



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & G.B.M. KARIUKI, J.J.A)

CIVIL APPEAL NO.246 OF 2013

BETWEEN

ARTHI HIGHWAY DEVELOPERS LIMITED.....APPELLANT

AND

WEST END BUTCHERY LIMITED.....1STRESPONDENT

SOLOMON MWINZI MWAU.....2NDRESPONDENT

JOHN MUCHENI MUSA.....3RDRESPONDENT

THE ATTORNEY GENERAL.....4THRESPONDENT

KENYA MEDICAL ASSOCIATION

COOPERATIVE SOCIETY LTD.....5TH RESPONDENT

YAMIN CONSTRUCTION CO. LTD.....6THRESPONDENT

GACHONI ENTERPRISES.....7THRESPONDENT

(An appeal against the entire judgment and decree of the High Court of Kenya at Nairobi (Nyamweya, J.) dated 20thDecember, 2012

in

H.C.ELC. No. 167 OF 2007)

JUDGMENT OF THE COURT

Introduction.

1. This judgment was due for delivery on 26th September, 2014 but for several reasons, it was not possible to do so. First was the pressure and priority given to Election Petition judgments which had Constitutional deadlines. The attention of the parties was drawn to this possibility for delay. Second, in the month of November, 2014, the presiding Judge, with the authority of the Hon. The Chief Justice proceeded on annual leave and engaged in official duties as President of the Residual Special Court for Sierra Leone, which took him outside the country throughout the month. Barely two days after his return to Kenya on 30thNovember, 2014, his father who had been hospitalised for cancer treatment passed on and he was allowed to concentrate on funeral arrangements until the end of term. The Judgment was prepared during the Christmas vacation and is delivered at the first opportunity in the new year.

2. The dispute before the High court was fairly protracted and has six volumes of documents running into more than 2,300 pages and several other volumes of authorities. The judgment was also fairly extensive at 185 pages. The memorandum of appeal before us puts forward some 34 grounds which include complaints on the assessment of factual evidence, which we shall examine. In our view, however, the appeal raises three central issues of law, the determination of which will dispose of the appeal. We shall revisit these grounds later in this judgment.

3. Pending the hearing and determination of the appeal, the parties recorded a consent restraining any of them or any other person from dealing in any way with all that parcel of land known as L.R No 7149/10 (the disputed land) or any subdivisions thereof. The Directorship and shareholding of **West End Butchery Ltd** also reverted to the original Directors and shareholders, and all other orders made by the High court were stayed.

The parties.

4. The appellant, **Arthi Highway Developers Ltd** (hereinafter “*Arthi*”) was registered on 1st November, 2005 for the purpose of purchasing and developing the disputed land. It is represented before us by learned counsel, Paul Mwangi and Thuita Guandaru, instructed by M/s Murage and Mwangi, Advocates. The first respondent, **West End Butchery Ltd** (West End), was the plaintiff before the trial court. It was registered in 1957 and has since carried on Butchery business in Westlands, Nairobi. It is represented before us by learned counsel, Mr. Newton Mwangi instructed by M.A Khan, Advocate. The 2nd and 3rd Respondents, **Solomon Mwinzi Mwau** (Mwau) and **John Mucheni Musa** (Musa) respectively, are not represented and never took part in the trial before the High Court. They did not file any appearances or defences despite service of process and the judgment lawfully entered against them has since not been challenged. The Attorney General represents the offices of the **Registrar General** (which includes the office of the Registrar of Companies) and the **Commissioner of Lands** (which includes the Chief land registrar) as the 4th respondent, and appeared before us through learned counsel Mr. Bitta. The 5th Respondent, **Kenya Medical Association Housing Co-operative Society Ltd**, (KMAH) is a co-operative society of medical doctors who purchased a portion of the disputed land and was represented before us, as it was before the trial court, by learned counsel Mr. Chacha Odera, instructed by Oraro & Company Advocates. The 6th respondent, **Yamin Construction Company Ltd** (Yamin), and the 7th respondent, **Gachoni Enterprises** were also purchasers of portions of the disputed land. Yamin was represented before us by learned counsel Mr. James Githinji, but there was no appearance or representation of the 7th respondent despite service of the hearing notice on them.

All learned counsel made oral submissions before us.

The dispute.

5. The salient facts as distilled by the trial court from the pleadings, oral evidence and submissions of counsel are not vastly contentious and may be briefly stated. At the centre of the dispute is a parcel of land situate in Mavoko Municipality in Athi River measuring approximately 100 acres, originally known as L.R No.7149/10 (the disputed land). West End bought the disputed land from one **James Alexander Sundsin** in November 1972 and the Transfer was registered as I.R 3456/47. Subsequently a Certificate of Title was issued by the Registrar of Titles in December 1976 as I.R No.30601 confirming that West End was the lessee of the disputed land for a term of 99 years from 1st August, 1930. The original Title has since been held by West End and was kept in safe custody by their Bankers until they produced it as evidence in court. West End also took possession of the disputed land and carried out some works, like digging a borehole, farming until 2001 before abandoning it due to unprofitability, and constructing a house which was later vandalized. They also kept a watchman and successfully fought off some court claims made by various individuals claiming ownership of the disputed land through adverse possession.

6. West End was a private limited liability company whose shareholding and Directorship changed in 1962 when **Mrs. Aziz Bibi** and her son, **Mohamed Asif** (Asif) bought out the original shareholders and made it a family business. Mrs. Aziz Bibi died in 1969 and two other sons, **Mohamed Juma Allah Rakha** (Rakha) and **Mohamed Abdul Rauf** (Rauf) acquired shares. They became the three shareholders/Directors of West End and that shareholding has always been reflected in Annual returns regularly filed by the company with the Registrar General in accordance with the **Companies Act** 2007. Rauf was the company Secretary.

7. In February 2007, West End was informed by their watchman at the disputed land that some documents had been delivered there by persons claiming to be the owners of the disputed land. On examining the documents and carrying out further enquiries, they found that on 19th February, 2004, a set of three documents:- Form 203A of the Companies Act which was executed almost three years earlier on 10th October, 2000; three share transfer forms executed on 10th October, 2000; and an Annual Return form executed on 31st October, 2000, were presented to the Registrar of Companies, and were registered to effect change in the shareholding and Directorship of West End. By those changes, Asif purportedly transferred his 1085 shares to Musa; Rakha transferred his 9455 shares to Musa; Rauf transferred his 1085 shares to Mwau; and Mrs. Aziz Bibi (who had died in 1969) transferred 3875 shares to Mwau. The Forms were signed by one **Lucy Nagaki Mburu** purporting to be the Company Secretary and Musa and Mwau signed as officers of the company. The three persons were not known to the Directors of West End and no authority had been given to them to transact any business on behalf of the company or any of its shareholders/Directors. In sum, all those documents were forgeries and the transaction of share transfers was fraudulent. West End was unable to verify the records on account of information from the Company Registry that the relevant file was missing.

8. The fraud went further. On 17th November, 2005, Musa and Mwau, purporting to be Directors of West End, signed an agreement with Arthi for the sale of the disputed land for the sum of Ksh.35 million. All documents and clearances necessary to effect the transfer were obtained but on presentation to the lands office for registration on 15th March, 2006, it transpired that the Deed file containing the original documents was missing. Musa and Mwau were asked to provide a Deed of Indemnity to facilitate registration. They did so on 24th April, 2006 and the Chief Land Registrar approved it. The transfer was eventually registered on 8th December 2006. Arthi took possession thereafter and subdivided the land into ten portions for sale and did in fact sell three subdivisions to KMAH in 2009, one to Yamin in 2010, as well as attempted sales to Gachoni Enterprises and the Nairobi City Council for use as a Cemetery. The rest of the land remained unsold.

9. These sales were taking place after West End had filed suit on 19th February, 2007 against Arthi, Musa, Mwau, the Registrar General and the Commissioner of Lands alleging fraud and illegality in the transfer of shares and the land, and sought injunctions and declarations for reversal of the entries made in respect thereof. Before filing the suit West End had written letters to the Registrar General, filed affidavits with the Commissioner of lands for placing a restriction on the Title, and reported to the Criminal Investigation Department (CID) for investigations. They also published general *caveat emptor* notices in newspaper dailies and obtained a temporary injunction and an order for maintenance of the status quo from the court. But that did not stop the subsequent sales and therefore the plaint was amended and Re-amended in April, 2008 and May, 2011, respectively to enjoin the Attorney General on behalf of the Registrar General and the Commissioner of Lands as well as the three alleged purchasers of the subdivisions of the disputed Land.

