**IN THE COURT OF APPEAL OF TANZANIA**

**AT ARUSHA**

**(CORAM: NDIKA, J.A., LEVIRA, J.A, And FIKIRINI, J.A)**

**CIVIL APPEAL NO. 179 OF 2019**

**TOM MORIO.....APPELLANT**

**VERSUS**

**ATHUMANI HASSAN** (Suing as the Administrator of the Estate of the Late Hassan Mohamed Siara)**.....1st RESPONDENT**

**WILFRED JUSTINE MOLLEL.....2nd RESPONDENT**

**AZANIA BANK LTD.....3rd RESPONDENT**

**(Appeal from the Judgment and Decree of the High Court of Tanzania, at Arusha)**

**(Opiyo, J.)**

**dated the 19th September, 2016**

**in**

**Land Case No. 40 of 2014**

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## JUDGMENT OF THE COURT

1st December, 2021 & 16th March, 2022.

**FIKIRINI, J.A.:**

The plaintiff, Athumani Hassan (*suing as the Administrator of the Estate of the Late Hassan Mohamed Siara*) hereinafter referred to as the 1st respondent, sued Tom Morio as 1st defendant, Wilfred Justin Mollel as 2nd defendant, and the Azania Bank Limited as 3rd defendant, in Land Case No. 40 of 2014, before the High Court of Tanzania, at Arusha, hereinafter

referred to as the appellant, 2nd and 3rd respondents respectively. Facts, as pleaded in the plaint, are that the late Hassan Mohamed Siara had mortgaged his house situated on Plot No. 39 Block "G" area F, Zaramo Street, Arusha Municipality, comprising of a Certificate of Title number 23262 (the suit property). On 25th March, 2013, the 3rd respondent released the Certificate of Title to the 2nd respondent, whom the 3rd respondent knew as Hassan Mohamed Siara.

The appellant and 2nd respondent purportedly entered into a sale agreement on the suit property on 27th September, 2013, for a sum of TZS. 284,000,000/. The 1st respondent learnt of the sale transaction in October, 2013, but there seemed to be no action taken until June 2014, when he sued all the three defendants.

The 1st respondent sued the appellant and 2nd respondent, claiming that the sale transaction entered between them on 27th September, 2013, transferring ownership of the suit property without his knowledge, is null and void *ab-initio* for being tainted with fraud and misrepresentation. In the same spirit, the 3rd respondent was sued for negligently releasing the Certificate of Title number 23262, regarding Plot No. 39 Block "G" Area F to

the 2nd respondent without satisfying itself whether he was Hassan Mohamed Siara.

The 1st respondent prayed, among other things, for the court order, and a declaration that the sale transaction and the subsequent transfer of title between the appellant and 2nd respondent were null and void, that the 3rd respondent acted negligently in releasing the Certificate of Title number 23262, that the transfer effected on 3rd December, 2013 in the name of the appellant and ownership revert in the name of Hassan Mohamed Siara and the appellant return the original Certificate of Title for cancellation after the cancellation of the transfer which was effected on 3rd December, 2013 by the Assistant Registrar of Titles-Moshi, and costs of the suit.

The appellant, on his part, contesting the suit, contended that he purchased the suit property from Hassan Mohamed Siara, who is still alive, on 27th September, 2013, and transferred the title in his name through the office of the Assistant Registrar of Titles-Moshi on 3rd December, 2013. Thus disputed the claim that the sale is null and void *ab-initio* for being tainted with fraud and misrepresentation.

The 2nd respondent, in his written statement of defence, contested the averment in paragraph 9 of the plaint that after receiving the

Certificate of Title with number 23262, in respect of the suit property, from the 3rd respondent, he and the appellant entered into a sale agreement on 27th September, 2013.

Whereas, the 3rd defendant, in its written statement of defence, claimed that after the said Hassan Mohamed Siara, who had secured a loan from it, had serviced his loan, he requested his Certificate of Title back. The 3rd respondent released the Certificate of Title with number 23262 regarding Plot No. 39 Block ""G" Arusha Municipality, to Hassan Mohamed Siara, thus disputing the contention that it negligently released the Certificate of Title without satisfying itself, it was doing so to Hassan Mohamed Siara or his legal representative.

At the trial court, before commencement, the following issues were framed:

1. *Whether the sale agreement entered on 27th September, 2013 and subsequent transfer of Plot No. 39 Block "G" Area F, Arusha Municipality concluded between 2nd and 1st defendants was valid.*
2. *Whether the 3rd defendant was negligent in releasing the title deed 23262 to the 2nd defendant.*
3. *To what reliefs are the parties entitled.*

The 1st respondent, Athumani Hassan Mohamed Siara – the administrator of the deceased's estate, testified as PW1. In his evidence, the 1st respondent testified that Hassan Mohamed Siara took a loan secured by a mortgage over the suit property from the 3rd respondent before his death. This account was, though, recanted in cross-examination. He also testified that he did nothing following his appointment as the administrator of the deceased's estate. Since the family had opted not to distribute the deceased estate amongst the heirs. This evidence was supported by Amon David Siara, a relative present at the family meeting. Amon David Siara testified as PW4 at the trial court.

