



**Ondiek (Suing as the administrator/legal representative of the Estate of Joel Ondiek Alwala) v Onyango & 3 others (Environment and Land Appeal E065 of 2021) [2023] KEELC 18829 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18829 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL E065 OF 2021**

**E ASATI, J  
JULY 13, 2023**

**BETWEEN**

**MOSES OTIENO ONDIEK (SUING AS THE ADMINISTRATOR/  
LEGAL REPRESENTATIVE OF THE ESTATE OF JOEL ONDIEK  
ALWALA) ..... APPELLANT**

**AND**

**BENTA AKINYI ONYANGO ..... 1<sup>ST</sup> RESPONDENT**

**BENTA AKINYI ONYANGO (SUED AS THE ADMINISTRATOR/  
LEGAL REPRESENTATIVE OF THE ESTATE OF CHARLES ONYANGO  
ALWALA) ..... 2<sup>ND</sup> RESPONDENT**

**JOSHUA AKEYO OGENDO ..... 3<sup>RD</sup> RESPONDENT**

**LAND REGISTRAR, AWASI ..... 4<sup>TH</sup> RESPONDENT**

*(Being an appeal from the judgement and decree of Hon. W. K. Onkunya dated and delivered at Kisumu on the 18th August 2021 in the original KISUMU CMC ELC NO. 60 OF 2020)*

**JUDGMENT**

**Introduction**

1. The appellant herein, Moses Otieno Ondiek, was the Plaintiff in Kisumu Cmc Elc No. 60 OF 2020 (the suit). He had, in his capacity as the administrator of the Estate of his father one Joel Ondiek Alwala (the deceased), sued the Respondents vide the plaint dated 28<sup>th</sup> July 2020. His case was that the deceased was the registered owner of a parcel of land known as North Nyakach/Agoro West/1403 (the suit land). That the husband of the 1<sup>st</sup> defendant one Charles Onyango Alwala, now also deceased, fraudulently



caused the suit land to be registered in his name, later subdivided it and a portion thereof sold and transferred to the 3rd Defendant. The appellant sought for the following relief in the suit: -

- a. A declaration that the transfer of land parcel North Nyakach/Agoro West/1403 into the names of the deceased 2<sup>nd</sup> Defendant and its subsequent sub-division to current titles North Nyakach/West Agoro/ 2083-2085 without a confirmed Grant was illegal, null and void.
  - b. An order for the cancellation of the transfer of land parcel North Nyakachi/Agoro West/1403 to the names of the deceased 2<sup>nd</sup> Defendant and its subsequent subdivision to North Nyakach/Agoro West/2083 – 2085 and the land to revert back to deceased's Plaintiff as land parcel North Nyakach/Agoro West/1403.
  - c. An order of permanent injunction restraining the Defendants their servants, agents and /or whomever jointly and severally from trespassing, encroaching, forceful entry, fencing, stepping on and/or dealing whatsoever with land parcel No. North Nyakach/Agoro West/1403.
  - d. Costs of and incidental to the suit plus interest
  - e. Any such other or further relief as this honourable court may deem appropriate.
2. The 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Respondents defended the suit and denied the appellant's claim vide the statement of defence for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants dated 18<sup>th</sup> August 2020.
  3. The court record shows that the 4<sup>th</sup> Defendant did not respond to the claim. An Affidavit of Service on record sworn by a process server by the name David Elvis Ochieng on 5<sup>th</sup> August 2020 shows that the 4<sup>th</sup> Respondent was served with an Order, Summons to Enter Appearance, Plaint, Verifying Affidavit, List of witnesses, list of documents Notice of Motion, Supporting Affidavit and annexures on 5<sup>th</sup> August 2020.
  4. The suit was heard before the trial court which delivered its judgement dated 18/8/2021. The trial court found that the plaintiff (appellant herein) had failed to prove his case on a balance of probabilities and dismissed the suit with costs to the Defendants (Respondents herein).
  5. Aggrieved by the judgement, the appellant proffered the present appeal seeking that: -
    - a. the appeal be allowed and the judgement and decree of the lower court dated 18<sup>th</sup> August 2021 be set aside and/or vacated in its entirety and be substituted by a judgement for the appellant against the Respondents as prayed.
    - b. costs of the appeal and of the lower court be borne by the Respondents
    - c. such further and/or other reliefs as the court may deem necessary.

