



Opar v Ng'tela (Sued as the Legal Administrator of the Estate of Joseph Ngiela Mbori) & 2 others (Environment and Land Appeal E017 of 2023) [2025] KEELC 3606 (KLR) (24 April 2025) (Judgment)

Neutral citation: [2025] KEELC 3606 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E017 OF 2023
FO NYAGAKA, J
APRIL 24, 2025

BETWEEN

ANTON JOEL AJOWI OPAR APPELLANT

AND

MARY ACHIENG NG'IELA (SUED AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF JOSEPH NGIELA MBORI) 1ST RESPONDENT

NATIONAL BANK OF KENYA 2ND RESPONDENT

COLLINS OMONDI T/A COLLINET INVESTMENT AUCTIONEERS 3RD RESPONDENT

(Being an appeal from the judgement of Hon. B.O. Omwansa (Senior Principal Magistrate) delivered on 25th October, 2023 in Oyugis Senior Principal Magistrate's Court in ELC Case No. 004 'B' of 2021)

JUDGMENT

1. The Appellant, Anton Joel Ajowi Opar, brought this appeal as a result of being aggrieved by the decision of Hon. B.O. Omwansa (Senior Principal Magistrate) delivered on 25th October, 2023 at the Senior Principal Magistrate's Court at Oyugis in ELC Case No. 004 'B' of 2021.
2. The Appellant has presented the following grounds of appeal vide the Memorandum of Appeal dated 10th November 2023;
 - a. That the learned trial magistrate misinterpreted the tenure and/or meaning of the provisions of Section 99 of the Land Act in ordering for the cancellation of the Appellant's title.



- b. That the learned trial magistrate erred in law and in fact in faulting the Appellant on what the trial magistrate construed as improper or irregular exercise of the power of sale by the 2nd Respondent.
 - c. That the learned trial magistrate approached and/or dealt with the evidence on record in a slanted manner and thereby failed to appreciate the tenure of the Appellant's evidence that due diligence was conducted on his part as purchaser for value.
 - d. That the learned trial magistrate erred in law by failing to acknowledge that the only remedy available for the 1st Respondent as expressly provided for by law in case of an authorized, improper or irregular exercise of the power of sale is damages against the 2nd Respondent.
 - e. That the learned trial magistrate erred in law and in fact in failing to accord the Appellant the requisite protection envisaged to him as an innocent purchaser for value in a sale by auction.
3. The Appellant sought for the following orders;
- a. That the judgement of the learned trial magistrate delivered on the 25th October, 2023 be quashed and/or set aside and appeal be allowed.
 - b. That the costs of this appeal and in the trial Court be awarded to the Appellant.

Brief Facts

4. The 1st Respondent filed the suit against the Appellant and the 2nd and 3rd Respondents vide the Plaint dated 18th October, 2021 that was amended on 26th November, 2021. In the amended Plaint the 1st Respondent sought the following prayers;
- a. Declaration that the sale and/or alienation over and in respect of LR No. Central Kasipul/Kamuma/452, carried out on the 1st August 2014, on the basis of non-existent statutory notices and public auction, was premature, misconceived and a nullity ab initio.
 - b. Declaration that the 1st and 2nd Defendants herein were obliged to comply with all the relevant provisions of the law including but not limited to the Land Act No. 6 of 2012, Auctioneers Act 1996 and the Auctioneers Rules, 1997 (as amended) and in particular Rule 12 thereof, relating to advertisement prior to sale and/or alienation.
 - c. Declaration that the sale and transfer of LR No. Central Kasipul/Kamuma/452 in favour of the 3rd Defendant having been carried out and/or undertaken in contravention of the law, the 3rd Defendant herein is not entitled to the protection provided for and/or envisaged under the provisions of Section 99 of the Land Act No. 6 of 2012 or at all.
 - d. An order cancelling and/or rescinding the transfer and registration of LR No. Central Kasipul/Kamuma/452 in the name of the 3rd Defendant and restoration of the register and title in respect thereof, to and in the name of the deceased, as the legitimate owner and/or proprietor of the suit property.
 - e. An order of eviction against the 3rd Defendant, his agents and/or servants from LR No. Central Kasipul/Kamuma/452.
 - f. Permanent injunction restraining the 1st Defendant either by herself, nominated agents, servants and/or anyone acting under the 1st Defendant from selling and/or purporting to sell, disposing of, transferring, alienating, clogging, encumbering and/or in any other manner



dealing with the suit property, that is, LR No. Central Kasipul/Kamuma/452, without complying with the provisions of the Land Act, No. 6 of 2012, the Auctioneers Act, 1996 and the Auctioneers Rules, 1997.

