Standard Chartered Bank. The Standard Chartered Bank, much more than the land registry, where the registration and the issuance of the title deed happened, was the one most important player in this dispute, and it was only the word of the Standard Chartered Bank which could have resolved the issue, as to whether the registration process was fraudulent or not. Prosecuting the case, without involving the Standard Chartered Bank, was bound to lead to a monumental failure.
23. I find it surprising that the investigating officer, PW8, did not find it necessary to get witnesses from the Standard Chartered Bank, to come forward and shed light on whether the Bank still held the original title deed, or whether it had foreclosed the property, sold it in exercise of its statutory power of sale, and transferred it to the appellant and her colleague. He and PW3, the son of Tom Buxton Wandera, appeared to appreciate the centrality of the Standard Chartered Bank in the whole episode. Unfortunately, PW8 failed to do the needful, to bring the Bank into the matter, by making its relevant officers witnesses. PW8 said, during cross-examination, that he had no witness from the Bank, and he had not taken statements from any of its officers. He said that he obtained certain documents, dating to the 1980s, when the Bank dealt with the initial proprietor, Tom Buxton Wandera. Documents do not speak for themselves. They are bespoken, by witnesses, and in that context, the best witness would not be the detective investigator, but the makers or custodians of the documents, in, this case the Bank through its officials. It was not enough to say that the Bank's officials spoke to them, PW3 and PW8, telling them that the Bank did not sell the property, and it had the original title deed. Such evidence was mere hearsay, which the court ought not have relied upon. PW8 should have procured the Bank's



officials to come as witnesses, to state, in court, with their own mouths, what they had told PW3 and PW8, and to present, bespeak and produce the relevant documentation to support their narrative.

24. It ought to be pointed out that in criminal proceedings, documents from a crucial source, such as the Bank in this case, have to be presented at the trial by the makers, to bespeak them. The standard of proof in criminal cases is beyond reasonable doubt. That would require that documents ought not be placed on record by investigating officers, without affording the accused person a chance to cross-examine the maker or source of the documents. It has, increasingly, become a common practice in civil proceedings, to have such documents placed on record, by consent of the parties, and thereafter be subjected to scrutiny by way of written submissions. That practice has no basis whatsoever in the criminal process. So, it was not enough for PW8 to obtain documents from the Bank, and to produce them in court, without calling their makers. He was not party to their making, and he could not testify authoritatively on the context within which they were made, and could not vouch for their authenticity. I am alive to the fact that the said documents were placed on record, and were produced as exhibits, without opposition from the Advocate for the defence. Questions were, however, put to PW8, on them, and he was quite confident that having gotten the documents, and the narrative about them, from their makers and custodians, he could produce them without calling the makers. That is not what the law envisages. The mere production of those documents, without calling the makers, did not answer the questions as to their context. The said documents could not speak for themselves, and the trial court was not justified to rely on them, without the benefit of the cross-examination of their makers. The bundle of fair trial rights, in Article 50 of *the Constitution*, militate against that.
25. As it is, the failure to call the makers of those documents left a huge gap in the prosecution case, being the role of the Standard Chartered Bank in the whole affair. The lands office had documents purportedly executed by the Bank, and presented on behalf of the Bank to them, for the purpose of transfer and registration of the property to the names of the appellant and her colleague. The lands office acted on those documents, to effect that transfer and registration, and the subsequent issuance of the title deed. Yet, the prosecution did not seek to impeach those documents, yet it was these documents that facilitated the registration of the appellant and her colleague as proprietors of the property, and the subsequent issuance of the title deed to them. The authenticity of the said registration, and of the title deed issued thereafter, rested on those documents, allegedly presented by the Standard Chartered Bank. If any fraud was involved, it could only be exposed through their impeachment. The only party that could impeach those documents was the Standard Chartered Bank, by way of denying that the documents came from them, or were issued by them, by denying their role in the application for the land control board consent, and in the application for transfer of the land to the appellant and her colleague, and by denouncing Gichuki Kirui as their Bank attorney. Without the said documents being renounced or denounced, by the Bank, which allegedly originated them, the registration process, of the appellant and her colleague, would remain valid and authentic, and the subsequent issuance of the title deed to them would be deemed to be above board. If the Bank had been drawn into the matter, by way of its officers being availed as witnesses, to confirm whether it had foreclosed on the property, then the issue of the authenticity of what allegedly happened, on 23<sup>rd</sup> and 24<sup>th</sup> January 2014, at the lands registry, would have been resolved. Without that resolution, there was a gap in the puzzle, which ought to have created a doubt, as to the lack of authenticity of the impugned title deed, which the trial court should have resolved in favour of the appellant.
26. The argument, implicit from the case presented by the prosecution, was that the documents that were used to register the appellant and her colleague as proprietors of the subject property, were not genuine. PW8 did not voice it, but the impression, that he seemed to want to create, was that the said documents did not emanate from the Standard Chartered Bank, who allegedly had custody of the original registration documents for the property, as registered in the name of the previous owner,