### **Submissions**

6. By consent of the parties, directions were given that the appeal be argued by way of written submissions. In compliance, the appellant through the firm of Bruce Odeny & Company Advocates, filed written submissions dated 21<sup>st</sup> March 2023 while the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed written submissions on 18<sup>th</sup> April 2020 through the firm of Ngala Awino & Company Advocates.
7. It was submitted on behalf of the appellant that what is in dispute is how the suit land was transferred to the deceased 2<sup>nd</sup> Respondent (Charles Onyango Alwala) in the year 2002. That the appellant had disclosed that no succession proceedings were conducted in regard to the Estate of his father. That it was only in the year 2020 when the appellant saw some construction on the suit land by some unknown people that he filed the suit. Counsel relied on section 45 of the [Law of Succession Act](#) on intermeddling



with the deceased's property. Counsel submitted further that a party who does not have a good title to a property cannot transfer such property to a third party. That the 1<sup>st</sup> Respondent had no title to pass to the 3<sup>rd</sup> Respondent. Counsel relied on the case *Re-Estate of Barasa Kanenje Manyu (deceased)* (2020) eKLR where it was held that the mere fact that a person was a surviving spouse or child of a deceased did not make him or her a personal representative of the deceased. That a personal representative had to be appointed by the court through the process of succession and that the property of the deceased cannot vest in any person until appointment of personal representatives.

8. It was submitted further on behalf of the appellant that the finding by the trial court that the 3<sup>rd</sup> Respondent met the threshold of a bona fide purchaser for value was erroneous. That land belonging to a deceased person could not be sold by dint of section 82 of the *Law of succession Act*. That the only recourse available to the 3<sup>rd</sup> Respondent was refund of the monies paid to the 1<sup>st</sup> Respondent. That the transfer and registration of the suit land into the name of the Deceased 2<sup>nd</sup> Respondent was illegal. That under section 26 of the *Land Registration Act*, a certificate of title can be challenged and impeached on grounds of fraud, misrepresentation to which the person is proved to be a party or where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme. Counsel relied on the cases of *Zachariah Wambugu Gathimu & another vs John Ndungu Maina* [2019] eKLR and *Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & another* (2013)eKLR to support this submission. Counsel submitted further that the trial court failed to consider the Appellant's submissions made before it hence arriving at the decision to dismiss the suit.
9. It was submitted on behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents that the appellant did not sue the owners of the other resultant parcels of land. That title to land is protected by article 40 of *the Constitution* and section 26 of the *Land Registration Act*. Counsel relied on the case of *Chemei Investments Limited vs Attorney General and others Nairobi Petition No. 94 of 2005* and the provisions of section 80(2) of the *Land Registration Act* which provides that the register to land cannot be rectified so as to affect a proprietor who acquired the land for valuable consideration without knowledge of any fraud. That the appellant should be estopped from reneging his previous actions and that the appellant did not deny that his mother built him a house with the proceeds of the sale.

### **Issues for determination**

10. The Memorandum of Appeal dated 9<sup>th</sup> September 2021 contained 6 grounds of appeal namely that the learned trial Magistrate erred in law and in fact: -
  - a. in failing to make a finding that the suit land belonged to the appellant's father (deceased) and that no succession proceedings have ever been conducted in regard to the Estate of the deceased hence occasioning a miscarriage of justice by denying the appellant his rightful inheritance of his father's property
  - b. in making a finding that the 3<sup>rd</sup> Respondent is a bona fide purchaser of the suit land having purchased the same from the 1<sup>st</sup> Respondent.
  - c. in failing to find that the particulars of fraud as pleaded were proved to the required standard in law
  - d. in that she disregarded the appellant's submissions and judicial authorities leading to resultant miscarriage of justice to the appellant
  - e. in failing to evaluate the entire evidence on record thereby arriving at wrong findings on the issues before court.



- f. the judgement is against the weight of the evidence on record and the law.