10. Arthi, both in its pleadings and oral evidence denied any impropriety in the manner in which it acquired the disputed land. It contended that it carried out due diligence by obtaining an official search from the Company Registry on 27th July, 2004 confirming that Musa and Mwau were the current Directors of West End and there was no reason therefore to suspect any fraud in the sale and transfer of the disputed land. It also carried out a search at the land registry on 29th September, 2005 and confirmed that the registered owner of the disputed land was West End before signing a sale agreement with the company on 17th November, 2005. Arthi was also entitled, as the lawful owner of the land to subdivide and sell it to willing buyers as it did to KMAH, Yamin, and negotiated with others. There was no court order or restriction registered against the Title, and therefore Arthi's actions were open and lawful. In sum, Arthi was *abona fide* purchaser of the disputed land for value without any notice of fraud or other impropriety. If there was, Arthi was not a party to it and was therefore protected under the law.

11. The Attorney General asserted in defence of the Registrar General and the Commissioner of Lands, that the actions they took in all the transactions were procedural, regular, lawful and within their statutory mandate. The alleged fraud and other improprieties were only brought to their attention after the events complained about.

12. For its part, KMAH insisted that it lawfully purchased three subdivisions of the disputed land from Arthi without any notice of any defect in the Title. An offer to sell the subdivisions was extended to it by Arthi on 28th March, 2008 and a sale agreement was executed on 30th January, 2009. Arthi subsequently obtained a change of user from agricultural to residential in June, 2009. After carrying out due diligence and ensuring it had full indemnity from the Directors of Arthi, KMAH paid the purchase price of Kshs.117,570,000/= and subsequently received the new Title deeds before taking possession. It became aware of the dispute in April, 2010 after constructing a perimeter wall and negotiating for funding to support the construction of 154 units for its members. It stopped further construction when a court order was served on 7th April, 2011. It was not a party to any fraud and it counterclaimed against Arthi, if Arthi was found to have been party to any fraud.

13. Although Yamin had signed a sale agreement with Arthi on 2nd August, 2010 to purchase one subdivision for Kshs.66 million, paid the agreed deposit for it, and spent Kshs.90 million constructing a perimeter wall, the transaction was not completed due to a court order issued in March 2011. Yamin was the owner of the piece of land adjacent to the disputed land but pleaded that it was not aware of any disputes over the land or defects in the Title held by Arthi. It was thus an innocent purchaser.

14. As for Gachoni enterprises, the deal went sour after signing of the sale agreement in February, 2010 and payment of Kshs.5.5 million to Arthi. Gachoni discovered that there were caveats and temporary injunctions restraining Arthi from dealing with the land. As Arthi could not pass good Title to the land, Gachoni resiled from the transaction and sued Arthi for refund of its money. It also counterclaimed for general and aggravated damages.

Findings of the trial court.

15. The parties did not agree on the issues for determination but the trial court framed 4 substantive issues arising from the pleadings, the evidence tendered before it, and submissions of counsel as follows:-

“1. Whether there was a fraudulent transfer of the shares and change of directors of the Plaintiff company from Mohammed Asif, Mohamed Juma Alla Rakha, Mohammed Abdul Rauf and Aziz Bibi to the 2nd and 3rd Defendants, and if so, who was privy to the said fraud and the effect thereof.

2. Whether there was a fraudulent transfer by the 2nd and 3rd Defendants of Land Reference Number 7149/10 to the 1st Defendant, and if so, who was privy to the said fraud and the effect thereof.

3. What is the effect of the subsequent sub-divisions of Land Reference Number 7149/10, sale and transfers by the 1st Defendant to the 5th, 6th and 7th Defendants?.

4. Whether the remedies sought are available to the parties herein.

The fifth issue was on costs.

16. On the 1st issue, the trial court had no difficulty in finding that there was fraud in the transfer of shares from the original owners to Musa and Mwau. The evidence of the original shareholders, Asif, Rakha and Rauf, was accepted as truthful that they never transferred any of their shares, had regularly filed annual returns, and West End was still active in business. At all events, Musa and Mwau never denied any of the allegations made in the pleadings or challenged the evidence tendered before the court. The court delivered itself as follows:-

“Coming to the actual fraud alleged, the Plaintiff's Exhibit 6 showed the disputed transfer of shares and notification of change of Directors which were both dated 10th October, 2000. Under Section 75 of the Companies Act (cap 486 of the Laws of Kenya) the shares or other interests of any member in a company shall be movable property transferable in the manner provided by the Articles of the company. Article 12 of the Articles of Association of West End Butchery Limited which were produced as the Plaintiff's exhibit 7, states that the directors may in tier absolute and controlled discretion refuse to register any proposed transfer of shares, except a transfer to an existing member, Section 77 of the Companies Act further provides that notwithstanding, anything in the Articles of a company, it shall not be lawful for the company to register a transfer of shares in or debentures of the company unless a proper instrument of transfer has been delivered to the company.

From the foregoing provisions, two legal requirements were therefore crucial in the valid transfer of shares of West End Butchery Company Limited. The first is the instrument of transfer, which was produced in evidence in the Plaintiff's Exhibit 6 and relied upon by the Defendants. The said instruments all dated 10th October, 2000 showed that Mohamed Asif

transferred 1085 ordinary shares of 20/= to John Micheni Musa, Mohamed Juma transferred 9455 ordinary shares of 20/= to John Micheni Musa and Mohamed Abdul Rauf transferred 1085 ordinary shares of 20/= to Solomon Mwinzi Mwau. The vendors and purchasers signatures on the instruments were alleged to have been witnessed by a firm of Advocates by the name of Kimathi and Micheni Advocates which PW1, PW2 and PW3 denied. They also denied ever selling or signing the said instrument, and the 2nd and 3rd Defendants did not appear to confirm if this was the case. It is therefore my finding that there is evidence of fraud in the preparation and presentation of the said instruments.

The second key legal requirement in the transfer of shares is that the transfer of shares and new members must be registered in the Register maintained by the Company. In this respect the Articles of West End Butchery gave its Directors discretion not to register any proposed transfer of shares except a transfer to an existing member. The original directors have denied ever selling the shares or indeed registering the 2nd and 3rd Defendants as members of the Plaintiff company. In addition, the 2nd and 3rd Defendants were not existing members of the Plaintiff company, and PW1, PW2 and PW3 gave evidence that indeed the intention was to keep the company as a family business.

It is therefore my finding that the alleged transfer of shares did not comply with articles of Association of West End Butchery Ltd and the law, and was also fraudulent. The general effect of not following these legal requirements is to invalidate the said transfer of shares as it was not done lawfully and in accordance with Section 77 of the Companies Act. In addition there is a penalty of imprisonment that is provided for in section 86 of the Act for any person who falsely and deceitfully personates the owners of shares of a company.

The second question I need to address under this issue is whether the notification of change of Directors of West End Butchery Ltd was fraudulent. It follows that if as found, the transfer of shares to the 2nd and 3rd Defendant was fraudulent, then their appointment as directors of the Plaintiff Company could not have been lawful. The law on removal of Directors is also clear under section 185 of the Companies Act, wherein it is provided that a company may by ordinary resolution remove a Director before the expiration of his period of office, notwithstanding anything in its articles or in any agreement between it and the said Director. The section provides in detail the procedures to be followed in making the resolution. The Articles of West End Butchery Ltd on the other hand have no specific provision for the removal or change of Directors, and it therefore follows that what was needed was a resolution to effect such a change. The Plaintiff's witnesses testified to their having been no such resolution by the members of the plaintiff company, and the Defendants did not bring evidence of any such resolution in rebuttal. There is no doubt in my mind that the said change of Directors of the Plaintiff company was illegal and fraudulent. The effect is that the records in the Companies Registry do not reflect the true state of affairs of the plaintiff company, and needs to be rectified.

It therefore does appear that the key players in the fraudulent transfer of shares and change of Directors of the Plaintiff Company were the 2nd and 3rd Defendants.”

(Emphasis is added)

17. As to whether there was complicity by or collusion with the Registrar of Companies, the court was affirmative. It considered and accepted the evidence of missing annual returns filed by the original Directors of West End, missing copies of receipts issued to West End upon filing of the annual returns, and the failure or refusal by the Registrar to produce the registry file as demanded by West End. The court cited several provisions of the Companies Act including Sections 108(1), 112(3), 201(4), 382, 384, and 399, and found that the Registrar has a duty and responsibility to the public to ensure that it is a depository of credible information of companies registered in Kenya. It held as follows:-

“There is no legal basis for the approach adopted by the 4th Defendant (Registrar General) in this case of “see no evil, hear no evil and say no evil” in terms of verification of documents presented to it for public consumption. The very least that the Companies Registry should do is to insist on evidence that the law has been followed when accepting documents presented to it. If the companies Registry does not do

so it risks being an unwitting player and facilitator of company identity theft and fraud, as happened in the case herein. It is therefore my finding that there was laxity on the part of the Companies Registry to this extent, and that either by way of omission or commission it did contribute to the fraud perpetrated by the 2nd and 3rd Defendants.”

