



**Kibwana & another v Mwango & 4 others; Mwango (Petitioner) (Succession Appeal E008 of 2021) [2023] KEHC 27129 (KLR) (21 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 27129 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
SUCCESSION APPEAL E008 OF 2021  
MS SHARIFF, J  
DECEMBER 21, 2023**

**BETWEEN**

**ANTONY OCHIENG KIBWANA ..... 1<sup>ST</sup> APPELLANT**

**EDWINA MILLICENT ANYANGO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ALICE ACHOLA MWANGO ..... 1<sup>ST</sup> RESPONDENT**

**TOM ONYANGO MWANGO ..... 2<sup>ND</sup> RESPONDENT**

**HELLEN ATIENO MWANGO ..... 3<sup>RD</sup> RESPONDENT**

**EVANS OTIENO MWANGO ..... 4<sup>TH</sup> RESPONDENT**

**AGNES AKOTH MWANGO ..... 5<sup>TH</sup> RESPONDENT**

**AND**

**JOTHAM OJUOK MWANGO ..... PETITIONER**

*(Being an appeal from the judgment of Hon. C. L. Yalwala in MASENO  
SPMCC SUCC CAUSE NO.3 OF 2017 delivered on 29/9/2021)*

**JUDGMENT**

**Background**

1. Jotham Ojuok Mwango (the Petitioner) applied and was granted letters of administration to the estate of Amos Mwango Guya on the 14/3/2018 at the Maseno Magistrate's court. On the 24<sup>th</sup> of July 2019 Alice Achola Mwango (1<sup>st</sup> Respondent) filed an application dated 23/7/2019 seeking revocation of the grant on grounds that it was obtained through fraud and concealment of material facts.



2. Via a ruling dated 21/8/2019 the learned magistrate revoked the grant issued to Jotham Ojuok Mwango. On 9/9/2020 Anthony Millicent Kibwana and Edwina Millicent Anyango (1<sup>st</sup> and 2<sup>nd</sup> Appellants respectively) were by consent joined as Interested parties in the suit. The magistrate then listed the matter for fresh hearing as between the Objectors, Petitioner and the Interested Parties.
3. The Interested Parties' claim on the estate was that they had bought parcels of land from the Petitioner at a total consideration of Kshs.1,600,000/= and had therefore acquired the status of beneficiaries of the estate of the deceased.
4. On 29/9/2021 after due consideration of the testimony, pleadings and submissions the Magistrate ruled that letters of administration be issued to Alice Mwango and secondly that the Interested Parties were not beneficiaries as contemplated by Section 29 of the Law of Succession Act. Additionally, the Magistrate found that the Interested Parties' only recourse was to file a suit at the Environment and Land Court, which was the right forum to adjudicate issues of title to land.
5. The Appellants however found this ruling dissatisfactory and filed this appeal on the following grounds: -
  - i) The magistrate erred in law by dismissing and refusing to appreciate that the Appellants were bona fide purchasers for value who had valid title deeds that were obtained after due process.
  - ii) The learned trial magistrate erred in law and in fact by failing to appreciate the fact that the Appellants were protected as bona fide purchasers by section 93(1) and (2) of the Law of Succession Act.
  - iii) The learned magistrate erred in law and fact by stating that the Appellants recourse as interested parties could only be pursued in a different forum and not on the succession proceedings thereon.
  - iv) The learned Magistrate erred in law and fact by totally ignoring and failing to refer to the Appellants' written submissions and thus failing to appreciate that the Appellants had used resources to acquire the parcels they had bought from the Petitioner
  - v) The Learned Magistrate otherwise erred in law and in fact by failing to interrogate the evidence presented to him and deliberately trashing the evidence adduced by the Petitioner Jotham Ojuok Mwango to the effect that he used money from the Appellants to pay out a debt that the 1<sup>st</sup> Objector had incurred on the same parcel of land and thereby prejudiced the Appellant's case and position.
  - vi) The Learned Magistrate erred in law and fact by failing to consider the Appellants' submissions.
6. On the strength of the foregoing the Appellants urge this court to set aside the Magistrate's ruling with costs to the Respondent.
7. On 5/8/2022 directions were taken on disposal of the appeal with parties agreeing to file written submissions. The Appellants filed their submissions on 27/4/2023, while the 2<sup>nd</sup> Respondent filed submissions dated 31/7/2023. Neither the Petitioner nor the remaining Respondents filed any submissions.



