



REPUBLIC OF KENYA



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**Ngombo v Kinyua (Environment and Land Appeal 34 of 2023)  
[2025] KEELC 1168 (KLR) (13 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1168 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT AND LAND APPEAL 34 OF 2023**

**JM MUTUNGI, J  
MARCH 13, 2025**

**BETWEEN**

**RICHARD MAINA NGOMBO ..... APPELLANT**

**AND**

**DANIEL KARANI KINYUA ..... RESPONDENT**

*(Being an Appeal from the Judgment and subsequent Orders of Hon. D.M. Ileri, Principal Magistrate sitting vide Baricho ELC Case No. 14 of 2019 delivered and dated 18th October 2023)*

**JUDGMENT**

1. This appeal is against the Judgment delivered by Hon. D.M. Ileri (P.M.) on 18<sup>th</sup> October 2023, in Baricho ELC Case No. 14 of 2019. In the suit, the Learned Trial Magistrate delivered the Judgment in favor of the Respondent and dismissed the Appellant's Counterclaim. The Learned Trial Magistrate ordered the appellant, along with anyone claiming under him, to vacate Land Parcel Mwerua/Gitaku/1855 ("the suit land") within six months. Failure to comply would result in a forceful eviction from the suit land. Additionally, the magistrate ordered the Appellant to bear the costs of the suit.
2. The Appellant who was the Defendant in the suit was dissatisfied with the Learned Magistrate's decision and has Appealed to this Court against the Judgment. The Appellant has set out 4 grounds of Appeal in his Memorandum of Appeal dated 1<sup>st</sup> November 2023 as follows:-
  1. That the Learned Magistrate erred in law in making a Judgment against the weight of evidence.
  2. That the Learned Magistrate erred in law and, in fact in failing to fairly evaluate and analyze the evidence adduced by the Appellant.
  3. That the Learned Magistrate erred in law and fact in disregarding the fact that the Respondent did not prove his case on a balance of probabilities.



4. That the Learned Magistrate erred in law and fact in disregarding all the evidence adduced by and on behalf of the Appellant thereby arriving at the erroneous finding.
3. The Appellant prays that the Judgment and the subsequent decree issued on 18<sup>th</sup> October 2023 be set aside and substituted with an order dismissing the Respondent's case with costs.
4. The background to this matter is that the Respondent filed a suit in the Lower Court by way of a Complaint dated 21<sup>st</sup> March 2019. He sought orders for the forceful eviction of the Appellant, along with his family and anyone claiming under him, from the land parcel Mwerua/Gitaku/1855 and costs of the suit. His case was that he is the lawful registered owner of the suit land from which the Appellant has refused to vacate, despite several demands. He asserted that he purchased the land parcel from Elizabeth Wambui Ngari, Bernard Mwai Njiraini, and Judy Wamuyu Macharia in 2007. He claimed that he paid the full purchase price and that the portion he owns is where the Appellant currently resides.
5. The Appellant filed an amended defence and Counterclaim dated 24<sup>th</sup> January 2023 in response to the claim. In his Counterclaim, he asserted that he was in possession of the land parcel Mwerua/Gitaku/96 (the original suit). He stated that he had sought an inhibition order and a status quo order over the original suit land in High Court Succession Cause No. 30 of 2013, which were granted by the Court on 27<sup>th</sup> June 2018. The Appellant averred that without any knowledge to him and/or the Court, the Respondent unlawfully partitioned the suit land on 17<sup>th</sup> July 2018 and transferred the same into his own name. The Appellant further averred that by a Ruling delivered on 7<sup>th</sup> February 2019, the Learned Judge in the Succession case inhibited any transactions relating to the original suit land. He asserted that neither he nor the Court was aware that the original suit land had been partitioned at that time.
6. The Appellant prayed for the following orders in the Counterclaim; (1) a declaration that the Respondent unlawfully dealt with the original suit land by subdividing it and transferring the suit land to his name;
  2. an order directing the District Land Registrar to cancel entry No. 8 in the register of the original suit land, restoring it to its original status.
  - (3) Costs of the suit.
7. The case was heard before the Lower Court on 16<sup>th</sup> June 2023. The Respondent in his evidence produced a copy of search certificate and title deed for the suit land and a Ruling dated 19<sup>th</sup> October 2022, in Kerugoya High Court Succession Cause No. 30 of 2013. It was his evidence that he purchased the suit land from Elizabeth Wambui, Judy Wamuyu, and Bernard Mwai in 2007 and that he paid the full purchase price as per the agreement. At the time of the purchase the land parcel Mwerua/Gitaku/96 had not been partitioned and that following the partition he stated his portion was adjacent to Elizabeth's portion and was where the Appellant's land was now located.
8. The Appellant in his testimony adopted his witness statement and supporting documents as evidence. He stated that his father, Abednego Ngombo, held a share in land parcel Mwerua/Gitaku/96, which comprised four acres and which belonged to him. The Appellant stated that he recently learnt the land was secretly subdivided by the Respondent, Bernard Mwai, Judy Wamuyu, and Elizabeth Wambui Ngari. The Appellant prayed that the subdivision be canceled and that the land be restored to Mwerua/Gitaku/96 as the subdivision was unlawfully and illegally carried out.
9. After reviewing the evidence, the Learned Trial Magistrate came to the conclusion that the Appellant had failed to produce any document showing that he was the registered owner of the suit land. It was the Trial Magistrate's view that the Appellant based his argument on land parcel No. Mwerua/Gitaku/96, which was no longer in existence after being partitioned into several parcels, which included the suit