(Emphasis added)

18. On the 2nd issue of fraudulent transfer of land, the trial court found no difficulty in pronouncing that the sale and transfer of the disputed land was fraudulent as it directly flowed from the fraudulent transfer of shares by the two fraudsters, Musa and Mwau, who kept away from the dispute thus confirming their nefarious acts. The only issue was: who else was complicit in that fraud.

19. After examining and considering the evidence on record, the trial court exonerated KMAH, Yamin and Gachoni Enterprises who were mere purchasers without notice of the original fraud. It had no doubt, however, that Arthi and the Commissioner of Lands or officers in that office, were part of the fraud. After examining the evidence on record, it reasoned as follows:-

“I will proceed with the substantive question as to which parties were privy to the alleged fraudulent transfer of the suit property by the 2nd and 3rd Defendants. I agree with the submissions made by the 1st, 4th and 5th Defendants and authorities cited that fraud must be strictly proved by the person alleging it. It is the finding of this court that no evidence of fraud was brought against the 5th to 7th Defendants, and in any case they

could not have been privy to the said transfer as they were not parties thereof. On the part of 1stDefendant, its participation in the said fraudulent transfer hinges on the evidence brought as to when it became aware that there was a challenge to the 2nd and 3rd Defendants' title to the suit property and their conduct thereafter. DW1 stated as follows in his evidence in chief in this regard:

"I first heard of the challenge to the 1st defendant's title from officials in the Land Ministry. We volunteered to go and present ourselves to CID headquarters with my co- Directors and met Inspector Kirarie and Inspector Mwangi of the Land Fraud Department. This was at the end of 2006. They told us that the complainant had not come back, and we left our particulars."

My understanding and interpretation of DW1 is that the 1st Defendant became aware of the problem with the title to the suit property after registration of the same in its name. The suit property was registered in the Defendant's name on 15th March, 2006, according to the certificate of search produced by DW1 as the 1st Defendant's Exhibit 13, whereas DW1 States that he became aware of the problem with the title at the end of 2006.

Upon being informed of the challenge to the 2nd and 3rd Defendants title, DW1 stated in cross- examination that he did not think of taking the 2nd and 3rd defendants to the CID as "nobody told him that he had paid Kshs.30,000,000/= to the wrong person". He also admitted that he saw the caveat emptor published in the newspaper with respect to the suit property, however that there was nothing stopping Arthi Highway Developers Ltd from subdividing the property despite the said caveat. According to the court record the defendant entered appearance in this suit on 3rd May, 2007. The title produced in evidence by PW6 shows that the subdivisions to the suit property were undertaken by the 1st Defendant on 23rd May, 2008. This in my view is adequate evidence of complicity by the 1st defendant in the 2nd and 3rd Defendant's fraud, and particularly by proceeding with the subsequent subdivisions and sale of the suit property whether there were orders or not stopping them to do so, while knowing very well that there was a challenge to the 2nd and 3rd Defendant's title. Fraud has everything to do

with one's state of mind and intentions, and not the outcome of actions. It is therefore my finding that while there is no evidence that the 1st Defendant was aware of or participated in the initial fraud by the 2nd and 3rd defendants, it however abetted and perpetuated the said fraud in subsequent dealings with the suit property.

(Emphasis added)

20. As regards complicity by the Commissioner of Lands, the trial court found the officials at the land Registry, who are the custodians and issuers of Titles to have allowed the existence of two different Titles on the same property with all endorsements made thereon, which on its own was participation in the forgery. It observed that the Ministry of Lands kept the master record of all land and the registered owners, under a system which guarantees a land title certificate to be full, valid and indefeasible Title. The Commissioner of Lands failed to explain in this case how two land Title certificates on the same land could exist and which one was genuine. The responsibility to ensure accuracy of the register and authenticity of Titles lay with the Government, which is by law required to pay compensation for any fraud or other errors committed during registration. It was on that basis that the Commissioner of lands was found to have been privy to the forged entries during registration and issuance of the title. This is what the trial court said:

"As regards the 4th Defendants participation in the alleged fraud, there were two titles to the suit property produced in evidence, ostensibly issued to the Directors of West End Butchery Ltd. The Plaintiff produced the original title in evidence as its Exhibit 4, the 1st defendant a copy of the title allegedly given to them by the 2nd and 3rd Defendants as is Exhibit 4b. Both titles showed that they were registered on 24th December, 1976 at 11.40 a.m. and were in all material respects similar save for the differences noted by PW6 of the serial numbers indicated as footers, and the noting of the daybook number in the Plaintiff's original copy. PW6 did admit that the presence of the two titles with respect to the same property is an indication that one of them is a forgery.

My observation of the testimony by PW6 is that he came to court ill prepared, and his sole purpose was to defend the status quo obtaining at the Lands Office and not to unravel the truth. He was not able to produce in court the transfer of the suit property to West End Butchery Ltd in the Ministry of Lands records, which would have been crucial in determining who the Directors were at the material time of issue of the title to the suit property. The transfer produced by the Plaintiff as Exhibit 4 shows that the suit property was transferred by James Alexander Sand (sic) on 15th November, 1972 to West End Butchery. This transfer was registered as number IR 3456/47 on 24th December, 1976 at 11.40 a.m. The 1st, 2nd and 3rd Defendant produced no evidence of such a transfer, and have not explained how a title bearing the same date and time of registration as that of the Plaintiff's transfer, came to be in their possession.

More importantly, according to the evidence relied upon by the 1st Defendant, the 2nd and 3rd Defendants were purportedly appointed as Directors of the Plaintiff company on 10th October, 2000, and as between the Title held by

PW1, PW2 and PW3, and that held by the 2nd and 3rd Defendants, that of PW1, PW2 and PW3 was earlier in time as they were the Directors at the time of the transfer of the suit property to the Plaintiff company. I am also persuaded in this regard by the decision in *Gitwany Investment Limited v. Tajmal Limited & Others* (2006) e KLR wherein it was held as follows; -

*"My understanding is therefore that the title given to Gitwany in the first instance and which I have held to be absolute and indefeasible as regards the suit land is the earlier grant and in the words of the Court of Appeal in *Wreck Motors Enterprises vs. Commissioner of Lands, C.A. No. 71/1997* (unreported): '...Like equity keeps teaching us, the first in time prevails so that in the event such as this one where, by mistake that is admitted, the Commissioner of Lands issued two titles in respect of the same*

parcel of land, then if both are apparently and on the face they were issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail.....”

It is therefore my finding that even if the two Titles produced in evidence were on their face alleged to be validly issued, the one in the possession of PW1, PW2 and PW3 would prevail as it was the first in time.”

(Emphasis added)

21. Finally on that issue, the trial court considered the effect of the fraudulent transfer of the disputed land by Musa and Mwau to Arthi in the light of the provisions of **Section 23** of the Registration of Titles Act (now repealed) and found as follows:

“It is already the finding of this court that at the time of the transfer of the suit property and issue of title to it, the 1st Defendant was not party to the fraud by the 2nd and 3rd Defendants. This finding notwithstanding, it cannot be said that the transfer of the suit property to the 1st Defendant was by the proprietor of the suit property within the meaning of section 23 (1) of the Registration of Titles Act, as it has also been found by this court that the 2nd and 3rd defendants fraudulently transferred shares of the Plaintiff company to themselves and filed a fraudulent notification of change of directors to effect the said sale.

It is in my view unjust and inequitable that an innocent proprietor can be dispossessed of his or her legal title to land through the acts of a fraudster, and this cannot have been the intention of section 23 of the Registration of titles Act. I am persuaded by the statements made in Alberta Mae Gacii V Attorney General & 4 Others (2006) eKLR where this court (Hon. Justice Onyancha) stated as follows:

“Cursed should be the day when any crook in the streets of Nairobi or any town in this jurisdiction, using forgery, deceit or any kind of fraud, would acquire a legal and valid title deceitfully snatched from a legal registered innocent proprietor. Indeed, cursed would be the way when such a crook would have the legal capability or competence to pass to a third party, innocent or otherwise, a land interest that he does not have even if it were for valuable consideration. For my part, I would want to think that such a time when this court would be called upon to defend such crooks, has not come and shall never come.....”

Likewise in the case of Iqbal Singh Rai vs. Mark Lecchini and the Registrar of titles, civil Case No. 1054 of 2001, this court (Hon. Justice Muchelule) held as follows:

“At the time when the 1st Defendant sought to buy the land in dispute the registered proprietor was the Plaintiff. There is no dispute that he never dealt with the Plaintiff in the transaction that followed. The person with whom he dealt was not the registered proprietor of the land in dispute. The person was a fraud who had no claim whatsoever to the land. The consequence is that the 1st defendant was a purchaser who did not deal with the registered proprietor of the land. Section 23(1) protects ‘title issued to a purchaser upon the transfer or transmission by the proprietor thereof’. The 1st Defendant did not obtain a transfer from the Plaintiff who was the registered proprietor. He obtained a transfer from a fraudulent person who had no claim to the land. He cannot I find invoke the provisions of section 23(1) to say he obtained an indefeasible title.”

