



**Kamau v M'nychurai & another (Environment and Land Appeal
E059 of 2022) [2023] KEELC 22195 (KLR) (14 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22195 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E059 OF 2022
CK YANO, J
DECEMBER 14, 2023**

BETWEEN

MARY NJERI KAMAU APPELLANT

AND

ISINDORO NYAMU M'NCHURAI 1ST RESPONDENT

JULIUS MUTUGI GITONGA 2ND RESPONDENT

*(Being an appeal from the judgment and Decree delivered by Hon. S. NDEGWA Senior
Principal Magistrate on 26th September, 2022 at Githongo Law Court in ELC NO. 34 OF 2017)*

JUDGMENT

Background

1. The appellant was the plaintiff in the suit filed in the lower court. In her plaint dated 13th September, 2011, the appellant prayed for an order of permanent injunction restraining the 1st respondent herein, his servants, agents, employees, and or family members from entering, tilling, utilizing and /or in any other manner whatsoever from interfering with land parcel No. abothuguchi/igane/1744 (the suit land) until the suit was heard and determined plus costs of the suit and any other or such better relief that the Honourable court may deem fit and just to grant.
2. The appellant pleaded that she was the absolute registered owner of the suit land having bought the same from Julius Mutugi Gitonga the 2nd respondent herein in 1998.
3. The appellant averred that she had been in occupation of the land and had developed the whole of it by planting trees, bananas, cow peas, pigeon peas, sweet potatoes, avocado, guava and nappier grass and other subsistence crops such as maize and beans.



4. The appellant pleaded that on 1st September, 2011 the 1st respondent trespassed onto the said land and pruned trees and carried away the branches as firewood and in the process damaged the appellant's crops above mentioned. The appellant further pleaded that the respondent had started tilling the suit land and selling the nappier grass.
5. The appellant stated that she had warned the 1st respondent and demanded that he stops his illegal actions but he was adamant and persisted in his illegal and wrongful actions.
6. The 1st respondent filed his statement of defence and counterclaim dated 21st October, 2011 and which was amended on 18th December, 2012 denying the appellant's claim. The 1st respondent stated that although the court was seized of jurisdiction to hear and determine the suit, the appellant had not exhausted the provisions of the Land Disputes Tribunal Act before instituting the suit.
7. The 1st respondent further stated that the appellant was not entitled to any of the reliefs sought and without prejudice averred that if the appellant bought land parcel No. Abothuguchi/Igane 1744 from the 2nd respondent in 1998 then the purported sale was fraudulent and/or null and void ab initio due to reasons inter alia that the purported sale of the land was effected before temporary grant of letters of administration made to the purported vendor in Meru High court succession Cause No. 31 of 1999 were confirmed and in contravention of the mandatory provisions of Section 45 (1), 45(2) and 83 (b) (ii) of the [Law of Succession Act](#) (Cap. 160 laws of Kenya).
8. The 1st respondent added that the suit land was unlawfully and dishonestly excised from land parcel No. Abothuguchi/Igane 627 which land was prior to 13th March 2003 owned by the 1st respondent's deceased father namely one NCHURAI MWOGA and which land was reserved solely for the 1st respondent and his family and to the exclusion of the appellant and the 2nd respondent who is the 1st respondent's nephew and the purported vendor of the suit land.
9. The 1st respondent further stated that between 9th October, 1998 and 13th March 2003 the 2nd respondent did not pass any good title in respect of the suit land to the appellant as he lacked any beneficial and/or proprietary interest on the land capable of being protected by the law.
10. In the counterclaim, the 1st respondent joined Julius Mutugi as a party to the suit and further stated that he would challenge the proceedings and finding of the trial court in Meru High Court Succession Cause No. 31 of 1999. The 1st respondent averred that from January, 2010, he was the one in exclusive possession, utilization, occupation and development of the suit land and land parcel No. Abothuguchi/Igane/1745 which land parcels are product of the sub-division of the land parcel No. Abothuguchi/Igane/627.
11. In the counterclaim, the 1st respondent stated that the 2nd respondent is his nephew and grandson to the late Nchurai Mwoga, the 1st respondent's deceased father. He further stated that land parcel No. Abothuguchi/Igane/627 was ancestral and family land and was registered in the names of the deceased between 2nd March 1970 and 12th March 2003. The 1st respondent further stated that prior to his death, the deceased lawfully, distributed his parcels of land to his 3 sons as follows – Land parcel No. Abothuguchi/Igane/627 to the 1st respondent but remained registered in the name of the deceased as the 1st respondent was by then working in Laikipia District having left his home place in 1969, land parcel No. Abothuguchi/Igane/789 to Cesare Muthuri M'Ncurai and land Parcel No. Abothuguchi/Igane/790 to Earnest Itonga M'Ncurai the 2nd respondent's father.
12. It was the 1st respondent's case that after the deceased passed on the 2nd respondent unlawfully, dishonestly and purportedly sold 2.00 acres of the 1st respondent's aforesaid land parcel to the appellant, consequential whereof the land parcel No. Abothuguchi/Igane/627 was subdivided into 2