- g. A permanent injunction restraining the 3rd Defendant either by himself, agents and/or servants and/or anyone acting under the 3rd Defendant from entering upon, taking possession of, dealing with and/or interfering with the Plaintiff's occupation and use of suit property that is, LR No. Central Kasipul/Kamuma/452.
 - h. Costs of the suit to be borne by the Defendants herein.
 - i. Such further and/or other relief as the Honourable Court may deem fit and expedient so to grant.
5. The 2nd Respondent filed its Amended Statement of Defence dated 17th March, 2022 where it sought that the 1st Respondent's suit be struck out with costs.
 6. The Appellant filed his Statement of Defence to the Amended Plaint dated 10th March, 2022 where he sought that the 1st Respondent's Amended Plaint be dismissed with costs.
 7. The matter was heard and the trial magistrate in his judgement issued the following orders;
 - a. A declaration is hereby and be made (sic) that the sale and/or alienation over and respect of LR No. Central Kasipul/Kamuma/452 carried out on the 1/8/2014, was premature, misconceived and a nullity ab initio.
 - b. Declaration is hereby made that the 1st and 2nd Defendants were obliged to comply with all the relevant provisions of the law notwithstanding that Joseph Mbori -deceased defaulted servicing and/or repayment of the loan.
 - c. Declaration is hereby made that the sale and transfer of LR Central Kasipul/Kamuma/452 in favour of the 3rd Defendant having been carried out and/or undertaken in contravention of the law, the 3rd Defendant herein is not entitled to the protection provided for and/or envisaged under the provisions of Section 99 of the Land Act No. 6 of 2012.
 - d. The transfer and registration of LR No. Central Kasipul/Kamuma/452 in the name of the 3rd Defendant is hereby cancelled and restoration of the register and title in respect thereof, to and in the name of the deceased, as the legitimate owner and/or proprietor of the suit property.
 - e. Eviction order is hereby issued against the 3rd Defendant, his agents and/or servants from LR No. Central Kasipul/Kamuma/452.
 - f. Permanent injunction is hereby issued restraining the 3rd Defendant either by himself, agents and/or servants and/or anyone acting under the 3rd Defendant from entering upon, taking possession of, dealing with and/or interfering with the Plaintiff's occupation and use of suit property that is LR No. Central Kasipul/Kamuma/452 and
 - g. Each party to bear own costs.

Appellant's Submissions

8. Counsel for the Appellant filed submissions dated 28th January, 2025. Counsel submitted on whether the Appellant was a bona fide purchaser for value of land parcel No. Central Kasipul/Kamuma/452. It was Counsel's submissions that Appellant participated in a public auction on 14th April, 2014 where he purchased the suit parcel at Kshs. 460,000/= . A memorandum of sale was entered on 14th April,



2014 and a certificate of sale issued on the same date. A transfer by Chargee was executed by the 2nd Respondent and the Appellant registered as the owner of the suit parcel. Counsel relied on Section 99 of the [Land Act](#) and submitted that the Appellant was a bona fide purchaser for value in a public auction for the suit parcel. The 1st Respondent did not tender any evidence to show that the Appellant had any notice of any irregularity before and/or during the said auction. All the Appellant did was to comply with the conditions of sale and was awarded the bid. Counsel relied on the case of Nationwide Finance Co. Ltd v Meck Industries Ltd [2005] eKLR and submitted that due procedure was followed by the 2nd and 3rd Respondents before the auction of the suit parcel.