It is thus my finding that similarly, in this case the 1st Defendant did not obtain a transfer from the registered proprietor, but from fraudulent persons namely the 2nd and 3rd defendants who had no claim to the suit property. The 1st defendant cannot therefore invoke indefeasibility of title and the transfer to him by the 2nd and 3rd Defendants was null and void .”

(Emphasis added)

The claim that Arthi exercised due diligence was dismissed since there was evidence that none of its officers or its lawyers ever bothered to visit the registered offices of West End to authenticate its records, including the Register of members.

22. The 3rd issue related to the effect of subdivision and sale of the disputed land to the three buyers. The court considered the evidence, the law and submissions of counsel relating to the doctrine of *Lispendens*, indefeasibility of Title under **Sections 23 and 24** of the Registration of Titles Act, the applicability of **Section 26** of the Land Registration Act of 2012, and the effect of court orders that were issued in respect of the disputed land. It found and held thus:-

“Section 23 of the Registration of Titles Act is still the applicable law in this regard, and this court has already made several findings on its applicability in this case. It has been found that there was complicity by the 1st defendant in the 2nd and 3rd defendants’ fraud specifically with respect to the subsequent sale and transfer of the suit property to the 5th, 6th and 7th defendants. It has also been found that because of the 2nd and 3rd Defendant’s fraud, the 1st defendant cannot invoke the principle of indefeasibility of title. It therefore follows that the 1st Defendant had no interest or title to the suit property that it could lawfully pass on to the 5th, 6th and 7th Defendants, and it was therefore not a proprietor of the suit property within the meaning of section 12(1) of the Registration of Titles Act. It is therefore the finding of this court that for these reasons the 5th Defendant cannot invoke the principle of indefeasibility of title with respect to the titles transferred to it by the 1st Defendant for LR Numbers 7149/112, 7149/113 and 7149/114, neither was any interest in the suit property or sub-divisions thereof passed on to the 6th and 7th Defendant pursuant to the sale agreements entered into with the 1st Defendant.

I will not belabor with (sic) the issue of the court orders granted in this case which are clearly on the court record, save to

state that the Defendants who were present and or/represented at the time of granting such orders and directions with respect to the suit property were under all obligation to observe them. The effect of non-observance of the court orders is nevertheless now rendered immaterial in light of the findings in the foregoing.”

(Emphasis added)

23. In considering the Remedies sought by West End, which was the 4th issue, the trial court considered the submission that West End was not entitled to the declarations sought and cancellation of the entries made in the Company Registry and the Land Registry because of its laxity or failure to secure itself and its land by registering restrictions against any dealing therewith. The court stated and held thus:-

“I have given consideration to these arguments and from the chronology of events undertaken by the Plaintiffs Advocate after this dispute came to his attention that was narrated in his evidence, and the exhibits he produced, I find that the Plaintiff did move with haste and took the necessary steps including the filing of the suit herein to protect its interest. The Plaintiff went to great lengths and costs to publish caveat emptor in the newspapers to warn the public at large, some who may not have access to the land registries of the dispute herein. The 1st Defendant acknowledged being aware of the notifications by the Plaintiff, and yet proceeded with the subdivision and sale of the suit property. It cannot therefore plead to be aided by equity.

The Plaintiff cannot also be blamed for the failings and inactions by departments of government that were also supposed to discharge their duties, particularly the criminal Investigations Department which has the responsibility for criminal investigation, and the Commissioner of Lands who was requested to register a restriction against the title to the suit property. The Commissioner is the *ex officio* Registrar General under section 5 of the Registration of Titles Act and the office was under an obligation to act on the evidence produced by the Plaintiff. It was also the responsibility of the 4th Defendant in this respect to ensure that the perpetrators of the fraud committed herein were brought to book, once the fraud was brought to its attention.

I am of the view that no more could have been asked of the Plaintiff in this case, and it is therefore deserving of the remedies sought. The 7th Defendant’s Counterclaim also fails for the reasons given in the foregoing.

(Emphasis added)

24. The court also granted the prayers for indemnity sought by KMAH and Yamin who had properly sought it within the suit, stating:-

“Indemnity by the 1st and 4th defendant under section 24 of the Registration of Titles Act is a proper remedy in the event of any loss occasioned to the 5th and 6th defendant for reasons of their complicity in and participation in the fraud perpetrated by the 2nd and 3rd Defendant. Indemnity by the 1st Defendant will in addition be determined by the provisions of the sale agreements entered into with the 5th and 6th defendants.”

The court further found as valid and enforceable, the indemnity agreement signed between Arthi and KMAH.

25. In the course of submissions, Arthi raised an issue of procedure and argued that the whole suit was not properly before the court. That was because, in its view, West End, was a legal entity which could only act through resolutions passed by the general meeting of its members. In this case, according to the records in the Companies registry, the only shareholders and Directors of West End at the time of filing suit were Musa and Mwau but there was no resolution filed by them authorizing the institution of the suit. Furthermore, it was submitted, the Firm of Advocates on record for West End was not authorized by the company to do so. Finally it was submitted that the claim for fraudulent transfer of shares could only be maintained by the individual shareholders who were defrauded and not the Company through the suit.

26. The trial court considered those submissions and rejected them holding thus:-

“I will start by addressing the question raised as to whether the Plaintiff is properly before his court. It is not disputed that the Plaintiff exists as a company registered in Kenya, and therefore has legal standing to bring this case. The issue that is before this court to determine is who its lawful directors are, and in the circumstances any set of the competing directors can give instructions for the institution of a suit on behalf of the company. The original directors are PW1, PW2 and PW3, and claim that there was a fraudulent change of directorship and that they are the lawful directors. They testified that they instructed a lawyer to institute the suit herein on behalf of the Plaintiff. This being a matter that affects the internal workings of the Plaintiff company, it was therefore upon the 2nd and 3rd Defendants to lay their rightful claim to directorship, or show the lack of instructions if any to institute the suit herein. The 2nd and 3rd Defendants never appeared or participated in these proceedings, and the 1st Defendant cannot take it upon itself to find that the original directors are not the lawful directors as this is an issue that is before the Court. I also note that the 1st Defendant in an apparent contradiction argues that the original directors are not the lawful directors, yet requires them to show a resolution giving instructions for the institution of the suit. In addition, alongside to the issue of directorship of the Plaintiff company, there are other issues in this suit with regard to that transfer of the Plaintiff’s property, and it must therefore of necessity be a party to these proceedings, quite apart from its directors. It is therefore this Court’s finding that there is sufficient evidence of instructions having been given by PW1, PW2 and PW3 as to the institution of this suit, and they have a right and locus to bring this suit in their claim as the lawful directors.”

(Emphasis added)

27. Ultimately the trial court issued the following orders after determining the suit:

“1. It is hereby declared that the entries and documents in the Plaintiff’s company file C-3958 maintained at the Companies Registry relating to the 2nd and 3rd Defendant, and specifically the notification of Change of Directors and secretaries dated 10th October, 2000, the transfers of Stock and shares dated 10th October, 2000 and the Annual returns filed showing the 2nd and 3rd Defendants to be members and Directors of the Plaintiff Company were fraudulent and illegal.

2. The 4th defendant on behalf of the registrar of Companies is hereby ordered to cancel and expunge from the plaintiff’s company file C-3958 maintained at the Companies Registry the said fraudulent entries and documents relating to the 2nd and 3rd Defendant.

3. The 4th defendant is hereby further ordered to forthwith commence investigations on the fraud committed by the 2nd and 3rd Defendants and to undertake the necessary action as to the criminal prosecution of the 2nd and 3rd Defendants, and any other persons found to have participated in the said fraud.

4. It is hereby declared that the transfer of the Plaintiff property known as Land Reference Number 7149/10 registered under Title number IR 30601 by the 2nd and 3rd Defendants to the 1st Defendant was fraudulent, unlawful and null and void.

5. It is also hereby declared that the sub-division of the Plaintiff’s property known as Land Reference Number 7149/10 registered under title number IR 30601 and the sale transfer of such sub-divisions to the 1st defendant of the suit land registered was fraudulent, unlawful and null and void.

6. The 4th Defendant through the Commissioner of Lands is hereby ordered to cancel all the entries relating to the transfer of ownership of Land Reference number 7149/10 to the 1st Defendant registered in the register of Land Reference Number 7149/10.

7. The 4th Defendant through the Commissioner of Lands is hereby ordered to cancel all the entries relating to the sub-division of Land Reference Number 7149/10 to LR Numbers 7149/111, 112, 113, 114, 115, 116, 117 and 118 registered in the register of Land Reference Number 7149/10.

8. The 4th Defendant through the Commissioner of Lands is hereby ordered to cancel all the entries relating to transfer

of the said sub-divisions namely LR Numbers 7149/111, of 112, 113, 114, 115, 116, 117 and 118 registered in the register of the Land Reference Number 7149/10.