The 1st respondent, aware that the Certificate of Title in respect of the suit property was with the 3rd respondent, approached the 3rd respondent to confirm. And indeed, the 3rd respondent confirmed to the 1st respondent that the Certificate of Title was with it. The 1st respondent came to learn later after the 2nd respondent, who testified as DW4 at the trial, had informed him at the family meeting that he was the one who took the said title to the 3rd respondent, as security on loan taken without stating the amount. Despite the alert, the 1st respondent, in his capacity as

the administrator of the deceased's estate, never took any action against the 2nd respondent, nor did he bother to know if the loan was serviced or not. When cross-examined by the counsel for the appellant if he had finalized the administration of the deceased's estate, the 1st respondent admitted that he had never concluded or gone back to court for that, as required by the law.

On 22nd May, 2014, the appellant, through court brokers, issued a notice requiring vacant possession of the suit property. That is when it allegedly came to the 1st respondent's knowledge that the 2nd respondent had sold the suit property to the appellant, who testified as DW3 during the trial. The 1st respondent filed a *caveat* on 9th June, 2014, and filed Land Case No. 40 of 2014 before the High Court.

Hawa Hassan Mohamed Siara-PW2, Issa Swalehe Kieti-PW3, and Amon David Siara-DW4 testified for the plaintiff. PW2 testified knowing one of their late father's houses, located in the Arusha Municipality, to have been sold to the appellant by the 2nd respondent, who is his brother-in-law, as he is married to Asha Hassan Mohamed Siara, his biological sister. In her evidence, PW2 testified that the 2nd respondent was handed the Certificate of Title for safekeeping. He instead used it to secure a loan

pretending to be the late Hassan Mohamed Siara. PW2 exonerated the appellant as innocent in the saga.

The appellant and 2nd respondent's case stated before the trial court was as follows: that the 2nd respondent and Asela Msando–DW2 knew each other from before. In early 2013, the 2nd respondent went to DW2's office and informed her that he had two houses he wanted to sell. One of the houses was an incomplete building at Mianzini being sold for TZS. 60,000,000.00 and another one at the Arusha bus stand being sold for TZS. 300,000,000.00. The 2nd respondent and DW2 visited and inspected the two houses.

From the information, DW2 took the liberty to inform the appellant, whom she had known since 2011, about the houses on the market for sale. The appellant and the 2nd respondent came to know each other in 2013, after being introduced by DW2. The 2nd respondent was introduced as Hassan Mohamed Siara, the house vendor. Together, they visited and inspected the houses, and later at Advocate Maro's office, the price was negotiated. From the initial price of TZS. 300,000,000.00 the price was reduced to TZS. 284,000,000.00, and the sale agreement concluded. Present at Advocate Maro's office were DW2, the 2nd respondent who

featured as Hassan Mohamed Siara, the appellant, and the 2nd respondent's wife, Asha Hassan Mohamed Siara. The 2nd respondent produced a copy of the Certificate of Title and a driving licence in the name of Hassan Mohamed Siara and photos upon request. After the transaction was concluded and the 2nd respondent paid in cash, he handed the original Certificate of Title to the appellant. The sale agreement signed by Advocate Deo Urassa at Advocate Maro's office was witnessed by Yahya Abdallah Nkya-DW1, who knew the 2nd respondent since 2009 under the name Hassan Mohamed Siara, and had assisted him in preparing his audited accounts for his business. Others present as witnesses were Frimati Francis Mrosso, who witnessed on behalf of the appellant, whereas Asela Msando-DW2, and Asha Hassan Mohamed Siara, the 2nd respondent's wife, did so on behalf of the 2nd respondent. The sale transaction was between the appellant and Hassan Mohamed Siara, who was identified as Wilfred Justine Mollel-DW4 by DW1, DW2, and the appellant.

Upon conclusion of the transaction, the appellant proceeded to effect the transfer and, in December, 2013 procured a Certificate of Title in his name. Up until when the suit was filed by the 1st respondent, who was appointed as the administrator of the deceased's estate, the appellant had

all along known the 2nd respondent as Hassan Mohamed Siara and not as Wilfred Justine Mollel.

Through Evarist Muhogosi, a Branch Manager with Azania Bank Limited-Mbauda branch, who testified as DW5, the 3rd respondent's laid out, before the trial court, its role in the unfortunate tale of fraud and misrepresentation. According to DW5, in January, 2009, Hassan Mohamed Siara, who was known to DW5, went to the bank, and a savings account was opened for him. This came to fruition after the customer met the requirements, which included filing an account opening form and customer information form (CIF) plus the annextures. In this instance, Hassan Mohamed Siara attached his TIN certificate with number 0042870, business licence, identity card, and photos, all in his name.

After opening the account, Hassan Mohamed requested a loan of TZS. 35,000,000.00 based on the loan application filed on 3rd February, 2009. As part of its operating procedures, the bank visited the business site cum security to ascertain its viability. Hassan Mohamed Siara and his wife were found at the cosmetics shop, situated at the main bus stand. Satisfied with the evaluation, the 3rd respondent advanced Hassan Mohamed Siara a loan of TZS. 30,000,000.00. A mortgage deed was signed following Hassan

Mohamed Siara submitting an original Certificate of Title, spousal consent, and affidavits to confirm signatures as exhibited in exhibit D7 collectively. Hassan Mohamed Siara paid the loan taken fully, warranting him to apply for another loan of TZS. 60,000,000.00. He was advanced another loan after signing a deed of variation. The repayment of the second loan was restructured four times, as exhibited by Hassan Mohamed Siara's letters to the 3rd respondent as shown in exhibit D10. Finally, on 27th March, 2013, after clearance of the loan facility advanced to him, Hassan Mohamed Siara requested the release of the Certificate of Title pledged as security, which the 3rd respondent complied with.