From these grounds of appeal, the record of appeal and the submissions made, the following are the issues that emerge for determination herein:

- a. whether the suit land belonged to Joel Ondiek Alwala deceased as at the time of his death and whether succession was undertaken in respect of his estate.
- b. whether the transfer and registration of the suit land in the name of Charles Onyango Alwala was lawful.
- c. whether the 1<sup>st</sup> Respondent had a good title to land No.Kisumu/west Agoro/2140.
- d. whether the 3<sup>rd</sup> Respondent is a bona fide purchaser for value without notice.
- e. whether the 3<sup>rd</sup> Respondent's title to L.R. No.kisumu/west Agoro/2140 is valid.
- f. who pays the costs?

### **Analysis and determination**

11. This being a first appeal, the court has reminded itself of its role to reconsider the evidence placed before the trial court, evaluate it itself and draw its own conclusions bearing in mind that it has neither seen nor heard the witnesses and make due allowance for this. (see *Selle & Another vs Associated Motor Boat co. Ltd & Others* [1968]EA 123).

### **Whether the suit land belonged to Joel Ondiek Alwala deceased as at the time of his death and whether succession was undertaken in respect of his estate.**

12. The appellant pleaded in paragraphs 10 and 11 of the plaint that the suit land belonged to his father Joel Ondiek Alwala, deceased, who died on 15/11/1998. That the deceased had inherited the suit land from his mother one Priska Ochieng Alwala, also deceased, who was the first registered proprietor thereof. In paragraph 16 of the plaint he pleaded that no full Grant of Letters of administration for purposes of distribution of the Estate of the deceased had been taken out. The appellant testified vide his witness statement filed with the plaint and adopted by the court as his evidence that he was the son and administrator of the Estate of Joel Ondiek Alwala, deceased who died on 15/11/1998. That as at the time of his death, his father was the registered owner of the suit land. He produced a copy of register (green card) in respect of the suit land as exhibit P.3. The same showed that as at 15/11 1998 when his father died the suit land was in the name of Joel Ondiek Alwal (the deceased) and that it remained in that name till 12.4.2002 when it was transferred in favour of Charles Onyango Alwala the 2<sup>nd</sup> Respondent herein. He also produced as exhibit P. 5 certificate of death for Joel Ondieki Alwala confirming the date of death as 15/11/1998. On cross examination he stated that he had asked his mother and she had told him that she had not done any succession to the estate of the deceased.
13. In response, the 1<sup>st</sup> , 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in their statement of Defence at paragraphs 4, 5 and 7 simply denied the contents of paragraphs 10, 11 and 16 of the Plaint and put the appellant to strict proof thereof. They however admitted paragraph 7 of the plaint which was to the effect that the plaintiff's father was the registered owner of the suit land. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents adduced no evidence to controvert the fact that succession had not been undertaken to the Estate of the appellant's father.



14. There is no specific finding in the judgement as to whether the suit land belonged to the plaintiff's father as at the time of his death and whether succession to his estate was undertaken so as to enable distribution thereof.
15. In this appeal the appellant contends that it was erroneous for the trial court to fail to make the finding.
16. The basis of the suit was that the suit land had been transmitted from the appellant's deceased father, subdivided and transferred to third parties unlawfully for lack of Letters of Administration. I find that totality of the evidence before the trial court proved that the suit land belonged to the deceased as at the time of his death and that Letters of Administration had not been taken out at least as at the time of transmission of the suit land in favour of the 2<sup>nd</sup> Respondent. It was therefore an error on the part of the trial court not to have made the finding.

**Whether the transfer and registration of the suit land in the name of Charles Onyango Alwala, the 2<sup>nd</sup> Respondent, deceased was lawful.**