9. The 4th Defendant through the Commissioner of Lands is hereby ordered to cancel all entries relating to transfer by the 1st Defendant of the sub-divisions known as LR Numbers 7149/112, 7149/113, 7149/114, to the 5th Defendant, and subsequently issued as new grants as L.R. Nos. 28183, 28184 and 28185, registered in the respective registers of the said sub-divisions and grants.

10. The 1st, 2nd, 3rd, and 4th Defendants shall pay the Plaintiff the costs of this suit in equal parts.

This Court also enters judgment for the 5th, 6th and 7th Defendants as follows: -

11. The 1st and 4th Defendants are hereby ordered jointly and severally indemnify the 5th and 6th Defendants with respect to any damage and costs incurred arising from the orders made herein, pursuant to the provisions of section 24 of the Registration of Titles Act (since repealed) assayed by the provisions of the Land Registration Act of 2012.

12. The 1st Defendant is hereby in addition ordered to indemnify the 5th Defendant with respect to any damage and costs incurred arising from the orders made herein, pursuant to the provisions of the sale agreements entered into with respect to LR Numbers 7149/112, 7149/113, 7149/114.

13. The 5th and 6th Defendants are at liberty to bring legal proceedings for the recovery of such damages and costs pursuant to the indemnities ordered herein against the 1st and 4th Defendant.

14. The 1st, 2nd, 3rd and 4th Defendants shall pay the 5th, 6th and 7th Defendants the costs of this suit in equal parts.”

The Appeal and submissions of counsel.

28. Arthi was aggrieved by the whole of that decision and raised 34 grounds of appeal to challenge it. As stated earlier, however, the appeal stands or falls on three issues of law which all learned counsel made submissions on and which may now be summarized.

The first is whether the suit was procedurally filed in the High Court. Secondly, whether fraud was proved and if so, the effect of it on the transactions entered into by the parties. Thirdly, whether Sections 23 and 24 of the Registration of Titles Act (RTA) apply, and if so to what extent and effect.

29. The procedural challenge was premised on the argument that the suit was instituted in the name of West End without any resolution or

authority of the Board of Directors. It was also Arthi's argument that the suit was instituted contrary to the rule in **Foss v. Harbottle** and the exceptions thereunder. Learned counsel Mr. Thuita Guandaru who restricted himself to the facts, submitted that there was no evidence on record to support the finding that instructions were given to lodge the suit in the name of the company. Learned counsel Mr. Paul Mwangi who dealt with legal aspects, submitted, as he did before the trial court, that the only valid Directors who could issue instructions to West End were Musa and Mwau but they never did so. The former Directors could only issue such authority if they changed the Shareholding/Directorship first before filing the suit. In the alternative they could have used their own names to file the suit, and then join the company as a defendant. In the end, no one gave instructions to the Advocate who filed suit on behalf of West End and consequently, the suit was a nullity. The cases of **Ruben & Another V. Great Fingall Consolidated (1906) AC 439**, **Tatu Ngina & Co Emporium v. Virjee Brothers Ltd CA 8/2000 (UR)** were cited in aid of those submissions.

30. In those submissions, Mr. Mwangi was supported by learned counsel for KMAH, Mr. Chacha Odera who submitted that it was incumbent upon West End to have its register rectified, if anything was wrong with it, before filing the suit. Without such rectification, Musa and Mwau were the only Directors who could lawfully instruct the company to institute the suit and there was no evidence that they did.

The Attorney General, through Mr. Bitta, raised a procedural challenge of his own submitting that under **Section 19(3) (d)** of the **Government Proceedings Act**, the Attorney General cannot be sued for actions of the Registrar, and that under **Section 24** of the Registration of Titles Act the Registrar of Titles can only be sued in nominal capacity under circumstances which were not shown to exist in this suit.

31. In response to those submissions, learned counsel for West End, Mr. Newton Mwangi submitted that there was no impropriety in bringing the suit in the manner it was. Firstly, because the claims made in the plaint were multifaceted since West End sought, not only rectification of the Company Register, but also cancellation of entries made in the Land Register. Secondly, he pointed out, the same issue was raised before Mbogholi-Msagha J. when Arthi sought to join the three Directors of West End in their personal capacity, but the court rejected that prayer and the suit proceeded. There was no appeal against that decision and it was reinforced by the finding, subsequently made by the trial court, that the three Directors who gave evidence were truthful and that they lawfully gave instructions for the suit to be filed in the name of the company. Mr. Mwangi referred to the **Rule in Tarquand's case** which obviates the necessity of investigating the internal management of a Company by those who have to deal with it, and submitted that the Rule had exceptions. It does not apply where fraudulent or *ultra vires* acts are alleged. In this case, he submitted, it was proved that the change of Directors was *ultra vires* the Memorandum and Articles of Association of West End which prohibited any transfer of shares outside the family. In his view, the **Ruben case** relied on by Arthi dealt with the exception to the **rule in Tarquand's case** and supported West End.

32. On the second issue whether fraud was proved and if so the effect on the subsequent transactions, Mr. Thuita submitted that there were no particulars of fraud in the pleading against Arthi, and therefore the finding was erroneous that there was such pleading.

He further submitted that there was a finding made by the trial court that Arthi was not party to any fraud but surprisingly proceeded to hold that it was guilty of fraud. In his view, the trial court also made errors of fact in discrediting the evidence of the Registrar of Titles; believing the evidence of a forensic examiner who left out crucial signature samples of a retired Registrar of Titles thus rendering his evidence worthless; relying on the evidence of a purported expert witness, M.A. Khan who was also the lawyer for West End; and in finding that the Directors of West End were vigilant when all evidence testified to the contrary. As to the submissions on legal issues, Mr. Paul Mwangi submitted that Arthi was *bona fide* purchaser of the disputed land without notice of any fraud. He cited various authorities including **Black's Law Dictionary** and **Snell's Principles of Equity** for the definition of "*Bona fide purchaser*", "*Purchaser without notice*" and "*Prejudicial Dispositions*". He also relied on the Uganda Court of Appeal case of **Katende v. Haridar & Company Ltd** cited with approval in Kenya High Court case of **Lawrence Mukiri v. Attorney General & 4 Others [2013] eKLR** on what amounts to "*bona fide* purchaser for value, thus:

"... a bona fide purchaser 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 purchaser 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."

Finally, he cited the Kenya Court of Appeal case of **East Africa Safari Air Ltd v Antony Kegode & Another [2011] eKLR**, as well as **Gower's Principles of Modern Company Law** on the application of the "**Rule in Tarquand's case**". On the basis of those authorities, he submitted that Arthi dealt throughout with West End and its lawful Directors on record and was not aware of or party to any fraud in relation to both the alteration of the company Register and the transfer of the disputed land at the lands office. The finding by the trial court that Arthi was guilty of "perpetuation of fraud", he submitted, was an alien principle of law. Indeed, he submitted, Arthi was absolved of fraud but denied the benefit of that finding.

33. The Attorney General through Mr. Bitta submitted that there were no particulars of fraud pleaded against the Registrar General and

none was proved. The evidence instead was that Musa and Mwau had share transfer documents which they submitted through their advocates and the Company Registrar had no reason to reject them.

Fraud cannot be imputed in this case especially when those Advocates were not called to testify. In any event, there was no challenge to the change of particulars before the suit was filed.

34. In response, Mr. Newton Mwangi submitted that on the basis of the pleadings and the evidence on record, there was no doubt that Arthi was complicit in the fraudulent transfer of the disputed land. The transfer documents were not sealed with the common seal of West End and when the documents were presented for registration there were no originals in the land Registry. No due diligence was conducted, and Arthi was intent on having the transfer effected in its favour, warts and all. Furthermore, there were injunctions and orders for maintaining the *status quo* issued by the court which were widely advertised, but Arthi ignored them and transferred portions of the disputed land to other parties. They were all aware of the fraud but had no intention of abandoning the fraudulent transactions, hence the finding by the trial court.

35. On the final issue relating to the application of **Sections 23 and 24** of the Registration of Titles act, Mr. Paul Mwangi cited the following authorities on indefeasibility of Title :-

- *Elijah Kipyegon Arap Bii vs. Samwel Mwahia Gitau & Another [2014] e KLR.*
- *Nairobi Permanent Society & 11 Others vs. Salima Enterprises & 2 Others [1997] e KLR.*
- *Dr. Joseph arap Ngok vs. Justice Moiwo Ole Keiwua & 5 Others, civil Appeal No. Nai.. 60 of 1997.*
- *Charles Karaithe Kiarie & 2 Others vs. Administrators of the Estate of John Mathere (deceased) & 5 Others [2013].*
- *Hannah Wangui & Another vs. Joel Nguni & 2 Others [2005] e KLR.*
- *Njilux Motors Limited vs. Kenya Power & Lighting Company Limited & another [2000] e KLR.”*

He submitted that such Title can only be impeached in cases of fraud or misrepresentation to which the holder is proved to have been a party.