In addition to parties' evidence, the court also received the following exhibits: letters of administration of the late Hassan Mohamed Siara's estate admitted as exhibit P1, the notice to vacate the suit property dated 22nd May, 2014 admitted as exhibit P2, the sale agreement signed on 27th September, 2013 admitted as exhibit D1, driving licence no. 4000230462 belonging to the 2nd respondent, in the name of Hassan Mohamed Siara admitted as D2, account opening form, signature specimen card and Tax Identification Number (TIN) collectively admitted as exhibit D3, accounting opening form (form C) of Hassan Mohamed Siara admitted as exhibit D4,

loan application form and loan application letter admitted as exhibit D5 and mortgage deed and proof of mortgage registration with spousal consent, affidavit to confirm signatures, Hassan Mohamed Siara's affidavit admitted and collectively marked as D7. Loan application form and letter and letter of offer collectively admitted as D8, deed of variation and spouse consent as exhibit D9, letters from Hassan Mohamed Siara dated 20th October, 2011, 2nd August, 2012, 1st June, 2012 and 3rd May, 2013 as exhibit D10, and letter of release of the title deed to Hassan Mohamed Siara as exhibit D11.

From the evidence furnished, the Judge found that the 2nd respondent's fraudulent acts of impersonation never made him acquire good title over the suit property to warrant passing it to the purchaser (the appellant), thus declaring the sale null and void *ab-initio*. The Judge exonerated the 3rd respondent from the liability of negligently releasing the suit property Certificate of Title. Therefore the trial court entered judgment in favour of the 1st respondent by declaring the sale and transfer void and proceeded to order for the return of the original Certificate of Title, revocation of transfer effected, and return of the original title. Furthermore, it ordered for the 1st defendant's recovery from the 2nd

defendant, the purchase price of Tzs. 284, 000,000/= paid, with interest at 9% per annum from the date of the agreement to the date of the full payment plus costs to be borne by the 2nd defendant.

Aggrieved by the judgment and decree of the High Court, the appellant preferred this appeal consisting of 10 points of grievances, namely:

1. *That, the Honourable trial Court erred in law and, in fact, for not holding the appellant was a bonafide purchaser for value without adverse notice.*
2. *That, the Honorable trial Court erred in law and, in fact, in not holding that the 1st respondent at worst colluded with the 2nd respondent to defraud the appellant.*
3. *In the alternative, and only in the alternative, the trial Court erred in law and, in fact, in not holding that the 1st respondent negligently blessed the 2nd respondent's defrauding of the appellant.*
4. *The trial Court erred in law and, in fact, in not holding that the 1st and the 2nd Respondents cannot benefit from their own wrongs since none of them had clean hands in the matter.*
5. *That, the Honorable trial Court erred in law and, in fact, by ordering the Appellant to return the original Certificate of*

*Title No. 23262 Plot No. 39 Block G situated in Arusha Municipality to the Assistant Registrar for cancellation.*

6. *That, the Honorable court erred in law and in fact by ordering the Assistant Registrar of Titles of Moshi to revoke the transfer dated 3rd December, 2013 effected in the name of the Appellant in respect of Plot No. 39 comprised in Certificate of Title No. 23262, Block G and revert in the name of Hassan Mohamed Siara.*

7. *That, the Honorable trial Court erred in law and, in fact, by ordering the Assistant Registrar of Titles, Moshi, to return the original Certificate of Title No. 23262 Plot No. 39, Block G to the 1st Respondent after the cancellation of the transfer effected on 3rd day of December, 2013.*

8. *That, the Honorable trial Court erred in law and in fact by ordering recovery of the purchase price to the tune of TZS 284,000,000/= with the interest of 9% per annum from the date of agreement to the date of full payment by the Appellant from the second Respondent without considering the fact that the Appellant is the bonafide purchaser for value without adverse notice.*

9. *That, the Honorable trial Court erred in law and in fact in entering judgment and decree with costs in favor of the 1st Respondent.*

10. *That, the decree of the trial Court is otherwise faulty and wrong in law.*

On 1st December, 2021, when the appeal came for hearing, Mr. Melchisedeck S. Lutema and Mr. Andrew Akyoo learned counsel appeared for the appellant. In contrast, Mr. Issa Rajabu Mavura, learned counsel, appeared for the 1st respondent, and Ms. Edna Mndeme learned counsel, and Mr. Wanyancha Martin appeared for the 2nd and 3rd respondents, respectively.

Getting the ball rolling, the appellant's counsel adopted the written submission he filed and outright declared the appellant was a bonafide purchaser for value without adverse notice. Assigning reason for his position, he contended that: **one**, the 1st respondent (PW1) is the one who built the environment leading to the fraud which occurred. After being appointed the administrator of the deceased's estate, he was required to accomplish his duties by submitting the statement regarding the deceased's estate to the court within four months. Had he done that, the sale on 27th September, 2013 would not have occurred. Mr. Lutema referred us to page 183 of the record of appeal. In furthering his submission, Mr. Lutema, contended that the 1st respondent cannot now come to court seeking justice after failing to fulfill his obligation. **Two**, as reflected on page 318 of the record of appeal, the 1st respondent stated to

have not taken action after learning that the 2nd respondent (DW4) had mortgaged the suit property to the 3rd defendant. That was in between 2012-2013. As reflected on page 13 of the supplementary record of appeal, the 1st respondent contributed to deceiving the appellant by his inaction, he stressed.