- portions which portions were subsequently registered in the names of the appellant and 2nd respondent. That land parcel No. Abothuguchi/Igane/1744 measuring 2.00 acres was registered in the names of the appellant while land parcel No. Abothuguchi/Igane/1745 measuring 2.00 acres was registered in the name of the 2nd respondent.
13. The 1st respondent stated that upon his return to his home place from Laikipia District in January, 2010, he lawfully lodged his claim against the appellant and the 2nd respondent over the land parcels No. Abothuguchi/Igane 1744 and 1745 before the clan elders and provincial administration consequential whereof they were found to have unlawfully dispossessed the 1st respondent and his family members of the land Parcel No. Abothuguchi/Igane /627 and that they were ordered inter alia to transfer the land parcels No. Abothuguchi/Igane/1744 and 1745 to the 1st respondent, a finding which the 2nd respondent duly complied with but that the appellant failed and thereafter rushed to court to institute the suit the subject of this appeal.
 14. The 1st respondent pleaded that the purported sale and transfer of the 2.00 acres of the land parcel No. Abothuguchi/Igane/627 by the 2nd respondent to the appellant was irregular and in contravention of the law. The 1st respondent further averred that he was the exclusive rightful owner and proprietor of the land parcels No. Abothuguchi/Igane/1744 and 1745 both parcels of land having resulted from the sub division of the deceased's land parcel No. Abothuguchi/Igane 627.
 15. The 1st respondent prayed for judgment to be entered against the appellant and 2nd respondent jointly and severally as follows-;
 - a. A declaration that the land parcel No. Abothuguchi/Igane/1744 and 1745, which land parcels originated from the subdivision of the land parcel No. Abothuguchi/Igane/627 exclusively belong to the 1st respondent and the said parcels of land ought to be legally and/or equitably owned by the 1st respondent in his names.
 - b. A declaration that the purported sale and subsequent transfer of the 2.00 acres of the land parcel No. Abothuguchi/Igane/627 by the 2nd respondent to the appellant was irregular and in contravention of the law and the said transactions were consequently null and void.
 - c. An order that the appellant do transfer the land parcel No. Abothuguchi/Igane1744 to the 1st respondent failing which the court do authorize and empower the Executive Officer of the Meru Law courts to sign and execute all relevant documents to effect the transfer of the land to the 1st respondent.
 - d. Cost of the counterclaim (suit) and
 - e. Any other relief which the Honourable court may grant to the respondent to meet the ends of justice.
 16. Upon considering the matter, the trial court found that the appellant's suit lacked merit and dismissed it. The 1st respondent's counterclaim was allowed in terms of prayer (b) and the learned trial magistrate issued a declaration that the purported sale and subsequent transfer of 2.00 acres of land parcel No. Abothuguchi/Igane/627 by the 2nd respondent to the appellant was irregular and in contravention of the law and that the said transactions were subsequently null and void and an order revoking the title to land parcel No. Abothuguchi/Igane/1744 and the same to be reverted into the names of the deceased. Each party was ordered to bear his or her own costs in both the suit and the counterclaim.
 17. Being aggrieved by the decision of the learned trial magistrate, the appellant filed this appeal and set out four grounds in the memorandum of appeal in the following terms:-