Tom Buxton Wandera. It would appear that it was assumed that the appellant would have had to lead evidence to demonstrate that she was registered as proprietor through a genuine legal process. However, that was not how it works. It was the prosecution alleging that the registration was not proper, and that the title, generated from that registration, was not genuine, and it fell upon it to prove that to the required standard. The evidential burden would have shifted to the appellant to explain herself, only after the prosecution had established that that process was fraudulent or improper or irregular. The prosecution could only demonstrate that by calling witnesses from the Standard Chartered Bank, to affirm to the court that the Bank had nothing to do with the alleged registration, which would then have left the title issued in favour of the appellant hanging in the air. Left hanging in the air that way would have required the appellant to justify how she obtained that title. The prosecution did not lead evidence to demonstrate that the said registration was not genuine. I would repeat, that evidence could only come from witnesses from the Standard Chartered Bank and from the lands registry. PW8 elected not to call witnesses from those 2 entities, and with that he sank the prosecution case.

27. The other weakness in the prosecution case was the failure to have the lands registry on its side, by way of calling officers from the lands registry as witnesses, to bespeak the land registration documents that PW8 produced. Title deeds are issued by the lands registry. They are procured from that registry. Registered proprietors do not issue title deeds to themselves. One cannot begin to talk about issuance of a title deed being fraudulent, without involving the lands registry, which is the custodians of land registration documents, and the entity responsible for issuance of title deeds. It is the lands registry that ought to denounce or renounce a registration process, or the issuance of a title deed. It is that lands registry that declares that a certain title deed did not emanate from the said registry, or, if it did emanate from the said registry, that it was not procured properly. It would be foolhardy, to try to impeach a registration of land, or a title deed issued, by a land registry, without calling any witness from that registry, to bespeak the process, and address the issue of the validity of the process leading up to the issuance of the title document. I am surprised that PW8 did not consider the land registrar as an important witness, for the purpose of proving that the title deed issued to the appellant was not proper. He said that he had recorded no witness statement from an officer at the lands registry, and did not intend to call anybody from the lands registry as a witness. That omission was fatal. The authenticity of a title deed cannot possibly be determined without calling witnesses from the entity which issues them. It is a pity that the land registrar had to be called by the defence, where he testified as DW3. From his records, the property in question was properly transferred to and registered in the names of the appellant and the other, and the issuance of the title deed to them followed as a matter of course. It could be that PW8 or the prosecution might have had misgivings about the lands registry, and the value it could have brought to their case, given that the co-accused of the appellant was, himself, an officer in the lands registry, a land registrar no less. However, such misgivings could not take away from the fact that the lands registry remained a Government or State entity responsible for registration of lands and issuance of title deeds, and the ultimate custodian of all records and documents relating to land in Kenya. That entity could not be ignored, in a process where its records were in issue. It could not be treated as if it did not exist; or that its records did not matter, or were not of consequence.
28. To compound the problem, the prosecution witnesses talked about the said property as belonging to a dead person, Tom Buxton Wandera, who allegedly died in 2005, but did nothing to demonstrate that fact. The fact of the death of the owner would have been a potent point in bringing out the fact that any handling of his property, outside of the succession process, including by the chargee Bank, would have amounted to intermeddling with the estate, which would have rendered unlawful the activities that allegedly happened in 2013 and 2014 relating to it. However, the prosecution witnesses only talked about the death and the succession process, but no documents were presented and produced,



to evidence the death, and the pendency of probate and administration proceedings relating to the estate. No wonder the count on intermeddling was dismissed, for lack of evidence. Evidence that the property belonged to a dead person, and that, as at the date of his death, the Bank had not foreclosed it, would have gone some way, to demonstrate that the registration of the appellant in 2014, as proprietor of the said property, and the issuance to her of a title deed, were either fraudulent, or, at the very least, improper, to the extent demonstrated, of the handling of the property of a dead person without authority.