**Three**, that the 1st respondent lied in his plaint, particularly in paragraph 6, when he stated that the late Hassan Mohamed Siara, mortgaged the suit property to the 3rd respondent and obtained loan, and blamed the 3rd respondent for negligently releasing the title deed, the fact which he later renounced by confessing that the 2nd respondent is the one who took the loan under the deceased's name. His case was thus founded on fraud.

The appellant's counsel further contended that the 2nd respondent was using and introducing himself in the deceased's name. All people believed him to be Hassan Mohamed Siara, as shown on page 361 of the record of appeal. Also, he had the original Certificate of Title in the name of Hassan Mohamed Siara. Aside from the appellant, DW1, DW2, and Advocate Maro, all fell prey to the 2nd respondent's fraud. With all that in

place, why should the appellant not fall prey to that? Questioned the appellant's counsel.

**Four**, Hawa Hassan Mohamed-PW2, on page 328, affirmed that the appellant is innocent as the 2nd respondent used his late father's name. The 3rd respondent also knew the 2nd respondent as Hassan Mohamed Siara, as reflected on pages 362-367. The 2nd respondent, when opening a bank account, had all the required documents presented to the 3rd respondent in the name of Hassan Mohamed Siara. The 2nd respondent and 3rd respondent registered mortgage was in the stated names as shown on pages 211-230. The appellant counsel wondered if the bank could not detect that, how could it be expected for the appellant to find out?

**Five,** the 2nd respondent's wife, also played a part when she admitted that the 2nd respondent was Hassan Mohamed Siara and signed a spousal consent. If the wife, siblings, bank, Tanzania Revenue Authority (TRA), Land Registry, and identification documents all indicated he was Hassan Mohamed Siara, and were deceived, the appellant was thus not an exception. Fortifying his submission, he referred us to the case of **Suzana S. Waryoba v Shija Dalawa**, Civil Appeal No. 44 of 2017 (unreported).

On the concept of a bonafide purchaser, the appellant counsel, in reference to his submission, elaborated on the three kinds of notices, of which he contended none was availed to the appellant. There was neither actual notice nor constructive notice or imputed notice. On actual notice, the appellant's counsel, in his submission, cited the case of **Llyod v Banks** (1868) 3 ChD 488, whereas on constructive notice referred us to the case of **Bailey v Barnes** (1894) 1 ChD 25 at page 35.

In addition to the above, he also directed us to section 26 (c) of the Law of Limitation Act, Cap 89 R.E. 2002 (the Law of Limitation Act) and 67 (b) (i) and (ii) of the Land Act, Cap. 113 R.E. 2002 (the Land Act). Both illustrate who a bonafide purchaser is. He insisted that the High Court should have pronounced that the appellant was a bonafide purchaser instead of entering judgment favoring the 1st respondent who kept quiet and yet won.

The appellant's counsel, in the written submission, showed the vigilance and caution taken by the appellant by inspecting the property and met the 2nd respondent with his wife and children living at the suit property. And when he inquired, the wife nodded with approval that her husband was Hassan Mohamed Siara. Buttressing his point, he referred us

to the cases of **Hunt v Luck** [1902] 1 Ch 428, **Williams & Glyn's Banks v Boland** [1981] AC 487, and **Hodgson v Marks** [1971] Ch 992, on equitable rights when inspecting the property.

In a further endeavor to elucidate on his point, the appellant's counsel also cited the case of **Ismail & Another v Njati** [2008] 2 EA at page 155, where the Court, despite the revocation of grant of probate and letters of administration, the validity of the sale which had already taken place was not affected as there was no notice of any encumbrances at the time of sale.

We probed the appellant's counsel on the alleged loan secured by the deceased as put forward by the 1st respondent. Referring us to page 318, he responded that the 1st respondent knew that the 2nd respondent took the loan in 2012 – 2013, as he informed them at the family meeting.

Replying to the appellant's submission, counsel for the 1st respondent outright opposed the appeal after adopting the written submission, which he filed on behalf of the 1st respondent. He contested the assertion that the appellant is a bonafide purchaser for value. He argues that the appellant was aware of the fraud committed by the 2nd respondent, referring us to pages 359-361 of the record of appeal. The evidence on

record is that the appellant instructed DW2 by ordering the 2nd respondent to change his name from Wilfred Justine Mollel to Hassan Mohamed Siara to get a loan and retrieve the Certificate of Title. Referring to pages 13, 14, and 15 of the supplementary record of appeal, the 2nd respondent testified that he went to TRA and changed names in his driving licence from Wilfred Justin Mollel to Hassan Mohamed Siara.

Counsel for the 1st respondent was thus of the submission that the appellant knew that the one selling the suit property was not the owner. Discounting the appellant's counsel submission that the 1st respondent did not take action, counsel for the 1strespondent contended that the matter was reported to Police, as seen on page 14 of the supplementary record of appeal. The appellant, 1st respondent, and Deo Urassa from Maro's advocates were summoned by Police. When inquired, Deo Urassa informed the Police that the house had not been sold, but the 2nd respondent took a loan and that his in-laws were aware. The 1st respondent's counsel further submitted that the 2nd respondent's signatures in the Certificate of Title and the sale agreement were not the same. And also, it was on record that the 2nd respondent changed the name in his driving licence on 22nd March, 2016, at TRA.