9. Counsel relied on the cases of Arthi Highway Developers Limited v West End Butchery Limited & 6 Others [2015]eKLR, Elizabeth Wangui Githinji & 29 Others v Kenya Urban Roads Authority & 4 Others [2019]eKLR, Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v Attorney General & 4 Others [2017] eKLR and submitted that before the Appellant purchased the suit parcel, he conducted a search which showed that it was registered in the name of the 1st Respondent's husband whom he would not have known was deceased. Counsel relied on Section 26(1) of the [Land Registration Act](#) and submitted that the issue of whether the Appellant acquired the suit parcel through fraud was not pleaded and he is therefore a bona fide purchaser for value. He added that the Appellant should therefore be protected by this Court as provided for under Article 40(1) of [the Constitution](#) and Section 99 of the [Land Act](#).

1st Respondent's Submissions

10. Counsel for the 1st Respondent filed submissions dated 27th February, 2024. On grounds 1 to 5 of the Memorandum of Appeal, Counsel submitted that the trial Court did not issue any decree on 25th October, 2023 and therefore the judgement and decree to which the appeal lies is the one issued on 7th November, 2023. Counsel relied on Section 99 of the [Land Act](#) and submitted that the protection provided under that section is not absolute. He submitted that the learned trial magistrate found that the public auction conducted on 14th April, 2014 was marred by irregularities. The 1st Respondent's father one Joseph Ngiela Mbori had died sometime in December, 2023 (sic) but before his demise he had taken a loan facility from the 2nd Respondent. The late Joseph Ngiela Mbori was unable to repay the loan so he commenced bankruptcy proceedings in Kisumu HC Bankruptcy Cause No. 18 of 2001. On 26th March, 2001 an official receiver was appointed and he did not authorize the sale of the suit parcel by way of auction. Counsel submitted that the 2nd Respondent did not serve the requisite notices upon the administrators of the estate of the deceased and neither did the 3rd Respondent serve the 45 days Redemption Notice upon the administrators of the deceased. Counsel set out in great detail the evidence produced before trial Court, relied on the cases of Arthi Highway Developers Limited v West End Butchery Limited & 6 Others [2015]eKLR, Dina Management Limited v County Government of Mombasa & 5 others [2023] KESC 30 (KLR) and submitted that it is not disputed that the Appellant purchased the suit parcel at a public Auction. The Public auction was marred with irregularities and therefore the 2nd Respondent did not pass a good title to the Appellant. Counsel relied on the case of Stephen Kibowen v Agricultural Finance Corporation [2015] eKLR among other cases in support of his submissions.

2nd and 3rd Respondents submissions.

11. Counsel for the 2nd and 3rd Respondents filed submissions dated 26th February, 2025. The first issue counsel submitted on was on whether the public auction of the suit parcel was regular. Counsel relied on the case of In re Estate of Joseph Eric Owino alias Joseph Eric Owino Nyaburi- Deceased (Succession Cause 58 of 2020) [2022] KEHC 15453 (KLR) (18 November 2022) (Ruling) and



submitted that it is not disputed that the deceased took a loan facility from the 2nd Respondent and he defaulted in the repayments. Consequently, the 2nd Respondent engaged the 3rd Respondent to sell the suit parcel by way of public auction. The requisite notices were served upon the representatives of the estate of the deceased and the 1st Respondent was aware of the said default. The sale conducted by the 2nd and 3rd Defendants was sanctioned by law and Counsel urges the Court to find in the affirmative.

12. The second issue Counsel submitted on was on whether the Appellant was a bona fide purchaser for value without notice. Counsel relied Section 26 of the *Land Registration Act*, the case of Lawrence P Mukiri v Attorney General & 4 others [2013] eKLR and submitted that the Appellant was the highest bidder at the public auction that was conducted and therefore the passing of the title from the borrower to the Appellant by way of transfer of chargee was procedural. Counsel relied on the case of Charles Karathe Kiarie & 2 others v Administrators of the Estate of John Wallace Mathare (Deceased) & 5 others [2013] eKLR and urged the Court to find that the Appellant was an innocent purchaser for value. Counsel relied on the case of Ongori v Housing Finance of Kenya Limited & another (Civil Case 248 of 2018) [2022] KEHC 268 (KLR) (Commercial and Tax) (31 March 2022) (Ruling) and sought that the Court finds that the Appellant is a bona fide purchaser for value and that the cancellation of his title was per incuriam as the only remedy lie in damages.