36. On this submission, Mr. Paul Mwangi was supported by Mr. Odera. In his view, if the transfer of shares of the Company was fraudulently made by Musa and Mwau, then there is power under **Section 118** of the **Companies Act** to apply to court for rectification of the register by way of Originating Motion. After that, the company would then come to court to challenge the subsequent transfer of the disputed land to Arthi. As this was not done, the suit filed in this case was a nullity since Musa and Mwau remained the registered Directors of West End which transferred the disputed land to Arthi. There was a finding that Arthi was not party to the fraud and therefore, there was absolute protection under **Section 23, RTA**. In the circumstances, the only remedy to any person deprived of the land is compensation as provided under **Section 24 of RTA**.

37. Mr. Odera further submitted that the trial court found that KMAH was not party to any fraud and therefore its Title should not have been interfered with. The trial court was in error when it decided to order compensation under **Section 24** in favour of KMAH instead of West End which had a cause of action for such damages. In aid of those submissions, he cited several authorities, including: *Urmilaw/oMahendra Shah v Barclays Bank International Limited & Another (1979) KLR 76. Mbothu & 9 Others v The Commissioner of Lands & 3 Others (1986) KLR 71.*

- *Wreck Motors Enterprises v The Commissioner of Lands & 3 Others Civil Appeal No. 71 of 1997 (Unreported).*
- *Mawji v United States International University & Another (1976) KLR 185.*
- *Halsbury's Laws of England 4th Ed. Vol. 37.*

38. Learned counsel for Yamin, Mr. Githinji, merely agreed with the submissions made on behalf of KMAH.

39. In response Mr. Newton Mwangi relied on the following authorities:

- *Satrya Investments Ltd. vs. J.K. Mugua Civil Appeal No. 164 of 2004*
- *Mawji vs. International University & another (1976) KLR 185,*
- *Surinder Kumari Mediratta vs. Kenya Commercial Bank 2 Others (2005) eKLR.*
- *Winfred Wambui Kingori vs. Paramount Universal Bank Ltd. & 2 Others [2009] eKLR.*
- *Alberta Mar Gacii vs. Attorney General & 4 Others [2006] eKLR.*
- *Gitwany Investment Limited vs. Tajmal Limited & 3 Others [2006] eKLR.”*

He submitted that **Section 23, RTA** presupposes a Title validly obtained from the owner, but in this case Musa and Mwau had no authority to transfer anything and did not therefore acquire good title to pass to anyone. **Section 23** was therefore not applicable in this case. Even if it was, he added, it required absence of fraud and the trial court was right in making the findings it did on fraud. Lastly, the court was right in ordering that it was KMAH, Yamin and Gachoni Enterprises who deserved compensation under **Section 24 RTA** as the property reverted to its rightful owner, West End.

Analysis and Determination.

40. We have considered the findings of the trial court, the submissions of counsel and the numerous authorities cited before us. As this is a first appeal, it is also our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. It was put more appropriately in **Selle v Associated Motor Boat Co. [1968] EA 123**, thus:

“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 allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan(1955), 22 E. A. C. A. 270).

This Court further stated in **Jabane – v- Olenja [1986] KLR 664**, thus:

“More recently, however, this Court has held that it will not lightly differ from the findings of fact of a trial judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular Ephantus Mwangi v Duncan Mwangi Wambugu(1982-88) 1 KAR 278 and Mwanasokoniv. Kenya Bus Services(1982-88) 1 KAR 870.”

41. Was the suit procedurally filed?

We do not intend to belabor this issue because we are satisfied, as the trial court did, that the original shareholders/Directors of West End; Asif, Ragha and Rauf (hereinafter, “the original Directors”), gave instructions to their Advocates for the filing of the suit in the name of the company. It is evident from the re-amended plaint which in law goes back to the amended and the original plaint, that the claim was not merely about theft of shares of Asif, Radha and Rauf by the two fraudsters, Musa and Mwau. If the claim was that plain and simple, perhaps the shareholders would have pursued the thieves in their own names. But the claim is more complex. West End claims that its property was alienated through a nefarious scheme where the two fraudsters engineered the alteration of its shareholding and Directorship in order to facilitate the transfer of its land. This is what learned counsel, Newton Mwangi referred to as a multifaceted claim. We understood him to mean that the fraud perpetrated by outsiders at the Company Registry and the fraud perpetrated at the Lands registry are not mutually exclusive since the first was intended to effect the second. In that case West End had the right to sue in its own name.

42. Lord Denning MR in his characteristic literary style summed up the law in **Moir V. Wallersteiner [1975] 1 ALL ER 849** at p. 857, as follows:

“It is a fundamental principle of our law that a company is a legal person with its own corporate identity, separate from the directors or shareholders and with its own property rights and interests to which alone it is entitled. If it is defrauded by a wrong doer, the company itself is the one person to sue for the damage. Such is the rule in Foss V. Harbottle [1843] 2 Hane 461. The rule is easy enough to apply when the company is defrauded by outsiders. The company itself is the only one who can sue. Likewise, when it is defrauded by insiders of the minor kind, once again the company is the only person who can sue”.

43. As we understand it, the argument is rather that the Directors appearing in the Company Register at the time were Musa and Mwau who, in law, were the ones entitled to pass a resolution for institution of the suit but there was no evidence of any resolution. However, as the trial court observed, correctly in our view, the suit was in part about who the rightful shareholders/directors of West End were. Those who asserted they were the rightful shareholders/Directors and who the alleged fraud was committed against West End, gave instructions for the filing of the suit in the name of the Company. They testified that they did so, and the Advocate testified that he accepted those instructions. In the end, the original directors were vindicated on this since the fraudsters never showed up to dispute their right to the shareholding and directorship of the company. The submission made that the two fraudsters were capable of passing a lawful resolution for filing suit in the name of West End, in our view, offends common sense and is not tenable.

44. The submission that there ought to have been a resolution to authorize the filing of the suit in the name of the company appears to have emanated from a decision of the Uganda High Court which has been followed and applied in this country for a long time; **Bugerere Coffee Growers Ltd v Sebaduka & Anor (1970) 1 EA 147**. The court in that case held:-

“When companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors’ meeting and recorded in the minutes, but no resolution had been passed authorizing the proceedings in this case. Where an advocate has brought legal proceedings without authority of the purported plaintiff the applicant becomes personally liable to the defendants for the costs of the action.”

45. To their credit, the appellant’s Advocates have cited another authority from the Supreme Court of Uganda decided in April 2002,

confirming that the principle enunciated in the **Bugerere** case has since been overruled by the Uganda Supreme court. The authority is **Tatu Naiga & Emporium vs. Virjee Brothers Ltd Civil Appeal No 8 of 2000**.

The Uganda Supreme Court endorsed the decision of the Court of Appeal that the decision in the **Bugerere** case was no longer good law as it had been overturned in the case of **United Assurance Co. Ltd v Attorney General: SCCA NO.1 of 1998**. The latter case restated the law as follows:-

“... it was now settled, as the law, that, it does not require a board of directors, or even the general meeting of members, to sit and resolve to instruct Counsel to file proceedings on behalf and in the names of the Company. Any director, who is authorized to act on behalf of the company, unless the contrary is shown, has the powers of the board to act on behalf of that Company.”

The decision has since been applied in Kenyan courts, for example, in **Fubeco China Fushun v Naiposha Company Limited & 11 others [2014] eKLR**.

46. It was also asserted before us by Mr. Newton Mwangi, and it was not strongly rebutted, that the procedural issue was unsuccessfully raised before Mboghli-Msagha J. before the hearing of the suit in the High Court and there was no interlocutory appeal against the decision of that court. We have indeed seen the relevant Ruling of the High court made on 3rd July 2009. The Attorney General for his part made submissions on other procedural defects which appear nowhere in the Memorandum of appeal and are therefore contrary to **Rule 104 of the Court of Appeal Rules 2010**. We decline to consider those submissions.

For the above reasons we find no merit in the procedural challenge and accordingly reject that ground of appeal.

47. Was fraud proved? If so what was the effect of it on subsequent transactions?

We say without hesitation that the finding of the trial court that the transfer of shares conducted through the Company registry by Musa and Mwau was contrary to the law and was fraudulent. The two fraudsters purported to execute an instrument of transfer of shares, an Annual return, and a notice of change of Directors, all in the year 2000 and presented them to the Companies registry three years later in 2004. The company secretary named in those documents was one Lucy Mburu who had no association with West End. The Postal address used was strange. The records in the Company registry at the time would show the Shareholding and Directorship of West End since there were annual returns filed regularly on behalf of the company to authenticate those records. The transfer of shares instrument purported to transfer non-existent shares from a deceased person (Aziz Bibi) and was contrary to the Memorandum and Articles of Association of West End which restricted share transfers to family members. None of the original Directors appeared before any Advocate to sign the transfer instruments as purported. Their signatures were forged and there was evidence, which in our evaluation was not denied, from an experienced forensic document examiner, **Antipus Nyanchwa**, (PW5), to confirm it. The seal of the Company which was in possession of the original Directors was not affixed to any of the documents. The purported transfer was not entered in the register kept in the registered office of West End as by law required and there was no resolution made by the company to effect change. All these transgressions of the law, and more, rendered the changes effected at the company registry null and of no effect.