29. The Supreme Court, in *Dina Management Limited vs. County Government of Mombasa & 5 others* Nairobi SC Pet No. 8 (E010) 2021 (Mwilu DCJ&VP, Wanjala, Njoki, Lenaola & Ouko, SCJJ) (unreported), stated that “... the title or lease is an end product of a process. If the process followed prior to the issuance of the title did not comply with the law, then such a title cannot be held as indefeasible.” Based on that, the prosecution was obliged to demonstrate that the registration process, which happened on 23<sup>rd</sup> January 2014, to pave way for the issuance of the title on 24<sup>th</sup> January 2014, did not comply with the law. The prosecution could only do so by having witnesses testify from those alleged to have been involved in that process, that is to say the entity which allegedly procured the process, the Standard Chartered Bank, and the State office responsible for the registration process, the lands registry. No evidence was led, by way of calling witnesses from the Standard Chartered Bank and the lands office, to impugn the said registration process, and, therefore, there can be no basis to say that the title issued thereafter was not valid or genuine.
30. Based on everything that I have said and discussed above, it is my view that the prosecution did not make out, beyond reasonable doubt, a case that the appellant fraudulently procured the title deed in question, and she should not have been convicted on that first count. I am not, by any or all means, declaring on the authenticity of the title deed issued to the appellant and her colleague. Far from it. I am merely declaring that the evidence, adduced or led by the prosecution, did not demonstrate, beyond reasonable doubt, that the said title deed was procured through a fraudulent process. Fraud could only have been proved by involving the Standard Chartered Bank and the lands registry in the prosecution process.
31. In its written submissions, the respondent argues that the duty was on the appellant to prove that the title deed was properly issued to her, once the prosecution proved that she was registered as proprietor on 23<sup>rd</sup> January 2014. With respect, I disagree. The burden of proof is always on the prosecution. It remained on the prosecution throughout, to establish, beyond reasonable doubt, that the appellant obtained her title deed fraudulently. A title deed does not hang in the air. It is not just issued at will. Its issuance is founded on the fact of registration, for it merely evidences that registration. That means that it was the duty of the prosecution to establish that the appellant was not properly registered on 23<sup>rd</sup> January 2014, for her to be issued with a title deed on 24<sup>th</sup> January 2014. Her registration as proprietor, according to the material on record, was allegedly preceded by presentation of certain documents at the lands registry by the Standard Chartered Bank. The duty was on the prosecution to demonstrate that that exercise, which allegedly involved the Standard Chartered Bank, was not authentic. The prosecution merely alleged that it was not authentic, but it did not prove it. It could only prove or establish it by calling officers from the Standard Chartered Bank and the lands registry, as discussed above. It did not do so. The evidential burden, to denounce the authenticity of that registration process, lay with the prosecution, and it was not discharged, to warrant the defence leading evidence to demonstrate that it was authentic. Indeed, the prosecution did not establish a prima facie case on the first count, for the appellant had no case to answer on it, and the appellant should not have been put on her defence on it. She was put on her defence, nevertheless, and she called the lands registrar, DW3, who testified that that process was authentic, for he acted on the documents that he ought to have acted upon, in the circumstances, for he was not bound to go beyond those documents.



It was the investigator, PW8, who ought to have gone beyond the documents presented to the lands registry, by bringing the Bank into the trial. Unfortunately, as seen above, he did not do what he should have done. The appellant had no duty to explain herself, as the prosecution had not presented a case that would have required her to do so. It was not the duty of the appellant to fill up the gaps left by the prosecution, of failing to properly adduce evidence from the Bank and the lands registry, on the process that preceded her issuance with the impugned title deed.

32. On the second count, of obtaining money by false pretences, I would repeat what I have stated above, that the conviction on the second count would stand or fall depending on the finding of the court on the earlier count, on whether the title deed issued to the appellant was so issued fraudulently. For if it was not obtained through a fraudulent process, then any subsequent sale of the subject land would not be unlawful. The prosecution needed to impeach the registration of the land, in favour of the appellant, and the issuance of the title deed, first, to get a basis or foundation for the second count, of obtaining money by false pretences. To the extent, that there was inadequate evidence of fraud, in the manner the title deed was obtained, there would be no foundation for concluding that, by selling the property, the appellant falsely pretended that the property belonged to her when in fact it did not. There could be no false pretence, when the property was in fact registered in her name, and when that registration had not been impeached. On the second count, for those reasons, the trial court ought not have convicted, indeed, it ought not to have put the appellant on her defence.
33. All that I have discussed above are matters that the trial court should have considered. If it had taken them into account, it would not have concluded that a prima facie case had been established against the appellant on the 2 counts, for which she was subsequently convicted, and it would not have gone on to convict her of the offences charged in them.
34. The petition of appeal herein was filed by Anyoka & Company, Advocates, on behalf of the appellant. I find it intriguing that the said law firm literally abandoned the cause, after prosecuting the application, dated 4<sup>th</sup> September 2023, which I granted on 27<sup>th</sup> October 2023, on terms. Thereafter, the firm did not attend court, in the appearances that followed, and did not even file any submissions in support of the appeal. I find this to be a form of dereliction of duty by an Advocate. Once a law firm places itself on record, as appearing for a party, it incurs a duty to prosecute the matter to the end. An Advocate should not just drop out of a matter, for whatever reason, by just not attending court or filing the subsequent process, without formally obtaining leave to cease acting. Conversely, if the appellant had abandoned the appeal, then the same ought to have been formally withdrawn. It would be in bad taste, to file court process, and then just abandon it, with no indication, to the court, of what the party intends about it. The cause belongs to the party, and not the court. It is the duty of the party filing it to progress it. I would have dismissed the appeal herein, for want of prosecution or abandonment, had the respondent not filed written submissions on it.
35. Be that as it may, I find that the appeal herein, does have merit. I allow it. The consequence is that the order by the trial court, of 9<sup>th</sup> October 2023, in Busia CMCCRC No. 1792 of 2020, convicting the appellant herein, is hereby quashed, and the sentence imposed, upon her, is hereby set aside. Any amount paid by the appellant as a fine or fines, shall be refunded to her, or, if she is serving time in default, she shall be set free forthwith. It is so ordered.

**JUDGMENT IS DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, THIS 28<sup>TH</sup> DAY OF JUNE 2024**

**W MUSYOKA**

**JUDGE**



Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Anyoka, instructed by Anyoka & Company, Advocates for the appellant.

Ms. Chepkonga, instructed by the Director of Public Prosecutions, for the respondent.