Analysis and Determination

13. Upon consideration of the grounds of appeal, pleadings, submissions and the authorities cited, the following issues are for determination:

1. Whether the appeal is merited.
2. Who should bear the cost of the appeal.

14. The role of the Appellate Court was stated by the Court of Appeal in the case of Gitobu Imanyara & 2 others v Attorney General [2016] eKLR. It was held as follows;

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.”

15. In Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR the Court held as follows;

“This being a first appeal, we are reminded of our primary role as a first Appellate Court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

16. It was the Appellant’s contention that on 14th April, 2014 he participated in a public auction whereat he purchased the suit parcel at a consideration of Kshs. 460,000/=.

17. The Appellant contended that he procedurally purchased the suit parcel which had been charged to the 2nd Respondent and he is therefore protected under Section 99 of the *Land Act*. He submitted that he was a bona fide purchaser for value and that the trial magistrate erred in not making that finding.



18. The 1st Respondent on the other hand relied on Section 99 of the Land Act and submitted that there are exceptions to the bona fide purchaser for value doctrine. It was the 1st Respondent's submissions that since the process that led to the auction was marred with irregularities, the Appellant did not acquire a good title from the 2nd and 3rd Respondents.
19. The 2nd and 3rd Respondents submitted that the auction was procedurally done and therefore the Appellant was a bona fide purchaser for value.
20. The learned trial magistrate at paragraph 4 of page 5 of his judgement held as follows;
- “...Having considered the evidence in totality as regarding service, of notices, I find that the 1st defendant has not discharged her duty as to whether notices were served upon the administrator. It is difficult to confirm that service was effected upon the intended persons. I thus, come to the irresistible conclusion that the 1st Defendant never issued the notices as contemplated by the statutory provisions of the law. This thus violated the deceased's right of redemption.”
21. The Learned Trial Magistrate at paragraph 7 of page 6 of his judgement held as follows;
- “In view of the foregoing analysis, Court (sic) finds that the 1st Defendant did not comply with the provisions of the law as in exercising her statutory power of sale. Consequently, the subsequent flow of things or moves are not founded on any law. Judgement is thus entered against the Defendants as follows;...
- c) Declaration is hereby made that the sale and transfer of LR Central Kasipul/ Kamuma/452 in favour of the 3rd Defendant having been carried out and/ or undertaken in contravention of the law, the 3rd Defendant herein is not entitled to the protection provided for and/or envisaged under the provisions of Section 99 of the Land Act No. 6 of 2012.”
22. This Court notes that the issue of whether or not the Appellant was protected under Section 99 of the Land Act was not addressed in detail by the learned trial magistrate in his judgement. Instead, he only issued a declaration that the Appellant was not protected under Section 99 of the Land Act but that does not mean much as of now.
23. Section 99 of the Land Act provides as follows;
- “99.
- (1) This section applies to—
- (a) a person who purchases charged land from the chargee or receiver, except where the chargee is the purchaser; or
- (b) a person claiming the charged land through the person who purchases charged land from the chargee or receiver, including a person claiming through the chargee if the chargee and the person so claiming obtained the charged land in good faith and for value.



- (2) A person to whom this section applies—
 - (a) is not answerable for the loss, misapplication or non- application of the purchase money paid for the charged land;
 - (b) is not obliged to see to the application of the purchase price;
 - (c) is not obliged to inquire whether there has been a default by the chargor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular.
- (3) A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has not been a default by the chargor, or that a notice has been duly served or that the sale is in some way, unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice.
- (4) A person prejudiced by an unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.”

24. In the case of *Munidi Okemba Lore v Lucy Wangui Gachara* [2014] eKLR the Court held as follows;

“ 54. In the case of *Krobought Grant v Kenya Commercial Finances Co. Ltd & 2 others* -Civil Appeal No. 227 of 1995, it was held that a purchase at a public auction was protected by Section 69 B of the ITPA (in this case section 99(4) of the *Land Act*) and could only lose the protection if it was an improper or irregular exercise of the statutory power of sale of which the purchaser had notice of.”