1. The learned trial magistrate erred in fact and law by holding that the appellant did not have a valid title.
 2. The learned trial magistrate erred in law by sitting and prosecuting the matter as a succession suit and not as an Environment and Land case.
 3. The learned trial magistrate erred in law by issuing orders and or/prayers not sought in the counter claim.
 4. The learned trial magistrate erred in law and fact by ordering cancellation of title to one portion being Abothughuchi/Igane/1744 and leaving out Abothughuchi/Igane/1745 a subdivision of original parcel No. Abothughuchi/Igane/627.
18. The appellant prayed that the judgment of the Senior Principal Magistrate's delivered on 26th September, 2022 and the subsequent decree be set aside, the appeal be allowed with costs and the court to make such further and other orders as it may deem just in the circumstances of the case.
19. The appeal was canvassed by way of written submissions. The appellant filed her submissions dated 16th October, 2023 and filed in court on 19th October, 2023 through the firm of Mwangi E.G & Co Advocates while the 1st respondent filed his dated 24th October, 2023 and filed in court on 27th October, 2023 through the firm of Kaberia Arimba & company advocates.

Appellant's Submissions.

20. Learned counsel for the appellant gave a brief background of the matter at the trial court and identified the following issues for determination-;
- i. Whether the trial court overruled the high court decision in Meru High Court Succession Cause number 31 of 1991 as such overstepping jurisdiction.
 - ii. Whether the court misdirected itself by dealing with succession related issues.
 - iii. Whether the trial magistrate erred in revoking only LR Abothughuchi/Igane/1745 and not both parcels.
 - iv. Whether the court has the power to re-evaluate the evidence on 1st appeal.
21. With respect to the first issue, learned counsel for the appellant pointed out that under Constitution of Kenya 2010, the High court or rather superior courts are granted supervisory powers over all courts subordinate to them. That in this particular matter, the High Court in Meru High Court Succession Cause No. 31 of 1999 issued a grant to the 2nd respondent, subdivided the land and gave 2 acres to the appellant herein.
22. Counsel for the appellant submitted that the 2nd respondent was a direct beneficiary to the land in question as such had both beneficial and proprietary interest over the original number Abothughuchi/Igane/627. That the trial court over stepped on its jurisdiction by over-ruling the decision of the High Court and subsequently upending the decree issued therein contrary to hierarchy of the courts.
23. The appellant's counsel submitted that the 1st respondent did indicate under oath that he knew the existence of the grant issued to the 2nd respondent as such the only sensible solution was to revoke the said grant. The appellant submitted that the trial court did not have the requisite jurisdiction to alter and/or over-rule the orders and decree of the High Court in succession cause number 31 of 1999.