## **Appellant's Submissions**

8. In their submissions dated 26<sup>th</sup> April 2023 the Appellants argued grounds 1, 2, 3 separately and grounds 4, 5, 6 together. On ground 1 the Appellants contended that they were bona fide purchasers for value. They argued that they were unaware of any fraud and had acquired their title deeds using the correct procedure. In buttressing the doctrine of bona fide purchaser for value the Appellants reiterated that; they had certificates of title, purchased the property in good faith, had no knowledge of fraud, and the vendor had a valid title.
9. With regard to the 2<sup>nd</sup> ground the Appellants placed reliance on Section 93 (1) of the [Law of Succession](#) to the effect that: all transfers of any interest in immovable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid notwithstanding any subsequent revocation or variation of the grant. They placed reliance on the case of Naivasha Misc Succ Cause No. 4/2019 [In the matter of the estate of Simon Njogu Gicheni \(deceased\) Lucy Njeri Njogu v John Njenga & Anor](#)
10. As for ground 3 on their only recourse being filing of a suit at the Environment and Land Court the Appellants contended that they were protected by the provisions of section 93(1) of the [Law of Succession Act](#) hence their issues can only be addressed in a succession cause.
11. In respect of grounds 4,5, and 6 of the Memorandum of Appeal the Appellants submitted that the Magistrate erred in blatantly disregarding the fact that they had produced agreements evidencing purchase of land. Additionally, they argued that the magistrate openly ignored the Petitioner's direct evidence to the effect that he subdivided and sold the land in order to reimburse one Anjeline Amungo whom the 1<sup>st</sup> Objector had sold land to. They further faulted the Learned Magistrate for not taking into account that the Petitioner may not be in a position to refund the purchase price or give alternative parcels of land.

## **2<sup>nd</sup> Respondent's Submissions**

12. In his submissions dated 31/7/2023 the 2<sup>nd</sup> Respondent took a tangent that did not address the issue raised in the appeal. This court therefore finds them to be of no probative value.

## **Analysis and Determination**

13. After extensive analysis of the record of appeal and the submissions filed this court is of the opinion that the only issue that arises for determination is whether the Appellants can claim to be bona fide owners of the portions of the estate sold to them by the Petitioner. Before delving into this issue, it is important to reiterate that the role of a court in a first appeal, is to re-evaluate, re-analyse and re-consider the evidence and draw its own conclusions, giving due allowance to the fact that that it did not see the witnesses testifying. (see the case of *Selle & Another v Associated Motor Boat Co. Ltd. & Others* (1968) EA 123).
14. It is not in dispute that the grant obtained by the Petitioner on the 14/3/2018 was obtained through concealment of material facts. Indeed, this fact is acceded to by the Petitioner himself in the lower court. It is for this reason that the Magistrate proceeded to rightfully revoke and annul the grant. The question that follows therefore is whether the Petitioner could pass good title to the Appellants in the absence of a valid grant.
15. As noted earlier the acquisition of the grant from which the land was sold to the Appellants was tainted in fraud. The Petitioner could therefore not pass good title. It is trite law that no one can pass a better



title to land than that which he himself possesses. Justice Musyoka in *William Musyoka's casebook on law of succession* as at page 581 states that:

“Where the assets have been misapplied by personal representatives and are traceable into the hands of a particular person, the law allows the beneficiaries entitled to such assets to follow them into the hands of the person holding such property.”

16. In dismissing the Appellants' claim the learned magistrate stated that they did not meet the threshold of beneficiaries since they were not dependants as contemplated by Section 29 of the *Law of Succession Act*. He then went ahead to state that the only recourse available to them was to sue the Petitioner at the Environment and Land Court. This court is inclined to agree with the Magistrate. The Appellants are not dependants and the Petitioner did not have good title to pass to them. In defending their claim, the Appellants have relied on section 93 (1) of the *Law of Succession Act*, which unfortunately only applies to transfers not affected by revocation.
17. In this suit however the grant was validly revoked and annulled hence that section doesn't apply. Indeed, the magistrate was right in making a finding the issue of indefeasibility of title is the province of the Environment and Land Court. Pursuant to the provisions of article 162 (2) (b) of the *constitution of Kenya* 2010 and Section 13 of the *Environment and Land Court Act* No. 19 of 2011 The court of Appeal in the case of *Samuel Kamere v Land Registrar*, Kajiado Civil Appeal No.28 of 2005 the court delineated the conditions under which a person may be considered a bona fide purchaser for value as follows: -

“he must prove that he had acquired a valid and legal title, secondly that he carried out the necessary due diligence to determine the lawful owner from whom he acquired a legitimate title, and thirdly that he paid valuable consideration for the purchase of the suit property”.
18. The Appellants did not acquire valid title as the initial grant was vitiated by concealment of material facts and was as already stated subsequently revoked..
19. The upshot of the foregoing therefore is that the magistrate cannot be faulted for the findings he made. This appeal therefore lacks merit and is dismissed with no orders as to costs.

**DATED AND DELIVERED AT KISUMU THIS 21<sup>ST</sup> DAY OF DECEMBER 2023.**

**MWANAISHA. S. SHARIFF**

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**JUDGE**