25. In the case of *Stephen Kibowen v Agricultural Finance Corporation* [2015] eKLR the Court held that;

“ 30. It will be seen that under Section 99 (2) (c) above, a purchaser is not obliged to inquire, inter alia, into whether the sale is necessary, proper or regular. Under Section 99 (3), the purchaser is protected unless there is fraud, misrepresentation or dishonest conduct on the part of the chargee of which the purchaser had actual or constructive notice. Section 99(4) provides that the remedy of a person affected by an unauthorised, improper or irregular exercise of the power of sale, shall have his remedy in damages against the chargee.

31. The protection offered to the purchaser is quite expansive. I have my own doubts as to the appropriateness of this expansive protection. It will be seen that protection is offered even where there has been no default, where no notice has been issued, where the sale is not necessary, proper or regular. I am not convinced that the principles of justice will still uphold a sale where no



statutory notice is issued; or where there has not been default; or where the sale is outrightly fraudulent, only that the purchaser is unaware of such fraud.”

26. I am persuaded by the above authorities. As afore-stated in the paragraphs above, the Appellant contended that he was a bona fide purchaser for value who is protected under Section 99 of the [Land Act](#). Does Section 99 of the [Land Act](#) apply to the Appellant? The answer to this lies in how he got to purchase the suit land.
27. It is not in contention that he participated in an auction conducted purposely for the sale of the suit land. Was he required to inquire into whether the requisite statutory notices had been given or the chargor was not in default? Section 99(2) provides an answer to the negative.
28. A perusal of the proceedings before the trial Court shows that the appellant gave his evidence as DW1. Upon cross examination he stated that he saw an advertisement in the newspaper for the sale of the suit parcel. He also stated that he conducted a search which showed that the suit parcel was registered in the name of James Ng'iel Mombi and was charged to National Bank of Kenya the 2nd Respondent. He involved a surveyor, went to the suit parcel and spoke to both the Area Chief and the villagers before he purchased the suit parcel at the auction. This was not controverted.
29. A cursory reading of the judgement delivered on 7th November, 2023 shows that the learned trial magistrate found that the 2nd and 3rd Respondents did not issue the requisite statutory notices and therefore the sale was not lawful.
30. It is important to note that the sole reason why the learned trial magistrate invalidated the sale was because he found that the requisite notices were not served upon the 1st Respondent. It is equally important to note that the lack of service of the statutory notices had nothing to do with the Appellant. They were only relevant and applicable to the bank in its process leading to the advertisement and sale, and if it did not issue them it can only be the one to blame but not a party who has heeded to the call (responded to an advertisement for the auction and complied with the terms thereof thereby acquiring the property advertised).
31. In the cases of *Munidi Okemba Lore v Lucy Wangui Gachara* (supra) and *Stephen Kibowen v Agricultural Finance Corporation* cited above, it was held that a purchase at a public auction is protected and it can only be lost if the purchaser was aware of any irregularity.
32. In the present matter, it was not demonstrated that the Appellant was aware of any irregularities in the sale of the suit parcel and it is therefore my view that he was protected under Section 99 of the [Land Act](#).
33. Consequently, the learned trial magistrate erred in issuing a declaration that the Appellant was not entitled to the protection provided for under Section 99 of the [Land Act](#) and subsequently cancelling the registration of the suit parcel in his name, issuing an eviction order and permanent injunction.
34. The remedy that would have been available to the 1st Respondent was damages against the chargee for the irregular exercise of the statutory power of sale. A perusal of the Amended Plaint dated 26th November, 2021 shows that the 1st Respondent did not seek for any order for damages. The Court can only hold its peace over an invitation, if any for such an award.
35. The upshot of the foregoing is that the present appeal succeeds. This Court hereby sets aside orders (a), (c), (d), (e) and (f) of the judgement of the trial Court delivered on 25th October, 2023 in Oyugis Senior Principal Magistrate's Court in ELC Case No. 004 'B' of 2021.
36. The Appellant shall have costs of the appeal and costs of the suit in the trial court.



**JUDGMENT DATED SIGNED AND DELIVERED VIA THE TEAMS PLATFORM THIS 24TH
DAY OF APRIL 2024.**

HON. DR. IUR F. NYAGAKA

JUDGE