17. The appellant pleaded in the plaint that after the death of the appellant's father the 2<sup>nd</sup> Defendant, Charles Onyango Alwala, deceased, stole the title deed for the suit land and unlawfully, illegally and without consent of the Plaintiff's family, caused the land to be registered in his name without any legal authority. In paragraph 17 of the plaint he listed the particulars of fraud to include intermeddling with the property of the deceased, obtaining the ownership of land parcel number North Nyakach/agoro West/1403 through illegal and unlawful means, transferring the suit land without Grant, stealing the deceased's title deed, knowingly presenting stolen documents to the land offices for registration of the suit land into his name, grabbing the deceased's land without giving consideration for it, colluding to deprive the plaintiff his proprietary rights over the subject land parcel, causing the land to be transferred and registered in the name of the 3<sup>rd</sup> Defendant's name without consent and/or authority of the plaintiff.
18. His evidence comprised of his own testimony and the exhibits he produced. He stated vide his witness statement filed with the plaint and adopted by the court as his evidence that soon after the death of his father, the 2<sup>nd</sup> Defendant Charles Onyango Alwala came to their home and stole the title documents in respect of the suit land. That thereafter the 2<sup>nd</sup> Defendant caused the suit land to be transferred to his name and subsequently unlawfully sub-divided it into resultant parcel numbers Kisumu/west Agoro/2083 to 2085. That Charles Onyango Alwala later died.
19. There was no evidence to controvert the appellant's evidence that Charles Onyango Alwala stole the title documents in respect of the suit land and subsequently caused the land to be unlawfully transferred into his name. This court has already found that no succession was undertaken. As such transfer of property that was part of the estate of the deceased without Letters of Administration was a nullity. The appellant referred the court to the provisions of section 82 of the *Law of succession Act* which vests powers to deal with property of deceased persons to personal representatives. No evidence was produced that a personal representative had been appointed as at the time of transfer of the suit land in favour of Charles Onyango Alwala. The 1<sup>st</sup> Respondent who was also sued as the personal representative of the Estate of Charles Onyango Alwala remained quiet on the issue of validity of the title held by Charles Onyango Alwala. I find that transfer of the suit land to Charles Onyango Alwala was unlawful.



### Whether 3<sup>rd</sup> Respondent is a bona fide purchaser for value without notice

20. The trial court found in the judgement that the 3<sup>rd</sup> Respondent was a bona fide purchaser for value and stated:-

“From the foregoing, the 3<sup>rd</sup> Defendant meets the threshold of a bona fide purchaser having bought land parcel Kisumu/ West Agoro/ 2140 subdivision of 2083 from the 1<sup>st</sup> Defendant for a consideration of Kshs.350,000 after conducting a search at Nyando Lands registry and confirming that the 1<sup>st</sup> Defendant was the registered owner and thereafter obtained title deed without any knowledge of the fraud.”

21. The appellant faults the court for this finding and submits that land belonging to a deceased person could not be sold by dint of section 82 of the *Law of succession Act*. That the only recourse available to the 3<sup>rd</sup> Respondent was refund of the monies he paid to the 1<sup>st</sup> Respondent.

22. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents on the other hand submitted that title to land is protected by article 40 of *the Constitution* and section 26 of the *Land Registration Act*. Counsel relied on the case of Chemei Investments Limited vs Attorney General and others Nairobi Petition No. 94 of 2005 and the provisions of section 80(2) of the *Land Registration Act* which provides that the register cannot be rectified so as to affect a proprietor who acquired the land for valuable consideration without knowledge of any fraud. That the appellant should be estopped from reneging his previous actions and that the appellant did not deny that his mother built him a house with the proceeds of the sale.

23. The evidence of the appellant in the lower court was that he did not know the 3<sup>rd</sup> Respondent. That he only found him constructing on the suit land.

24. The 3<sup>rd</sup> Respondent on his part testified vide his witness statement dated 17<sup>th</sup> August 2020 that on 14<sup>th</sup> January 2012 he entered into a sale agreement with the 1<sup>st</sup> Respondent to purchase land parcel No. Kisumu/west Agoro/2140 at Kshs.350,000/= . That he did due diligence and found that the 1<sup>st</sup> Respondent was the registered owner of the land as at the time of purchase and that she lawfully transferred the land to him. That later he commenced construction on the land and the same was on going. That the plaintiff was a stranger to him.

25. In arriving at her decision, the trial court relied on the decision of the Court of Appeal of Uganda in the case of Katende vs Haridar & Company Limited [2008] 2 E A 173. However subsequent decisions have varied this decision. In Mwangi James Njehia vs Janetta Wanjiku Mwangi & another [2021]eKLR the Court of appeal held:-

“In Lawrence Mukiri Mungai, Attorney of Francis Muroki Mwaura vs attorney General & 4 others, Nairobi Civil Appeal No. 146 of 2014 this court cited with approval the case of Katende vs Haridar Company Ltd (2008) 2 E A 173 where the Court of appeal of Uganda held that:

-“for the purposes of this appeal it suffices to describe a bona fide purchaser as a person who honestly intends to purchase 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 that

1. he holds a certificate of title;
2. he purchased the property in good faith;
3. he had no knowledge of the fraud;



4. he purchased for valuable consideration;
5. the seller had apparent valid title;
6. he purchased without notice of any fraud;
7. he was not party to the fraud.