24. On whether the court misdirected itself by dealing with succession related issues, it was submitted that the *Environment and Land Court Act* clearly designated issues dealt under these courts. The appellant submitted that in determining the issues herein the court while fully aware of the existence of determination in the High Court went ahead and pronounced itself on the matter already dealt with at the High Court in succession No. 31/1999.
25. It is the appellant's submission that the trial magistrate erred by asserting that the 2nd respondent did not have any interest in the land and that the sale was null and void. The appellant submitted that the 2nd respondent did have capacity as he was entitled to ½ share on all that land and particularly that the land was passed to the appellant vide a confirmed grant which to date has not been revoked.
26. The appellant further submitted that any person entitled to any part of any inheritance can will away that entitlement and or sale the entitlement to 3rd parties. The appellant further submitted that the assertions that that land was acquired contrary to the law is unfounded since in the matter herein, a grant was issued by the High court vide a succession cause which was used to pass a legitimate title to the appellant. That the appellant acquired the land by transmission.
27. The appellant submitted that the 1st respondent knew for a fact that having resurfaced after 45 years, the 2nd respondent had dealt with the land but he was given a share nevertheless.
28. The appellant submitted that the trial court erred by varying already existent orders of the High Court in the succession Cause 31 of 1999 and that only a superior court could alter the determination of another superior court or courts of equal status. The appellant submitted that she was a beneficiary via purchase on the estate of the late Nchurai Mwoga in Meru High court succession cause number 31 of 1999 who was the owner of land known as Abothuguchi/Igane 627. That this was land that was subdivided upon transmission and gave rise to Abothuguchi/Igane/1744 and Abothuguchi/Igane/1745 respectively and as such any issues as to entitlements or objection ought to have been dealt by the succession court and not the trial court as to the validity of the entitlements under the law of succession. The appellant submitted that the court overstepped its mandate and overreached on its jurisdiction.
29. Whether the trial magistrate erred in revoking only L.R. Abothuguchi/Igane/1745 and not both parcels, the appellant submitted that the 1st respondent left home in 1967 and only came back in 2013 after 40 years and upon his return, the 2nd respondent had already filed Meru High court Succession 31 of 1999 and acquired the grant and transmitted properties to people listed on the grant. That the 2nd respondent did retain 2 acres as instructed by his late grandfather to transfer to the 1st respondent if he showed up.
30. The appellant stated that upon the succession cause, two parcels of land emanated that is Abothuguchi/Igane/1744 and 1745. That the 1st respondent was granted Abothuguchi/Igane/1745 which is under his name and the appellant argued that due to greed the 1st respondent deemed it fit to try acquire Abothuguchi/Igane 1744 which belongs to the appellant and which was passed vide a valid succession case.
31. The appellant submitted that Equity dictates that both titles be revoked as they emanated from the alleged poisonous tree since if left the 1st respondent will have undue advantage. The appellant further submitted that the trial court did not have the requisite power to overrule the determination of the High court but could only deal with the issues before it relating to injunctory orders. That the validity of the title deed issued to the appellant was not an issue as it was a direct purchase of the title but rather a title acquired via transmission with a valid certificate of grant in which the appellant was listed as a



beneficiary. The appellant contended that by overruling the decision of the High court in succession cause No. 31 of 1991, the trial court had dealt with the issues already decided upon.

32. On whether the court has the power to re-evaluate the evidence on the first appeal, the appellant relied on the case of *Selle & another Vs Associated Motor Boat Co Ltd & other* (1968) EA 123 and submitted that the entire trajectory of the case and the testimonies presented set out the chronology of events as transpired before and after transmission which is a clear indication that the 1st respondent was not solely entitled to benefit from the land alone but along with the interests of the 2nd respondent. The appellant further submitted that equity dictates equality and that if the transactions are voided both titles ought to be cancelled. The appellant urged the court to evaluate the proceedings and testimonies as presented in court and uphold the appeal and set aside the judgment and orders of the trial magistrate. The appellant submitted that she has on a balance of probability proved that the decision of the trial magistrate was flawed and ought to be reversed and the appeal upheld with costs.