land. The Learned Magistrate relied on the case of Beta Engineering Co. Ltd & Another v Joseph Mbithi & 4 others (2017) eKLR, where the Court held as follows:-

“The Plaintiffs have adduced evidence that they are the bonafide registered proprietors of the suit property. Their rights to the said property are protected under Section 24 and 26 of the Land Registration Act 2012. The two Sections vest in a person/entities who have absolute proprietorship together with all rights and privileges and the certificate of grant issued to them shall be taken by all Courts as prima facie evidence that the entity named is the absolute owner. The plaintiffs are therefore entitled to the order of vacant possession of L.R No. 209/10309. The Court will therefore enter judgment as prayed for in the plaint and specifically an Order of Eviction and vacant possession of L.R NO. 209/10309.

10. The Learned Trial Magistrate additionally relied on the case of Paul Ngashema Kamau v Halima Said (2020) eKLR, where the Court stated as follows:

“From the legal provisions cited above, as well as associating myself with the quoted decision, I hold that since the plaintiff is one of the co absolute proprietors of the suit land and their certificate of title having not been challenged, he is entitled to all rights and privileges belonging or appurtenant thereto and hence entitled to protection of the law as envisaged in sections 24, 25 and 26 of the Land Registration Act. Further, based on these findings, I hold that the Defendant should indeed be evicted from the suit land.”

11. The Learned Trial Magistrate determined that the Respondent was the absolute registered owner of the suit land, and his rights were protected under the provisions of Sections 24 and 25 of the Land Registration Act. Consequently, he issued eviction orders against the Appellant. The Learned Trial Magistrate also dismissed the Appellant’s Counterclaim, stating that the partition of the original suit land had been done in accordance with the grant issued in Kerugoya High Court No. 30 of 2013. He noted that the Appellant failed to prove that the suit land was acquired by the Respondent through fraud, illegal means and/or misrepresentation. He concluded that the matters raised by the Appellant would be better resolved within the pending succession cause before the High Court. Ultimately, the Learned Trial Magistrate affirmed that the Respondent had acquired the suit land legally and in accordance with due process.
12. The appeal was argued by the parties by way of written Submissions. The Appellant’s counsel submitted on three issues as follows:
1. Whether the Respondent was a bona fide purchaser.
  2. The absence of a sale agreement.
  3. The existence of an inhibition order against the original suit land.
13. Regarding the issue whether the Respondent was a bona fide purchaser for value, the Appellant’s Counsel highlighted two reasons to support the claim that the Respondent was not. Firstly, during Cross-examination, the Respondent admitted that he was unsure of the exact location of the land when he purchased it. Secondly, a Court visit to the suit land revealed that there were permanent structures on the property that belonged to both the Appellant and Elizabeth Wambui. This the Appellant argued was clear evidence that the Appellant had been occupying and utilizing the suit land all along. According to Counsel, this demonstrated that the Respondent failed to conduct appropriate



due diligence before purchasing the property. The Appellant’s Counsel placed reliance on the Case of Samuel Kamere v. Land Registrar (2015) eKLR, where the Court of Appeal held that:

“In order to be considered a bonafide purchaser for value, a person 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 legitimate title and thirdly that he paid the valuable consideration for the purchase of the suit property.”

14. Counsel also relied on the case of Kihara V Gichuhi & 2 others (2023) eKLR, where the Court held that:

“A party who fails to carry out proper due diligence or who is negligent in doing so while purchasing a property has only himself to blame when it turns out that the person who sold the property to him had not disclosed all material facts. He cannot be heard claiming that he innocently purchased the property and in good faith. In this case, plenty of evidence showed that the Plaintiff was interested in the property. In addressing this issue, this court having found earlier that the Plaintiff never consented to the sale of the said property it cannot arrive at the position that the same was valid. The 2<sup>nd</sup> Defendant never did any due diligence in establishing the position and interest of the Plaintiff in respect to the said property.

15. In relation to the second issue, Counsel argued that the Respondent failed to provide any sale agreement to demonstrate that he had purchased the suit land from Elizabeth, Bernard, and Judy. Counsel further argued that there was no evidence of payment of the full purchase price and hence asserted that there was no proof of any sale and/or payment of the purchase price.

Section 3 of the [Law of Contract Act](#), which states that:

“No suit shall be brought upon a contract for the disposition of an interest in land unless-

- i. is in writing
- ii. is signed by all the parties thereto; and
  - (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such parties:

16. In addition to the lack of a sale agreement and evidence of payment, Counsel argued that the Respondent did not call any of the vendors to provide evidence supporting the transaction. Counsel relied on the cases of Nelson Kivuvani v. Yuda Komora & Another, Nairobi HCCC No. 956 of 1991, and Alton Homes Limited & Another v. Davis Nathan Chelogoi & 2 Others (2018) eKLR to support his argument.

17. Counsel submitted there was an inhibition order barring any transactions in regard to the original suit land. He argued that this order and the status quo order, were issued on 27<sup>th</sup> June 2018, in Kerugoya High Court Succession Cause No. 30 of 2013 yet the subdivision of the suit land occurred three weeks after this order was issued. Counsel argued that this subdivision and registration were unlawful, as they occurred place while the orders were still in force. To support his argument, Counsel relied on the cases of Mukabi (Suing on his own behalf and on behalf of the members of the Gekara Clan) v. Mbugi & 26 Others (2022) KEELC 15611 (KLR) and Dina Management Limited v. County Government of Mombasa & 5 Others (2023) KESC 30 KLR.



18. The Respondent filed his written submissions dated 28<sup>th</sup> October 2024. Counsel for the Respondent argued that the Appellant failed to produce any evidence showing that the Respondent subdivided the suit land. He submitted that he did not see any reason to challenge the Learned Trial Magistrate's Judgment, as he believed it was well-founded in law. Counsel further noted that the Appellant did not specifically plead the unlawful acts alleged in his amended Counterclaim, nor did he provide evidence to support these claims. He maintained that the Respondent was not involved in subdividing the original suit land and had no authority to transfer the suit land to himself. He stated that the land register clearly indicated that the suit land was transferred to him by the three individuals named. Additionally, Counsel pointed out that the Respondent was not a party to the Succession Cause that issued the inhibition orders. He also asserted that the ruling issuing the inhibition order was made a week after the original suit land was partitioned. He highlighted that the official search of the original suit land revealed it belonged to four proprietors with whom he dealt.
19. I have reviewed the Memorandum of Appeal, the Record of Appeal and the evidence presented before the Lower Court and have duly considered the submissions made by the parties. This Court being an Appellate Court, is obligated to consider and re-evaluate the evidence and material that was before the Learned Trial Magistrate at the time he rendered the impugned Judgment itself that the decision of the Learned Trial Magistrate was justified. This was in keeping with the principle established by the Court of Appeal in the Case of *Selle & Another –vs- East African Motor Boat & Others* (1968) EA 123.
20. The key issues for determination in this Appeal are who the legal owner of the suit land is, whether the Learned Trial Magistrate erred in issuing the eviction orders, and whether the Learned Trial Magistrate erred in dismissing the Appellant's Counterclaim.

#### **Who is the legal owner of the suit land?**

21. Both the Appellant and the Respondent claim ownership of the disputed land. The Respondent's claim is predicated on the fact that he holds title to the suit land parcel Mwerua/Gitaku/1855 having acquired the same through purchase. The Respondent claims he was a bonafide purchaser for value without any notice of any defect in the title. The Appellant counters the Respondent's contention and asserts the Respondent did not lawfully acquire the title to the land and he was not a bonafide purchaser for value without notice.
22. The Respondent asserts his claim as a purchaser for value without notice and claims as the registered proprietor he is entitled to quiet possession. He stated that he purchased the land from Bernard, Elizabeth, and Judy in 2007 and was registered as the legal owner on 17<sup>th</sup> July 2018. The Appellant, on his part, argues that he was the beneficial owner of the land, and contends that his grandfather originally owned land parcel Mwerua/Gitaku/96, and the portion he occupies was inherited from his late father.
23. The Respondent exhibited a copy of the title deed to the suit land indicating he was the registered proprietor. Section 24 of the [Land Registration Act, 2012](#) provides as follows: -

“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”
24. Section 25 (1) of the said Act further provides that:-

“the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and



appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to any lawful encumbrances, set out in this Section.”

25. Section 26(1) of the same Act provides that:-

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except

- a) on grounds of fraud, or misrepresentation to which to which the person is proved to be a party; or
- b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

26. The Court in the case of Elijah Makeri Nyangw’ra –vs- Stephen Mungai Njuguna & Another (2013) eKLR, held that:

“...the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation, to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”

27. The Appellant has disputed the Respondent's claim to the title of the suit land. He has raised several concerns regarding the validity of the claim. Firstly, he stated that the original suit land was partitioned while Kerugoya Misc. Succession Cause No. 30 of 2013 was still pending, and there was an inhibition and status quo order in force at that time. Secondly, he argued the Respondent did not exhibit a sale agreement to prove he legitimately purchased the land from Elizabeth, Judy, and Bernard. Thirdly, the Appellant contended the Respondent never provided any evidence of having paid the purchase price. Fourthly, the Appellant argued the Respondent did not conduct proper due diligence regarding the suit land, because if he had, he would have discovered that the Appellant was already living on the land and would have involved him in the sale transaction. The Appellant thus maintained the Respondent did not lawfully acquire the suit land and hence never got a good title.

28. The evidence presented showed that the title to the suit land was registered in the names of Judy Wamuyu Macharia, Bernard Mwai Njiraini, and Elizabeth Wambui Ngari on 17<sup>th</sup> July 2018. On that same date, the title was transferred to the Respondent. The interim court order issued in Kerugoya HC Miscellaneous Succession Cause No. 30 of 2013 indicates that the Succession Court imposed orders of inhibition and ordered maintenance of the status quo regarding any transactions related to the LR No. Mwerua/Gitaku/96 (original suit land) on 27<sup>th</sup> June 2018. This evidence clearly indicated that the original suit land was partitioned days after the Succession Court had issued interim inhibition and status quo orders.

29. The Hon. Richard Mwongo, J in the penultimate paragraphs in the Ruling dated 19<sup>th</sup> October, 2022 in the said High Court Misc Succession cause No. 30 of 2013 held as follows:-

“Finally, whilst perusing the file, I noted the Replying affidavit of the respondent dated 16<sup>th</sup> July, 2018 which annexes the Mutation Form that was used to give instructions for the subdivision of Mwerua/Gitaku/96. The instructions to the Surveyor appear to have been



given prior to 23<sup>rd</sup> June 2018 because the Form indicates that the registered proprietors were to meet the Surveyor on that date. On page 2 of the Form, the sketch plan of the proprietors' intentions to subdivide the parcel is dated 23<sup>rd</sup> June 2018. On page 3 of the Form, the Surveyor's certificate under Section 9 of the Survey regulations appears to have been issued on 26<sup>th</sup> June 2018. On page 4 of the Form, the confirmation of the survey and authority to register is dated 16<sup>th</sup> June 2018. The date of the registration of the Mutation Form on the first page is shown as 1<sup>st</sup> July 2018. Thus, the instructions to partition the land had been given before the Interim Court orders were issued on 27<sup>th</sup> June 2018. To that extent, the partition horse had bolted from the stable before the time the orders of 27<sup>th</sup> June 2018 had been issued by the court. In these circumstances, the proper action would have been for the applicants to file a caution on the strength of the Court orders."

30. The Respondent was not a party in the High Court succession cause and therefore cannot be said to have had anything to do with the subdivision and/or any actions of the parties involved in the succession case. I agree with the analogy and observations of the Hon. Mwangi, J that by the time the interim inhibition order was issued, "the partition horse had bolted from the stable" as the partition of the original land had commenced and was ongoing. What however was not explained was how come the Mutation Form got registered on 1<sup>st</sup> July 2018 and titles issued thereafter when there was an inhibition order issued on 27<sup>th</sup> June 2018 restraining any transactions affecting the original land parcel. The explanation could only be that the inhibition order was not registered against the title and hence there was nothing that would have prevented the Land Registrar from processing transactions affecting the original suit land in the normal course of his duties as the Land Registrar. It is difficult however to believe the persons who sold the land to the Respondent were not aware of the inhibition order considering they were party in the highly contested succession cause.
31. As Kerugoya HC Misc Succession Cause No. 30 of 2013 has been extensively referred to in the Record of Appeal and by the parties, I suo moto sought to peruse the file to affirm the status of the Succession matter and the file was made available to me from the Registry. Having perused the succession file the following is the apparent status as per the file:-
1. There have been numerous applications by various parties in the matter as the file oscillated between Kerugoya and Embu Law Courts. The file commenced as Kerugoya CM Succ. No. 262 of 2004, was transferred to Embu High Court and renumbered Embu HC Succ Cause No. 245 of 2007 and was again retransferred to Kerugoya High Court and renumbered Kerugoya HC Misc. Succession Cause No. 30 of 2013.
  2. The Appellant with others vide a summons for Revocation of Grant dated 25<sup>th</sup> June 2018 applied to have the grant issued on 27<sup>th</sup> January, 2005 and confirmed on 11<sup>th</sup> July 2016 revoked and annulled. The Applicant's also sought an order of inhibition of any transactions relating to LR Mwerua/Gitaku/96 and an interim inhibition order was granted on 27<sup>th</sup> June 2018 and was later confirmed by Lady Justice L. W. Gitari on 7<sup>th</sup> February 2019 pending the hearing and determination of the prayer for revocation and/or annulment of grant issued to Elizabeth Wambui Ngari and confirmed on 11<sup>th</sup> July 2016.
  3. The summons for Revocation of Grant apparently was not heard as Justice Mwangi heard another Interlocutory application dated 10<sup>th</sup> April 2019 where the Applicants who again included the Appellant inter alia sought orders for inhibition against transactions relating to LR Nos. Mwerua/Gitaku/1852 to 1856 being the resultant subdivisions from LR. No. Mwerua/Gitaku/96; cancellation of the subtitles pending the hearing and determination of the summons for Revocation of Grant dated 25<sup>th</sup> June, 2018; and an order punishing the



Respondent for disobedience of the order issued by the Court on 27<sup>th</sup> June, 2018 inhibiting any transactions in regard to LR Mwerua/Gitaku/96.

4. In the Applicants application dated 10<sup>th</sup> April 2018 the Applicants sought to have joined as Interested Parties Judy Wamuyu Macharia, Bernard Mwai Njiraini, Joseph Murimi Ngombo and Daniel Karani Kinyua (Respondents herein) who were the beneficiaries following the subdivision. The Judge ordered that they be joined to the succession suit and that they be served with the pleadings.
  5. The Applicants under prayer (6) of the application dated 10<sup>th</sup> April 2019 prayed for an order of stay of proceedings in relation to Baricho SPMC ELC Cases No. 12 of 2019, 13 of 2019 and 14 of 2019 pending hearing and determination of summons for Revocation of Grant dated 25<sup>th</sup> June, 2018.
32. The Learned Judge in declining to order cancellation of the sub-division and titles issued following the subdivision of the original LR Mwerua/Gitaku/96 on the basis that they were made in breach of the Court order issued on 27<sup>th</sup> June 2018 the Judge at Paragraphs 47, 48 and 49 of the Ruling stated as follows:-
47. These arguments are attractive, but as noted are untenable given that the orders would affect interested parties who are not parties to the present suit, but are parties to a suit in the ELC Courts to which the Applicants are also not parties. This would be absurd, and in addition, it is questionable whether this Court has supervisory jurisdiction over suits in the Lower Court relating to matter to which the ELC Courts have sole jurisdiction.
  48. Whilst it may be that the ELC cases were filed in bad faith and are potentially an abuse of the Court process since the subject parcels of land are the subject of the proceedings herein, I think the correct action would be for this Court not to intermeddle with those suits in the ELC Court for, amongst other reasons, jurisdiction challenges and violation of the right to be heard. As pointed out in the case of JMK –vs- MWK & Anor (2015) eKLR cited by the Respondent:-  
“The Courts of this land have been consistent on the importance of observing the rules of natural Justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made.”
  49. For the foregoing reasons, this Court does not find it prudent or apt to issue an order for stay of the proceedings in Baricho SPMC ELC cases Nos. 12, 13, and 14 of 2019.
33. It was common ground that the Respondent was not a beneficiary of the estate of the late Elijah Ngari, also known as Ngari Ngotho. He claimed to have purchased the disputed land from Elizabeth, Judy, and Bernard. The Appellant for his part was staking claim to the land on the basis that he was a beneficiary of the deceased estate. The persons from whom the Respondent purchased the land were awarded the land pursuant to a Grant issued on 27<sup>th</sup> January, 2005 and confirmed on 11<sup>th</sup> July 2016. The Appellant together with others had applied for Revocation and Annulment of the Grant and that application for Revocation of the Grant had not been heard and determined. The High Court in the Succession Cause had in fact issued an inhibition respecting any dealings with the property. The Appellant in his evidence affirmed he had developed and resided on the portion that was given to him by his father and that was the portion that the Respondent allegedly purchased. The Respondent stated that at the time of purchase he did not know the portion that he would be given. The Appellant’s position was that the original land was fraudulently and secretly subdivided and transferred. The Appellant essentially was contesting the title that the Respondent had acquired and the Respondent in the circumstances was obligated to prove that he procedurally and legally acquired his title. The root of



his title was in question and the Appellant contended the Respondent could not have been a bonafide purchaser for value without notice.

34. The Court of Appeal in the case of *Munyu Maina...Vs.. Hiram Gathiha Maina* [2013] eKLR, held as follows:

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”

35. The Black’s law Dictionary, 8th Edition defines a “bona fide purchaser” 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.”

36. In the case of *Dina Management Limited vs County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR), the Supreme Court stated that, for a Court to establish whether a party is a bonafide purchaser for value, the Court must first establish the root of the title right from the first allotment. For the Respondent to qualify as bona fide purchaser he ought to have clearly demonstrated how he got to be registered as proprietor of the suit parcel.

37. This position has recently been reaffirmed by the Supreme Court of Uganda in *Lwanga vs Mubiru and Others* (Civil Appeal 18 of 2022) [2024] UGSC 7, where the court held:

“The principle of bona fide purchaser for value without notice is a general defence in any transaction of sale or purchase of any property, particularly land. The definition of bona fide purchaser for value without notice is “that buyer who has paid a stated price for the property without knowledge of existing or prior claims or prior equitable interest”. Bona fide is a Latin word meaning good faith, without fraud, sincere, genuine. See (Black’s Law Dictionary 9th Edn Page 199) A bona fide purchaser is a buyer who buys without constructive or actual notice of any defects or infirmities against the seller’s title. See (page 1355 Black’s Law Dictionary 9th Edn. It is trite law that a person who relies on the defence of bona fide purchaser for value without notice has the burden to prove that he or she acted in good faith. The purchaser must have given due consideration and purchased the land without notice of the fraud. Such notice covers both actual and constructive notice of fraud. In the case of *Jones v. Smith* [1841] 1 Hare 43, the Chancery Court held: “a purchaser has constructive notice of fraud if he had actual notice, that there was some encumbrance and a proper inquiry would have revealed what it was (but if) it abstained either deliberately, carelessly from making those inquiries which a prudent purchaser would have made...then the defence cannot be available to him or her.”

38. In demonstrating that they are an innocent purchaser, a party must also demonstrate that they conducted their due diligence prior to purchasing the property. In the case of *Kukan & another (Administrators of the Estate of the Late Jason Kukan Lila) vs Kibutha* (Civil Appeal 339 of 2018) [2023] KECA 742 (KLR) the Court of Appeal affirmed the standards of due diligence laid out by



Mutungi, J in the case of Esther Ndegi Njiru & Another vs Leonard Gatei [2014] eKLR where the Learned Judge held as follows:

“The rampant cases of fraudulent transactions involving title to land has rendered it necessary for legal practitioners dealing with transactions involving land to carry out due diligence that goes beyond merely obtaining a certificate of search. Article 40 (6) of the Constitution removes protection of title to property that is found to have been unlawfully acquired. This provision of the Constitution, coupled with the provision of section 26(1) (a) and (b) of the Land Registration Act, in my view places a responsibility to purchasers of titled properties to ascertain the status of a property beyond carrying out an official search. In this era when there are many cases of what has been described as “grabbed public lands” it is essential to endeavour to ascertain the history and/or root of the title.”

39. During Cross-examination, the Respondent stated that he was uncertain regarding the ground position of the portion of land he bought. He believed that the land occupied by the Appellant belonged to him simply because Elizabeth had indicated that his share would be next to hers. The Lower Court, in its Judgment, noted that it visited the disputed parcel and observed buildings and structures belonging to both the Appellant and Elizabeth Wambui on the property and that some of the buildings were of a permanent nature.
40. In his submissions, the Appellant pointed out that since the Respondent was a relative, most likely he was aware that the Appellant was occupying the land he allegedly purchased. The Respondent in my view did not demonstrate that he had carried out the appropriate due diligence and that discounts him from having been a bonafide purchaser. The Respondent’s strongest weapon was that he was registered as the owner of Land Parcel LR Mwerua/Gitaku/1855 and that he held title to the land. As demonstrated in the authorities that I have referred to above, where ownership of land is contested, it is not sufficient to flash a title as proof of ownership. The root of the title and the process of acquiring the same are vital components of proving ownership.
41. In the instant matter the title acquired by the Respondent resulted from subdivision of Land Parcel Mwerua/Gitaku/96 pursuant to a Confirmation of Grant that is the subject of a summons for Revocation in Kerugoya HC Misc Succession No. 30 of 2013. The Appellant is one of the Applicants as a beneficiary of the deceased estate. The record shows an order of inhibition against any transactions affecting the original title was given on 27<sup>th</sup> June 2018. The Respondent was registered and issued title on 17<sup>th</sup> July, 2018. Although the Respondent argues he was not party to the succession case, he was joined as the 4<sup>th</sup> Interested Party for the purposes of hearing the application relating to the Revocation of Grant as any orders ensuing could affect him. It is difficult as earlier observed to believe that the Administrators of the deceased estate at the time they transferred the disputed title to the Respondent were unaware of the inhibition order. However that is an issue for the Succession Court to determine.
42. Be it as it maybe, had the Respondent carried out the necessary and appropriate due diligence, he would have discovered the Appellant was in possession and in occupation of the disputed property, and had he bothered to find out, under what circumstances the Appellant was occupying the land, he would have learnt that the Appellant was laying claim to the land as a beneficiary. Most certainly the said Elizabeth Wambui Ngari, Bernard Mwai Njiraini and Judy Wamuyu Macharia who purportedly sold the land to the Respondent were aware the Appellant was laying claim to the disputed land. In the premises and having regard to the evidence, the Learned Trial Magistrate erred when he held the Respondent was the absolute and bonafide owner of the disputed property. The title the Respondent held was under challenge and until the succession matter was finalized, the Appellant cannot be held to be in illegal and unlawful occupation of the disputed property.



43. The Appellant in the Counterclaim as per the Amended defence and Counterclaim had prayed for a declaration that the Respondent unlawfully dealt with LR Mwerua/Gitaku/96 by way of subdividing the Land LR Mwerua/Gitaku/1855 to himself; and an order directing the Land Registrar to cancel entry No. 8 in the register of LR Mwerua/Gitaku/96 thereby cancelling LR Mwerua/Gitaku/1852, 1853, 1854 and 1855 and revert the same to the original parcel. For the same reason that Mwongo, J in the High Court Succession matter could not make orders that would affect parties not before the Court, the Court cannot make orders that affect parties who are not before it. The subdivided titles other than the title in the Respondent's name are in the names of persons who were not parties before the Trial Court or in the instant appeal. The rules of natural Justice precludes the Court from condemning parties without affording them a hearing.
44. In the pending application for summons for Revocation of Grant in the High Court Succession matter, at least all parties with an interest in LR Mwerua/Gitaku/96 and the resultant subdivisions LR. Nos. Mwerua/Gitaku/1852 to 1855 have been enjoined to the suit and each one of them will have an opportunity to be heard. The issues that were litigated before the Lower Court ought to have properly been canvassed in the succession matter.
45. Upon evaluation of the Record of Appeal, the evidence and the submissions of the parties and the applicable law, it is my determination that neither the Respondent nor the Appellant as relates to the Counterclaim proved their respective cases. I allow the Appeal, set aside the Judgment of the Lower Court and substitute the same with an order dismissing the Respondent's case. As the Appellant's Counterclaim was dismissed. I will make no order for costs. Each party to bear their own costs of the Appeal.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 13<sup>TH</sup> DAY OF MARCH 2025.**

**J. M. MUTUNGI**

**ELC - JUDGE**