We nonetheless wish to state that the law; including case law is not static and the above requirements which were crafted about 20 years ago cannot be said to have been cast in stone. We hold the view that (5) above will need to be revisited and the word “apparent” be done away with altogether...”

See also *Dina Management Limited -vs- County Government of Mombasa & 5 others* [SC Petition No. 8(E010) OF 2021]

26. The import of this decision is that for a claimant to succeed as a bona fide purchaser for value he must among other things prove that the seller had good title.
27. Having found that the suit land belonged to the deceased and that no succession had been undertaken in respect of his estate, it was incumbent upon the 3<sup>rd</sup> Respondent to prove that the 1<sup>st</sup> Respondent from whom he bought the land had obtained a good title from her deceased husband, the 2<sup>nd</sup> Respondent. That he did due diligence to establish that the Sellers title was good.

This was not proved.

#### **Whether the 1<sup>st</sup> Respondent had a good title.**

28. The appellant’s case was that after Charles Onyango Alwala unlawfully subdivided the suit land, the 1<sup>st</sup> Respondent Benta Akinyi Onyango was later registered as owner of one of the resultant portions registered as parcel No. Kisumu/west Agoro/2140 which was a sub-division of resultant land parcel number 2083. That she later sold the land to the 3<sup>rd</sup> Defendant who started constructing a house thereon. On cross examination, he stated that he does not know about the resultant parcels after the subdivision. That he only knew about the original parcel the suit land herein which is the land he was claiming.
29. The 1<sup>st</sup> Respondent’s case was that she got the land from her deceased husband. The 3<sup>rd</sup> Respondent testified that the allegations of fraud were baseless and that if there was any fraud, the plaintiff should have reported to the police.
30. Having found that Charles Onyango Alwala, the 2<sup>nd</sup> Respondent and the 1<sup>st</sup> Respondent’s husband did not have good title to the suit land, transfer of a portion thereof which had been registered as Kisumu/agoro West/2140 could not vest a good title in the 1<sup>st</sup> Respondent. The court finds that the title held by the 1<sup>st</sup> Respondent in respect of land parcel number Kisumu/agoro West/2140 before transfer to the 3<sup>rd</sup> Respondent was invalid.

#### **Whether the 3<sup>rd</sup> Respondents title is valid**

31. The appellant’s case was that the title held by the 3<sup>rd</sup> Defendant was not indefeasible as the same was obtained unlawfully. It was submitted on his behalf that under section 26 of the [Land Registration Act](#), a certificate of title can be challenged and impeached on grounds of fraud, misrepresentation to which the person is proved to be a party or where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme. The 3<sup>rd</sup> Respondent submitted that title to land is protected by article 40 of [the Constitution](#) and section 26 of the [Land Registration Act](#). My finding is



that the origin of the title held by the 3<sup>rd</sup> Respondent was an illegality in the form of illegal transfer and registration of the suit land in favour of Charles Onyango Alwala and consequent subdivision of the same. Hence the title held by the 3<sup>rd</sup> Respondent is invalid as well.

32. In a conclusion, I find that the appellant proved his case before the trial court on a balance of probabilities and hence it was erroneous for the court to dismiss the suit.
33. On costs, the law as contained in section 27 of the [Civil Procedure Act](#) is that costs follow the event.
34. I find that the appeal has merit and allow it as follows: -
  - i. the judgement and decree in KISUMU CMC ELC NO. 60 of 2020 dated 18<sup>th</sup> August 2021 be and is hereby set aside and substituted with a judgement in favour of the appellant against the Respondents as prayed in the plaint.
  - ii. costs of the appeal and of the suit are awarded to the appellant.

Orders accordingly.

**JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 13<sup>TH</sup> DAY OF JULY, 2023 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

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**E. ASATI,**

**JUDGE.**

In the presence of:

Maureen - Court Assistant.

Odeny for the Appellant.

Odah holding brief for Ngala Awino for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