1st Respondent's Submissions

33. Learned counsel for the respondent also gave a brief background of the case and identified the issues for determination to be whether the 2nd respondent had locus to sell L.R No. Abothuguchi/Igane/1744 a resultant subdivision of L.R No. Abothuguchi/Igane/627 to the appellant and whether the 1st respondent is entitled to land parcel No. Abothuguchi/Igane/1744.
34. The 1st respondent's answer to the first issue is in the negative and relied on section 82 (b) (1) of the [Law of Succession Act](#) which provides that no immovable property shall be sold before confirmation of grant. The 1st respondent's counsel pointed out that the grant issued to the 2nd respondent was confirmed on 12th October, 2000 whereas the 2nd respondent purported to sell the deceased parcel of land Abothuguchi/Igane/627 vide an agreement dated 9th October, 1998. The 1st respondent submitted that it is very clear that the 2nd respondent had no authority as provided under the [Law of Succession Act](#). The 1st respondent further submitted that the purported sale was contrary to Section 45 (1) of the Law of Kenya Succession Act Cap 160 Laws of Kenya. That in view of the aforesaid provisions, the sale of L.R No. Abothuguchi/Igane/1744 being a subdivision of L.R No. Abothuguchi/Igane/627 was unlawful hence the agreement dated 9th October, 1998 is null and void ab initio and the same is unenforceable and is dead on arrival as the whole process was based on fraud.
35. On the second issue, learned counsel for the 1st respondent submitted that the court be guided by the 2nd respondent's own admission that L.R No. Abothuguchi/Igane/1744 was a resultant subdivision of L.R No. Abothuguchi/Igane/ 627 which was initially in the name of the 1st respondent's deceased father and the reason that he agreed to retransfer L.R No. Abothuguchi/Igane/1745 to the 1st respondent. The 1st respondent submitted further that the 2nd respondent testified in court that his grandfather died in 1979 when he was only 14 years old and told the court that his grandfather, who is the 1st respondent's father, instructed him to give the 1st respondent only 2 acres from L.R no. Abothuguchi/Igane/627. The 1st respondent's counsel submitted that this is purely an afterthought and that in any case the 2nd respondent was only a minor incapable of entering into any such transaction with his grandfather yet his father, Ernest Itonga M'Ncurai and his uncle Cesare Muthuri M'Ncurai, were still alive.
36. It is the 1st respondent's contention that he is entitled to land parcel No. Abothuguchi/Igane/1744 as the same was unlawfully and dishonestly excised from land parcel No. Abothuguchi/Igane/627 which land prior to the alleged sale was owned by the 1st respondent's deceased father one Nchurai Mwoga and which land was reserved solely for the 1st respondent and his family and to the exclusive of the appellant and the 2nd respondent who is the 1st respondent's nephew and the purported vendor of the suit land.



37. The 1st respondent submitted that between 10th October, 1998 and 13th March 2003, the 2nd respondent who is the purported seller of the suit land did not pass any good title in respect of the suit land to the appellant as the 2nd respondent lacked any beneficial and or proprietary interest on the suit land parcel No. Abothuguchi/Igane/627 capable of being protected by the law. The 1st respondent further submitted that the appellant's submission is misplaced and based on evidence from the bar.
38. It was further submitted that the appellant's argument that the trial court overruled the High Court decision in Meru High Court Succession cause number 31 of 1991 is misguided. That when the appellant filed a suit against the 1st respondent in the Environment and Land Court, the succession court had already become functus officio, hence the allegations of the court below overstepping jurisdiction is neither here nor there.
39. The 1st respondent submitted that the whole process of selling and transferring L.R no. Abothuguchi/Igane/1744 to the appellant by the 2nd respondent was illegal, hence the court was not bound to sanitize an illegality. The 1st respondent therefore submitted that the lower court's judgment is to the point and that the court did not overstep its mandate as alleged by the appellant. That the trial court only refused to justify and sanitize on illegality by the appellant and the 2nd respondent.
40. The 1st respondent submitted that it is clear from the evidence that the appellant failed to prove her case and urged the court to find that the appellant's appeal is not merited and proceed to dismiss the same with costs.

Determination

41. I have perused and considered the record of appeal, the grounds of appeal, the submissions made and the authorities relied on by the advocates for the parties to buttress their rival positions. This being a first appeal, I am reminded that this court has the duty and obligation to reconsider the evidence, evaluate it and draw its own conclusion, bearing in mind that this court has neither seen nor heard the witnesses and therefore will make due allowance in this respect. See *Abok Odera t/a AJ Odera & associates Vs Joan Patrick Machaira & co. Advocates* [2013] EKLK, *Mwana Sokoni Vs Kenya Bus Service Ltd* (1985) 931 and *Ephantus Mwangi & another Vs Duncan Mwangi Wambugu* (1982-88) 1KAR 278 as well as *Selle & another Vs Associated Motor Boat Co. Ltd & others* (1968) EA 123.
42. The issues for determination as I can deduce from the grounds of appeal are;
 - i. Whether the trial court had jurisdiction to determine the matter.
 - ii. Whether the decision of the learned trial magistrate was against the weight of the evidence and the law.
 - iii. Whether the appeal is merited or not.
43. It was the appellants submissions that the trial court, while fully aware of the existence of a determination in the High Court went ahead and pronounced itself on a matter which was already dealt with by the High Court in Meru Succession cause No. 31 of 1991. The appellant submitted that the trial court overstepped its jurisdiction by overruling the decision of the High Court in the said succession cause contrary to hierarchy of the courts. It is the appellant's submission that the trial court did not have the requisite jurisdiction over the matter.
44. To determine whether the trial court (siting as an ELC) had jurisdiction over the matter, one must examine the contents of the pleadings and the order sought therein. The appellant filed the plaint dated 13th September, 2011 seeking for orders of permanent injunction against the 1st respondent.