On the conduct of the 3rd respondent, the counsel for the 1st respondent contended that the bank policy on knowing your client (KYC) is usually conducted when one opens an account and not otherwise. In the present case, the 2nd respondent changed his driving licence on 22nd March, 2016, opened an account in 2009, business licence issued in 2004, and know your client exercise carried out after all the above, rendering it questionable. All the documents produced by the 3rd respondent had photos of Hassan Mohamed Siara, but before the court, the 2nd respondent appeared as Wilfred Justine Mollel. Based on all the above, he concluded that there was a fraud, referring us to the case of **Lazarus Estates Limited v Beasley** (1956) All ER 341 at page 345, cited in the written submission, in which the Court brought on board the principle that fraud unveils everything, and no court could allow that let alone win the case. Counsel for the 1st respondent urged us to order that the appellant and 2nd respondent's committed a crime.

When asked to submit on the transaction, counsel for the 1st respondent, without hesitation, declared the transaction illegal. Addressing on the High Court decision, he urged us to uphold the decision and maintained that the 2nd respondent should give back TZS. 284,000,000.00

he received from the appellant. We invited counsel for the 1st respondent to submit on the pleadings as reflected on page 13 of the record of appeal if the pleadings were at variance with the evidence. The 1st respondent's answer to the question was that the plaintiff was told by his father of his intention to secure a loan and construct a multistory building.

The 2nd respondent's counsel, on her part, prefaced her submission by adopting the written submission filed, and in her short submission, leaning towards supporting the 1st respondent's submission rather than the 2nd respondent, she stressed that the appellant was not a bonafide purchaser. Without elaborating why she proceeded to submit that the case before the court had nothing to do with the appointment of the administrator of the deceased's estate or anything to do with the administrator's duties.

Submitting on the 2nd respondent's role, she discounted the submission on the 2nd respondent's signature in the Certificate of Title. Attacking the appellant, she argued that he should have noted that the signatures on the Certificate of Title and driving licence differed if not part of the deal. Otherwise, the 1st respondent followed up on information that Hassan Mohamed Siara had taken a loan. However, in the follow-up, he

was confused about who took the loans. Since there were no dates mentioned, it cannot thus be said the pleadings were at variance with the evidence, she argued. She, therefore, urged us to dismiss the appeal.

Mr. Martin, in his submission after canvassing the grounds of appeal and did not find anything implicating the 3rd respondent, prayed for the High Court decision as reflected on page 290, exonerating the 3rd respondent to be upheld. On account opening as reflected on pages 192 - 193, in 2009, the forms did not have the driving licence identity card referred. It was until 2014, as shown on pages 199-200 of the record of appeal, when the 3rd respondent requested more information, and that is when the 2nd respondent was called to fill in the form, the exercise he carried on 1st April, 2014, in fulfilling the bank procedure for updating customers' personal information.

Rejoining, the appellant's, reiterated his earlier submission on the appellant being a bonafide purchaser despite the discrediting submission by counsel for the 1st respondent. The appellant's counsel challenged the parties' attempt to bring in things, not in the pleadings. He challenged the 2nd respondent's assertion that he was convinced to change his name as not reflected in his written statement of defence appearing on page 48, nor

was DW2-Asela Msando cross-examined on that, referring us to pages 344-349 of the record of appeal. *First,* he contended that parties are bound by their pleadings, and *second,* the claim raised during defence is therefore not part of the pleadings and can at best be considered an afterthought.

Elaborating more on the case, he argued that what transpired was a family affair. Even the 2nd respondent's counsel exhibited that when submitting on behalf of her client, by weighing in supporting the submissions made on behalf of the 1st respondent. In his view, the blame had to start way back when the deceased was alive in 2009, as that was when the account was opened. Adding to that is that the 1st respondent acknowledged knowing the 2nd respondent was using the name Hassan Mohamed Siara. Also, the family consists of seven children; if there had been no collusion, there would not have been peace. All these examined together proved that the appellant is a bonafide purchaser.

Before we proceed, wish to state that, this being the first appeal, we are enjoined to reconsider and re-evaluate the evidence and draw our conclusions: See: **Okeno v R** (1957) E. A 32, **Peter v Sunday Post** (1958) 1 E.A. 424 and **Tanzania Sewing Machine Co. Ltd v Njake Enterprises Ltd**, Civil Appeal No. 15 of 2016 (unreported). The most basic

things we shall be looking at would be the evidence and conclusion arrived at. If there is no evidence to support a particular conclusion, or if the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has gone wrong, that is when we can intervene. However, once the issue of concern is witness credibility which is the domain of the trial court, we rarely interfere.