48. The case was akin to **Ruben & Another vs. Great Fingall Consolidated (1906) A.C 439** where Ruben and another person advanced money to the company secretary for his own purposes on the security of a share certificate issued by the secretary certifying that they were registered in the companies register of shareholders as transferees of shares. The secretary forged the signatures of the company Directors and affixed the company seal on the certificate without authority, but otherwise the certificate was in accord with the Memorandum and Articles of Association of the company. The company refused to register Ruben and his friend as owners of the shares and they sued the company. The dispute went all the way to the House of Lords which decided, affirming the Court of Appeal, that the company was not estopped by the forged certificate from disputing the claim of the appellants and it was not responsible for the wrongful actions of the secretary.

49. **Lord MacNaghten** was forthright in his exposition of the matter:-

“The thing put forward as the foundation of their claim is a piece of paper which purports to be a certificate of shares in the company. This paper is false and fraudulent from beginning to end. The representation of the company’s seal which appears upon it, though made by the impression of the real seal of the company, is counterfeit and no better than a forgery. The signatures of the two directors which purport to authenticate the sealing are forgeries pure and simple. Every statement in the document is a lie. The only thing real about it is the signature of the secretary of the company, who was the sole author and perpetrator of the fraud. No one would suggest that this fraudulent certificate could of itself give rise to any right or find or affect the company in any way. It is not the company’s deed, and there is nothing to prevent the company from saying so.

Then how can the company be bound or affected by it. The directors have never said or done anything to represent to lead to the belief that this thing was the company’s deed. Without such a representation there can be no estoppel.

The fact that this fraudulent certificate was concocted in the company’s office and was uttered and sent forth by its author from the place of its origin cannot give it any efficacy which it does not intrinsically possess. The secretary of the company, who is a mere servant, may be the proper hand to deliver out certificates which the company issues in due course but he can have no authority to guarantee the genuineness or validity of a document which is not the deed of the company.”

So was **Lord Loreburn L.C.**, who stated:-

“I cannot see upon what principle your Lordships can hold that the defendants are liable in this action. The forged certificate is a

pure nullity. It is quite true that persons dealing with limited liability companies are not bound to inquire into their indoor management, and will not be affected by irregularities of which they had no notice. But this doctrine, which is well established, applies only to irregularities that otherwise might affect a genuine transaction. It cannot apply to a forgery.”

Lord Daveytoo, stating thus;

“The appellants have no doubt been grossly defrauded, but the question is whether they can shift the loss on to the shoulders of the innocent. The company has done literally nothing in the transaction, and could do nothing, because in no stage of the transaction did it come before the board of directors, which alone was entitled to speak and act for it.”

50. And so it is in the matter before us. The documents which perpetrated the fraud of share transfer were not even presented to the Company Registry by the real company secretary of West End.

They were all forgeries. They never bound West End in any way. The Registrar of Companies failed in his statutory duty to West End and members of the public who rely on the authenticity of documents entrusted to that office. The Registrar easily allowed the perpetration of the fraud and was complicit in it as he allowed the disappearance of annual returns filed by West End and copies of official receipts issued to it. To cap it all, the entire file was still missing when West End applied to peruse it, and appears to have been reluctantly produced in court, according to the observation of the trial court on the conduct of **Johnson Otieno Odera**(DW1), a former Senior Assistant Registrar General. The case is a clear exception to the **Rule in Turquand’s case**, derived from the case of **Royal British Bank v Turquand**(1856) 6 E & B 327 which prevents outsiders from being affected by internal irregularities of which they have no means of discovering. But the Rule does not apply, amongst other exceptions, where the corporate signature is forged or if the outsider knew of the internal non-compliance, or knew facts that would lead a reasonable person to inquire further.

Fraud in this case was proved.

51. The registration of the forged documents was subsequently used by the fraudsters for the purpose intended by them, that is, to have access to the land registered in the name of West End. Barely one year later in 2005, the fraudsters entered into an agreement of sale with Arthi. The trial court found upon reviewing the evidence on record, that fraud was committed in the land transaction too and upon re-examination of that evidence, we respectfully agree.

52. According to **Black’s Law Dictionary**,

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another”.

Section 2 of RTA also defines “Fraud” as follows:-

“Fraud” shall on the part of a person obtaining registration include a proved knowledge of the existence of an unregistered interest on the part of some other person, whose interest he knowingly and wrongfully defeats by that registration.”

53. It is common ground 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. One of the authorities produced before us has this passage from **Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition at page 427:**

“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 (Wallingford v Mutual Society (1880) 5 App. Cas. 685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd’s Rep. 305, 308).

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 Lawrence V Lord Norreys (1880) 15 App. Cas. 210 at 221). 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 (Davy V Garrett (1878) 7 ch.D. 473 at 489). “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”.

see **Insurance Company of East Africa vs. The Attorney General & 3 Others Hccc135/1998.**

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

54. It was contended before the trial court that there was no pleading or particulars that Arthi and the Attorney General (for Commissioner of Lands) were party to the fraud perpetrated at the Lands office. The trial court found there was and the contention has been renewed before us. We have examined the re-amended plaint and confirmed that the issue of fraud at the company Registry was pleaded and particulars were given. As regards fraud at the Lands registry, the pleading is as follows;

“13. By further acts of fraud and forgery the 2nd and 3rd defendant became new directors of the Plaintiff and then fraudulently transferred the Plaintiff's property known as Land Reference Number 7149/10 registered under title number I.R.30601 in favour of the 1st defendant Arthi Highway Developers Ltd for a consideration of Kenya Shillings Thirty Million. The transfer was registered on the 15th March, 2006 as No. I.R. 3060/12.

14. The said transfer of the said property to the 1st defendant was done fraudulently by person who had no authority to transfer the said property and was not even sealed with the common seal of the company which still remains in the custody of the aforesaid directors MOHAMMED ASIF, MOHAMMED ABDUL RAUF and MOHAMMED JUMA ALLAH RAKHA who also still continue to hold the original title to the aforesaid property Land Reference Number 7149/10 registered under Title Number I.R 30601.

.....

20. The Plaintiff claims from the Fourth Defendant for and on behalf of the Commissioner of Lands for cancellation of the title deed fraudulently issued to the 1st defendant for the fraudulent transfer of the aforesaid property Land Reference Number 7149/10 registered under title Number I.R. 30601 and a new title be opened based on the title that the Plaintiff has and puts a restriction on the title so that no transaction of any nature can be done on the title deed without the express authority of the Chief land registrar.”

55. Arthi and the Commissioner of Lands filed their defences to those pleadings denying the allegations of fraud and so there was joinder of issue at the close of pleadings. At no time did the two parties seek to strike out the suit on account of inadequate pleading, as would ordinarily happen, and indeed evidence was led on all sides addressing that issue without difficulty. The expert witness in matters of registration of Titles, **M.A. Khan** (PW7) was cross-examined on the particulars of fraud committed by Arthi and he responded that Arthi proceeded to register a transfer without the original Title document and further continued to subdivide and sell the disputed land despite its knowledge of existing court proceedings and orders. The trial court was able to decide on the issue of fraud on the basis of the entire evidence on record and it is our view that the objection raised at the tail end of the trial was of little moment. There was no prejudice caused to any party.

It should not be forgotten that the fraud committed in this matter was not an event but a process starting with the change of particulars of West End up to the time it was stopped by the judgment of the court.

56. A finding was made by the trial court that there was no evidence to connect Arthi with the fraudulent process at the Company Registry, and also at the beginning when the sale agreement and transfer were signed in November 2005. We are prepared to reluctantly accept those findings. Reluctantly because, in our view, the conduct of the Director of Arthi, **Franklin Kimathi Kamau** (DW1), who was the driving force in the transactions, left gaping holes in his evidence as to how he came to know the two fraudsters, Mwau and Musa, and was evasive. We caution ourselves that the trial court is always better placed to assess the credibility and demeanour of a witness since it has the advantage of seeing that witness in the witness box. But the record speaks for itself and it is the duty of this court to re-examine the record and satisfy itself, as stated in the **Selle case** (supra), that the trial court did “**take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally**”.