The 1st respondent filed a counterclaim against the appellant and the 2nd respondent herein, wherein he claimed that land parcel No. Abothuguchi/Igane/627 was ancestral and family land and was registered in the names of the late Nchurai Mwoga (deceased) between 2nd March 1970 and 12th March 2003. That prior to his death, the deceased had distributed the land to his sons with the 1st respondent getting parcel No. Abothuguchi/igane/627 but remained in name of the deceased since the 1st respondent was working in Laikipia since 1969, parcel No. Abothuguchi/Igane/789 was given to Cesare Muthuri M’Nchurai while Ernest Itonga M’Narai (the 2nd respondent’s father) was given land parcel No. Abothuguchi/Igane/790. That the 2nd respondent unlawfully sold 2.00 acres to the appellant out of land parcel No. Abothuguchi/627 which was sub-divided into two parcels nos. Abothuguchi/Igane/1744 measuring 2.00 acres registered in the name of the appellant and Land Parcel No. Abothuguchi/Igane1745 also measuring 2.00 acres registered in the name of the 2nd respondent herein. In the counterclaim, the 1st respondent prayed for a declaration that the land exclusively belongs to him and should be registered in his names and a declaration that the said sale and transfer was irregular, null and void. The 1st respondent wanted the appellant ordered to transfer land parcel No. Abothuguchi/Igane/1744 to the 1st respondent.

45. In the case of the Owners of Motor Vessel “Lillian S” Vs Caltex Oil (Kenya) Limited, (1989) 1 KLR 1 Nyarangi J.A stated-;

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings... A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

46. In the case of Samuel Kamau Macharia & another Vs Kenya Commercial Bank Limited & others [2012] eKLR, it was held that-;

“A court’s jurisdiction flows from either *the constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law...”

47. The jurisdiction of the Environment and Land Court to hear and determine disputes relating to the environment, use and occupation of and title to land is provided for under Article 162 (2) (b) of *the Constitution* of Kenya. Further, Section 13 of the *Environment and Land Court Act* gives the court the power to hear and determine disputes relating to among others title to land. The said provisions are replicated under Section 9 of the *Magistrates’ Courts Act* 2015. Indeed, some magistrates have been gazetted to hear environment and land matters. Therefore, it is my view that since the issue was in regard to the titles held by the appellant, and specifically the question of how the same were acquired, the trial court had the requisite jurisdiction to hear and determine the matter. Similarly, the appellants claim for injunction related to occupation and title to land. I am therefore not persuaded that the probate court still had the jurisdiction to adjudicate over the matter since it was apparent that the suit properties herein were already in the names of the parties and the issue at hand was whether the said titles were acquired procedurally and legally or not.
48. The next issue for determination is whether the decision of the learned trial magistrate was against the weight of the evidence adduced and the law and whether the appeal is merited or not.
49. The appellant pleaded that she bought the suit land Abothuguchi/Igane/1744 from the 2nd respondent. The 2nd respondent testified that the 1st respondent’s father gave him land after he failed to trace him. That he was given 2 acres by his grandfather and 2 acres was left for the 1st respondent



in case he ever came back. It was the 2nd respondent's testimony that he sold parcel No. 1744 because he needed to file a succession cause as he had no funds for the same and further that he left parcel no. 1745 in his name but was to go to the 1st respondent once he showed up.

50. It was the 2nd respondent's evidence that he filed the succession cause in 1999. The appellant in her evidence produced a sale agreement dated 9th October, 1998 which clearly indicated that the land was sold before the succession cause was done. The evidence on record indicates that the 2nd respondent could get funds to file the succession cause.
51. It was the trial court's finding that under the law of contract, for a contract to be valid, there are essential elements which must be present and amongst them is the capacity to contract. The trial court stated that the law prohibits sale of land or immovable property before the grant is confirmed and further held that before confirmation of the grant, no part of the state of a deceased person may be dealt with in a manner that amounts to intermeddling.
52. In Civil Appeal 343 and 345 of 2002 at the Court of Appeal at Nyeri, Jane Gachoki Gathecha Vs Priscilla Nyawira Gitunga & another [2008] eKLR, the Court of Appeal dealt with a situation in which the land of a deceased person was unprocedurally transferred to a third party and the third party thereafter sold to a fourth party. The said fourth party thereafter claimed to be protected under Section 93 of the Law of Succession Act. The court dismissed the claim and in doing so stated-;

“We think, with respect that there is a fallacy in invoking and applying the provisions of Section 93(1) of the Law of Succession Act and the Superior Court fell into error in reliance of it. The section would only be applicable where, firstly, there is a “transfer of any interest in immovable or movable property.” Kabitau had no interest in plot 321 or any part thereof and therefore he could not transfer any. A thief acquires no right or interest which is transferable in stolen property. The transaction would be void ab initio and the property is traceable”

53. In Chuka Succession Cause No. 560 of 2012 Estate of M'Muthamia Mwendwa (deceased) [2016] eKLR, the High Court handled a matter in which the beneficiaries of the deceased's estate also sold property while they were not administrators. Mabeya J stated-;

“.. of course both Speranza and Linus were neither the owners of the properties they were purporting to sell nor were they administrators of the estate. Even an administrator of the estate with a grant which has not been confirmed cannot pass any title to land by dint of Section 82 of the Act. Accordingly, Francis Kithinji and John Mutembei are at best intermeddlers who together with Speranza Kaguri and Linus Mwitwi have fallen foul of Section 45 of the Act. Of course, under that section intermeddling with an estate of a deceased person is criminal and it attracts criminal sanctions.”

54. In Machakos HCC 256 of 2007 in Re Estate of John Gakunga Njoroge (deceased) [2015] eKLR, the court dealt with similar facts in which property was claimed by persons who had bought land from the deceased prior to his death and by person who had bought land from beneficiaries to the estate of the deceased. Muriithi J stated-;

“For the transactions between the applicants and the beneficiaries of the estate of the deceased entered into before the Grant of Letters of Administration to them and before the confirmed Grant, the contracts of sale are invalid for offending the provisions of Section 45 and 82 of the Law of Succession Act. Even if the sale transactions were by the administrators,



the dealings with immovable property of the Estate is restricted by the provisions on the powers and duties of the personal representatives under Section 82 (b) Proviso (ii) which provides that;

“(ii) No immovable property shall be sold before confirmation of the grant”.

“7. Recovery of consideration

If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person who it was paid, but without prejudice to section 22.”

55. The net effects of the above is that because the 2nd respondent sold land when he had no capacity to do so made the sale null and void ab initio and as such there was no valid title held by the appellant herein. The appellant lacked any beneficial and/or proprietary interest on the suit land capable of being protected by the law. The purported sale was contrary to the law, and specifically Section 45(1) and 82 of the *Law of succession Act*. The whole process of selling and transferring the suit land to the appellant by the 2nd respondent was illegal, hence the court was not bound to sanitize an illegality.
56. Considering the totality of the evidence on record and applying the legal principles outlined in law, I am satisfied that the learned trial magistrate was justified in arriving at the decision he made. The findings and holdings of the learned magistrate were well founded and I find no basis to interfere with the same.
57. In the result, I find no merit in the appellant’s appeal and the same is dismissed with costs to the 1st respondent.

DATED, SIGNED AND DELIVERED AT MERU THIS 14TH DAY OF DECEMBER, 2023

IN THE PRESENCE OF

Court Assistant – V. Kiragu/lena M

Ouma holding brief for Karanja for appellant.

No appearance for respondent.

C.K YANO

JUDGE