In examining the appeal before us, we have dispassionately considered the learned counsel submissions, arguments, the record of appeal, cited references, and other things, amongst the undisputed facts. We entirely agree with the appellant's counsel that the following facts are not at issue: *one,* that the disputed suit property was sold to the appellant by the 2nd respondent who represented himself as Hassan Mohamed Siara its owner. *Two,* it is a settled legal principle that no one can give title which he does not have to another person (*Nemo dat quod non habet rule*). Nevertheless, there are exceptions to the above stated settled legal position as illustrated in the case of **Suzana Waryoba** (supra) in which the Court failed to fault the second appellate court on its conclusion that the respondent was a bonafide purchaser for value, after receiving the purchased land in good faith and without knowledge of any fraud. Also, in

the case of **Ismail & Another** (supra), the Court failed to fault the validity of the sale, which had already taken place as there was no notice of any encumbrances at the time of sale. In the present case, similarly, the appellant purchased the suit property in good faith after being introduced by DW2 to the 2nd respondent, who camouflaged himself as Hassan Mohamed Siara. Therefore, the appellant did not know about fraud being committed by the 2nd respondent.

We thus find the vital issue to be answered in the instant appeal turns to be whether the appellant was a bonafide purchaser for value without adverse notice when the suit property was purchased. We feel this one ground will embrace all other grounds in one way or another.

While the appellant's counsel vehemently holds that the appellant is a bonafide purchaser for value, hence faulting the High Court decision, the 1st and 2nd respondents do not find so. The 3rd respondent opted to leave it upon us, satisfied that the appeal had no potential adverse outcome on it.

From the evidence gathered and submissions made, we entirely agree with the appellant's counsel on the following: **one**, that the 1st respondent pleaded lies and adduced evidence contrary to what was in his pleadings. In the plaint, the 1st respondent in paragraph 6 pleaded that the

late Hassan Mohamed Siara had mortgaged the suit property to the 3rd respondent and obtained a loan facility. There was no scintilla of evidence at the trial that was led to prove that. Knowing that parties are bound by their pleadings as stated in the case of **Scan-Tan Tour Ltd v The Catholic Diocese of Mbulu**, Civil Appeal No. 78 of 2012 (unreported), the 1st respondent was thus expected to lead evidence supporting the averments in the pleadings. There are of course scenarios which can be considered constructively by the court as illustrated in the case of **Jaluma General Supplies Ltd v Stanbic Bank (T) Ltd**, Civil Appeal No. 11 of 2013, related to pleadings, such as when there has been an amendment to the pleadings as decided in the case of **Galaxy Paints Company Ltd v Falcon Guards Ltd** (2000) 2 EA 385 and when the court is invited to decide on an unpleaded issue or if the advocate for the appellant led evidence and addressed the court on it as illustrated in the case of **Agro Industries Ltd v Attorney General [1994] T.L.R. 43,** both cases cited in **Jaluma** (supra). Regrettably, there was no amendment of the pleadings in the case before us, nor was there evidence led on the unpleaded issue upon which the court was invited to decide. What was in the plaint was an unsubstantiated claim that Hassan Mohamed Siara secured a loan from the

3rd respondent upon a mortgage over the suit property. On page 313, the 1st respondent, when cross-examined by the counsel for the appellant (then 1st defendant), had this to say:

> *"My father did not take a loan from the bank. Paragraph 6 of the plaint is not true".*

The pleadings and later on his evidence rendered the 1st respondent's pleadings questionable since the averment in the pleadings and evidence were at variance and easily led to a conclusion that the averment was a fabricated story, if not a pure lie.

**Two**, the 2nd respondent claimed that he was convinced to change his name by the appellant, who asked DW2-Asela Msando to approach the 2nd respondent. This claim was never raised in the 2nd respondent's written statement of defence. The allegation was raised during the defence phase, notably when the 2nd respondent testified. By then, the appellant and DW2 – Asela Msando had already testified. When we say parties are bound by their pleadings, the requirement does not only stop with the plaintiff but also other parties. It was the 1st respondent counsel's submission that the 2nd respondent, under the appellant's instructions through DW2-Asela Msando, was urged to change the name in his driving licence so that it

could tally with the other documents which were in the name of Hassan Mohamed Siara, is short of being plausible. DW2, who was stated to be the one instructed, came to testify on 13th May, 2016, as reflected on pages 344-349, and she was never cross-examined on that fact. Neither was DW3, who testified on 10th June, 2016, as indicated on pages 351-353, who was stated to have given the instructions to DW2.

It is trite law that failure to cross-examine a witness on a crucial matter ordinarily implies the acceptance of the truth of the witness evidence See: **Damian Ruhele v. R,** Criminal Appeal No. 501 of 2007 (unreported). In the same parity of reasoning, it was observed in **Nyerere Nyague v. R,** Criminal Appeal No. 67 of 2010 (unreported) that:

> *"It is a matter of principle; a party who fails to cross-examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said. "*

The claim that the appellant instructed DW2 to ask the 2nd respondent to change the name in his driving licence so that the names in the documents can all read the same was vital in determining as to whether the appellant had a notice and, as such, could not rely on the defence that he was a

bonafide purchaser for value without notice. This evidence is lacking to dent or blemish the appellant's assertion that he was a bonafide purchaser for value without notice.

**Three,** the 2nd respondent operated and acted as owner of the suit property with the connivance of the deceased and later of the 1st respondent as the deceased's representative. As reflected on page 318, even after becoming aware, the 1st respondent did not take any action against the 2nd respondent, even though he was aware that the suit property was subject to a mortgage. As the administrator of the deceased estate, the 1st respondent neither fulfilled his duties nor exercised powers conferred upon him under paragraph 11 of the Fifth Schedule to the Magistrates' Courts Act, Cap. 11 R.E, 2002 (the MCA) and The Primary Courts (Administration of Estates) Rules, GN. No. 49 of 1971. Even though the family had opted not to distribute the properties among themselves, the 1st respondent was still obligated to file an inventory giving an account of all of the deceased's assets, paid creditors, and collected debts, with the Primary Court which appointed him. Had he keenly and diligently executed his duties, he would have come across the deceit posed by the 2nd respondent.

**Four,** the 2nd respondent's case is purely founded on fraud. He started his fraudulent acts even before the passing on of the late Hassan Mohamed Siara. In 2009 he opened a bank account with the 3rd respondent's bank and continued operating it after Hassan Mohamed Siara's death. On 361 of the record of appeal, the 2nd respondent admitted to have been using the late Hassan Mohamed Siara's name, and all people believed him to be. Even DW1, in his evidence, stated knowing the 2nd respondent in that name.

Absolving the 1st respondent from the liability, the 1st respondent's counsel argued that the issue was reported to Police. The issue was indeed reported to the Police rather belatedly, as reflected on pages 13-14 of the supplementary record of appeal, but had the 1st respondent acted appropriately, the situation would not have reached this far. The 1st respondent had all the means of preventing the 2nd respondent's fraudulent acts and misrepresentation and would have stopped this from happening long ago. Therefore, his inaction limits his right to crave justice on the one hand, and on the other, gives the appellant room to claim 1st respondent's contribution, which we do not have any reason to disagree with.

In an effort to hold the 3rd respondent accountable, the 1st respondent's counsel challenged its way of doing things, especially knowing your client policy (KYC), applicable when opening an account. We agree to the concern and questionability of the KYC policy; however, considering that the business licence was that of 2004, the account opened in the name of Hassan Mohamed Siara in 2009, and that all documents furnished carried that name, relating the application of KYC to the facts was not possible. By the time the name change occurred, or the 3rd respondent raised an eyebrow to ask for an additional document, it was in 2013, which by then had already occurred. The 3rd respondent would have no reason to doubt that the 2nd respondent was not the actual Hassan Mohamed Siara, he claimed to be, as all the documents he presented to the bank had the name and photo of Hassan Mohamed Siara. Having stated so, we nonetheless do not put past us that the KYC policy should be effectively used to achieve the intended purpose.

Based on the evidence on record, the bank, TRA, Land Registry, DW1, DW2, and the appellant himself all fell prey to the 2nd respondent's fraud, impersonating himself as Hassan Mohamed Siara. Since there was no evidence that the appellant knew this, his claim that he was a bonafide

purchaser for value becomes plausible. We are persuaded based on the evidence furnished to the court and the appellant's counsel's submission.

We equally concur that the circumstances in the case of **Suzana S. Waryoba** (supra) are not different from those featured in the present case. That the information relied on by the bank to open an account, issue loans, the same information relied on by the Land Registry in registering the mortgage, TRA to change the driving licence, presentation made before DW1, DW2, Deo Urassa and production of the number of documents in the name Hassan Mohamed Siara showing that he was the bearer of the name would, by any standard make one to believe that person is the one he claims to be, is the same information relied on by the appellant. It was until the 1st respondent filed the case and, of course, approached the 1st respondent as indicated on page 353, wanting them to discuss. The appellant agreed and attended a family meeting convened. The 2nd respondent was one of the attendees at the family meeting, which consisted of about fifteen people. That could be another opportunity for the appellant to prove that the 2nd respondent was Wilfred Justine Mollel and not Hassan Mohamed Siara as he presented himself to be. Therefore, believing or demanding the appellant go beyond that in verifying the 2nd

respondent's name or otherwise would be a stretch of the imagination. We find the case of **Lloyd** (supra) relevant as the requirement to stop the appellant from claiming that he was a bonafide purchaser for value stops if it is proved he had actual, constructive, or imputed notice. There was no iota of evidence indicating the appellant had knowledge that the vendor had no good title in the present case.

Counsel for the 1st respondent and counsel for the 2nd respondent discounted the appellant's submission on this but have failed to establish that the appellant was aware that he was dealing with a fraudster. While we agree in principle with the decision in the case of **Lazarus Estates Limited** (supra) that fraud unveils everything, we have not been able to find any proof that the appellant was aware or part of the fraud committed by the 2nd respondent. The availed evidence leans more towards discharging the appellant from prior knowledge. This is, however, a different scenario to the 1st respondent who was trying to persuade the court that he was also a victim of the 2nd respondent's fraudulent activities.

Examining the whole evidence, it is clear that the appellant had neither the actual notice, constructive and/or imputed notice, to warrant us to decline his invitation that he was a bonafide purchaser for value.

As submitted by the appellant's counsel, the appellant is covered under section 26 (c) of the Law of Limitation Act, on the effect of fraud and mistake. We agree that since he was not aware or had no notice in any manner whatsoever about the suit property and its alleged owner, he was without a doubt a bonafide purchaser.

Furthermore, the law in our country protects the bonafide purchaser for value who purchased the property in good faith and without any notice of encumbrance, as it occurred to the appellant. The provisions of Section 67 (b) (i) and (ii) of the Land Act, 1999, protect the purchaser who has evidently done his part.. The provision on section 67 (b) (i) (ii) of the Land Act, reads as follows:

> *"67* (b) *A person obtaining a right of occupancy or a lease by means of a disposition not prejudicially affected by notice of any instrument, fact or thing, unless: -*
>
> (i) *It is within that person's knowledge, or would have come to that person's knowledge if any inquiries and inspections had been made which ought to have been made by that person,* or
>
> (ii) *It has in disposition as to which a question of notice arises, come to the knowledge of the*

*person's advocate or agent as such if such inqueries had been made as ought reasonably to have been made by that advocate or agent as such."*

As pointed earlier in this judgment, it was not within the appellant's knowledge that the suit property had nothing to do with the 2nd respondent. The way the bank, TRA, Land Registry, DW1, DW2, and family members were deceived is the same way the appellant was. The 2nd respondent does not dispute whether he impersonated Hassan Mohamed Siara or sold the suit property. On page 359, the 1st respondent stated that the late Hassan Mohamed Siara allowed him to use the Certificate of Title. He also did not dispute that, as shown on page 358, he signed in a letter dated 27th March, 2013, requesting to withdraw the mortgage. However, he claimed the Certificate of Title was handed to the appellant and not him in his presence. The appellant was never cross-examined on that fact. Logically, it does not sound sensible. How could the 3rd respondent hand the Certificate of Title to the appellant whom they did not know, instead of the 2nd respondent they had been dealing with? We find it is more credible the other way round. And even if assuming that is what transpired still, it could be based on the existing agreement between the 2nd respondent and

the appellant after the latter had presumably been assisted in repaying the remaining part of the loan.

Given what transpired, it is obvious, and we agree with the appellant's counsel, that the 1st and 2nd respondents cannot benefit from their wrongs since none of them had clean hands in the matter. Had the trial court considered all these, certainly it would not have ordered the appellant to return the original Certificate of Title no. 23262 Plot 39 Block "G" Area F located in Arusha Municipality to the Assistant Registrar for cancellation, at the same time order revocation of the transfer effected on 3rd December, 2013.

The above conjecture augment the 3rd respondent's evidence in proving two things: *one*, that the 2nd respondent opened and operated the bank account masquerading as Hassan Mohamed Siara, and *two*, the account was opened before the deceased passed away and was still operational even after the passing on of Hassan Mohamed Siara.

In addition to the information on record, we have equally reasoned with the appellant's counsel. Considering the family consisted of seven children, there must have been collusion for what had transpired to go unnoticed, or there would be no peace amongst them. Indeed, putting all

these together, it is hard to conclude otherwise, except that the appellant was a bonafide purchaser for value, as he purchased and received the suit property in good faith and without knowledge of any fraud. See: **Mire Artan Ismail & Another v Sofia Njati**, Civil Appeal No. 75 of 2008; **Millicom (Tanzania) N.V. v James Alan Russelll Bell & 5 Others**, Civil Revision No. 3 of 2017 (both unreported) and **Dorothy Hall v Maria Amina Morel & 2 Others**, Civil Appeal Seychelles Court of Appeal 22 of 2017. In the **Dorothy's** case citing other cases, the Court tried to elucidate on good faith to be exhibited by the purchaser by stating:

> *"Good faith on the part of a purchaser is a firm belief on his part that the vendor of a property has the right and the capacity to sell it."*

Although the facts in each of the above cited cases differ, the courts agreed that a person is a bonafide purchaser for value once there was no notice of any encumbrance at the time of sale. In the present appeal, there is abundant evidence that the appellant believed the 2nd respondent was actually Hassan Mohamed Siara, the property owner, and could sell it to the appellant. The same way the bank, TRA, Land Registry, DW1, and DW2 all fell prey to the 2nd respondent's fraud, impersonating himself as Hassan Mohamed Siara, is the same way the appellant was deceived.

From our discussion above, we are satisfied that the appellant is a bonafide purchaser for value without adverse notice and find the appeal merited. The High Court judgment and decree dated 19th September, 2016 in Land Case No. 40 of 2014 is quashed and order set aside. The appellant is declared the true and rightful owner of the landed property known as Plot No. 39 Block "G" Area F, Zaramo Street, Arusha Municipality.

Appeal allowed in entirety with costs against the 1st respondent.

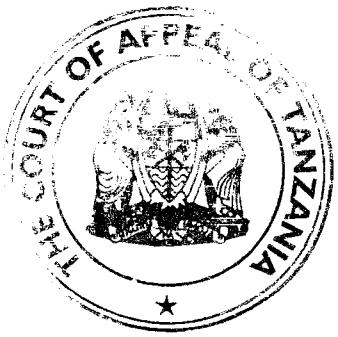
**DATED** at **DAR ES SALAAM** this 11th day of March, 2022.

G. A. M. NDIKA
**JUSTICE OF APPEAL**

M. C. LEVIRA
**JUSTICE OF APPEAL**

P. S. FIKIRINI
**JUSTICE OF APPEAL**

The judgment delivered this 16th day of March, 2022 in the presence of Ms. Dora Mallaba, learned counsel for the appellant who is holding brief for Mr. Issa Rajabu Mavura, counsel for the 1st respondent, Ms. Edna Mndeme and Mr. Wanyancha Martin, learned counsel for the 2nd & 3rd respondents, is hereby certified as a true copy of the original.




H. P. NDESAMBURO
**SENIOR DEPUTY REGISTRAR**
**COURT OF APPEAL**