57. **Franklin Kamau** (Kamau) was not an ignorant novice in matters of land. Hear him when his evidence was tested in cross examination:-

“This was not my first development, I have had others – I buy and sell, develop and rent. I develop in my own name and I have another family Property Development Company. We formed Arthi Developers for purposes of purchasing the land as we were many players – 4 of us. I have handled land transactions or quite sometimes. I started dealing with land matters in 2001 and am conversant with matters of land in the lands office. I am not aware of all section of the law on land. What I am aware of is that if I am served with court orders, I must stop dealing with the land in question. My lawyer participated in this case.”

58. How did he meet and handle the fraudsters? Again hear him:-

“Yes I saw the property while driving along Mombasa road and met the sellers after seeing their numbers on the sign board on the property. I cannot remember the name of the first person. I met who connected me to the sellers. I met the Directors of West end Butchery later on – Solomon Mwinzi and Muchemi on the land. This was my first contract even with the two directors. After we met on the land, I told them that I needed to consult with other people before concluding the sale. We later met in my office in Upper Hill, Mutumbato Road. The Directors did not have an office in Nairobi. I subsequently confirmed if they were Directors of West End Butcheries, I did not pursue if they and a registered office. To this date, I do not know their registered office. After I met them I looked for proof of ownership – they gave me CR 12 date 2004 which had their names and shareholding which I verified. It is in our bundle of documents. They also gave me the copy of the title which I verified. When we agreed to purchase the land they were required to bring the original title, Pin Numbers and pictures & consent of the Land Control Board and they submitted them together with the sale agreement for the transfer. We went to the land Board and they produced the original title. The Directors did not give me any resolution by West End Butchery to sell the property. I am not aware of any such resolution dated 17th November, 2005.”

59. The conclusion is inescapable that Kamau was either casual or complicit in what the fraudsters were up to even at that stage. But,

as stated earlier, we shall give him the benefit of doubt and accept the finding of the trial court to that limited extent.

60. As to the events that succeeded those two stages, we have reassessed the evidence, relating to the time Arthi became aware about the challenge to the ownership of the disputed land.

The evidence on record is that the transfer documents were presented for Registration on 13th March, 2006. But they could not be registered because the original Deed file was missing from the land registry without explanation. According to the Registrar of Titles, **Charles Kiptanui Ngetich (PW6)**:

“The Deed file is not allowed out of the strong room unless there is a court order.”

He did not produce any court order to justify the absence of the file at the time. Apparently this did not ring any bell to Arthi and its Advocates as it ought to have done. Instead they went looking for the fraudsters at Mlolongo to provide a Deed of indemnity to facilitate the registration of the transfer in the absence of the original documents.

The Deed of indemnity signed by the two fraudsters was lodged and approved by the Registrar on 24th April, 2006 and the Transfer was registered on 8th December 2006. Soon after, according to Kamau, Arthi took possession of the disputed land, but it was not a peaceful Take over. We may quote him:

“We took possession immediately after registration. There were people keeping cattle as (sic) the land, including Mwinzi Director of West End butchery some of the herders would stop there for the night. After the development started taking place in the surrounding, we started encountering disturbance from squatters. The squatters would chase away our guards, and at times we would chase them away. They wanted to occupy the land because it was not developed.”

61. Kamau testified that he knew about the challenge relating to the Title of the disputed land in December, 2006. It is our finding that he knew about this in March, 2006. For a purchaser who claims that due diligence was carried out at all stages, we find it difficult to believe that there was no explanation sought from the Registrar of Titles about the mysterious disappearance of the original Deed file from the strong room of the land registry. It was common knowledge, and well documented at the time, that the land market in Kenya was a minefield and only a foolhardy investor would purchase land with the alacrity of a potato dealer in Wakulima market. Perhaps the provisions of the new **Constitution 2010** and the **Land Registration Act, 2012** will have a positive impact for land investors in future. In this matter Arthi was prepared to seek and accept a Deed of indemnity from the two fraudsters to have the transfer registered urgently. Kamau and the Directors of Arthi were informed by Criminal Investigation Department (CID) officers, “at the end of 2006”, that “some Asians from Westland were claiming the land belonged to them. I did not reveal who had sold the property to me to the CID - how could I have done that?”... “I did not think of taking Mwinzi and Muchemi (the two fraudsters) to the CID”.

62. That, in our view, is not the conduct of a “bona fide purchaser” defined in **Black’s law Dictionary 8th Edition** 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.”

More about this later.

63. Furthermore, within two months of registration of the Transfer, in February, 2007, the suit was filed and the issues of fraud in respect of the disputed land became clear to Arthi. Despite that knowledge, Arthi proceeded with the subdivision and sale of the disputed land to other parties. We do not take seriously its feigned assertion that it was not aware of what was going on in court despite having an Advocate on record throughout.

This is the conduct which the trial court deprecated and found it amounted to complicity in the fraud and perpetuation of it. There was sufficient basis for that finding and we do not consider it as a new concept unknown to law as submitted by Mr. Mwangi. We do not disturb that finding. Fraud was proved, and Arthi, as well as the Registrar of Titles were party to it. We so find

64. Did the provisions of Section 23 RTA (repealed) save the transaction between Arthi and West End on the one part, and Arthi and the subsequent purchasers on the other?

As recently as November 2013, this Court, differently constituted, confirmed the finality of the construction and application of **Section 23 of RTA** by the Court of Appeal in a long line of previous decisions. The Court refused leave to a party who sought to challenge those decisions in the Supreme Court, particularly on the definition of Fraud and its effect on the doctrine of indefeasibility of Title. The case was **Charles Karathe Kiarie & 2 others v Administrators of the Estate of John Wallace Mathare (Deceased) & 5 others [2013] eKLR**. In that case, evidence of fraud in the context of the Registration of Titles Act was considered by both the High Court and the Court of Appeal and found to have existed from the attendant primary facts and circumstances of the transaction in issue. It was held that the law on fraud and indefeasibility of Title has been settled and there was no need for involvement of the Supreme Court.

65. The law is typically stated in the case of **Dr. Joseph Arap Ngok v. Justice Moijo ole Keiwua & 5 others, Civil Appeal No. Nai.60 of 1997** where this Court categorically declared that:-

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

There are numerous other decided cases to the same effect, some of which have been referred to by the parties herein.

66. We have found already, on evaluation of the recorded evidence, that fraud was committed both at the registry of companies as well as the Lands office. The consequence is that West End did not divest its registered interest in the disputed land which was not an equitable one. It was the proprietor of the legal interest in the disputed land and did not part with it, as alleged or at all. The trial court held, following previous court decisions, that an innocent holder of legal Title to land cannot be dispossessed of that interest by a fraudster, and that **Section 23** protects “Title issued to a purchaser upon the transfer or transmission by the proprietor thereof”. Those decisions are the **Alberta Mae Gacie case**(supra) and the **Iqbal Singh Rai case**(supra) which emanated from the High Court. With respect, we are persuaded by the reasoning in those cases as it accords with the law.

67. Furthermore, the protection accorded by law in the event of fraud, is to a “bona fide purchaser without notice” and even then, only against equitable interests. We have seen the definition of “bona fide purchaser” from **Black’s Law Dictionary** and from the **Katendecase**(supra). The onus is on the person who wishes to rely on such defence to prove it, and the defence is against the claims of any prior equitable owner. **Snell’s Principles of Equity**(supra) illustrate the issue, thus:-

“An important qualification to the basic rule is the doctrine of the purchaser without notice, which demonstrates a fundamental distinction between legal estates and equitable interests.

1. The doctrine. A legal right is enforceable against any person who takes the property, whether he has notice of it or not, except where the right is overreached or is void against him for want of registration. If A sells to C land over which B has a legal right of way, C takes the land subject to B’s right, although he was ignorant of the right. But it is different as regards equitable rights. Nothing can be clearer than that a purchaser for valuable consideration who obtains a legal estate at the time of his purchase without notice of a prior equitable right is entitled to priority in equity as well as at law. In such a case equity follows the law, the purchaser’s conscience not being in any way affected by the equitable right. Where there is equal equity the law prevails.”

68. It is also stated therein that “**the doctrine of purchaser without notice never enabled a purchaser to take free from legal rights, as distinct from equitable interests**”. So that, even if the issue of *bonafide* purchaser arose in this matter which, in our finding, it did not, we are not satisfied that the evidence tendered by Arthi supports a credible finding that it was a bona fide purchaser of the disputed land.

69. It is our finding that as between West End and Arthi, no valid Title passed and the one exhibited by Arthi before the trial court was an irredeemable fake. It follows that Arthi had no Title to pass to subsequent purchasers, and therefore KMAH, Yamin and Gachoni cannot purport to have purchased the disputed land or portions thereof.

70. The upshot is that the decision of the trial court was right in principle and correct in law and we uphold it. We also uphold the various orders issued by that court.

The appeal is dismissed with costs.

Dated and delivered at Nairobi this 30th day of January, 2015.

P.N. WAKI

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

G.B.M. KARIUKI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR