



Yinda (Suing as Administratrix of the Estate of the Late Linus Yinda Opondo) v Okumu & 3 others (Environment and Land Appeal E012 of 2022) [2025] KEELC 182 (KLR) (24 January 2025) (Judgment)

Neutral citation: [2025] KEELC 182 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL E012 OF 2022
AY KOROSS, J
JANUARY 24, 2025**

BETWEEN

**SELINE AWUOR YINDA APPELLANT
SUING AS ADMINISTRATRIX OF THE ESTATE OF THE LATE LINUS YINDA
OPONDO**

AND

**JOICE ACHIENG OKUMU 1ST RESPONDENT
EMILY APONDI MURENDE 2ND RESPONDENT
JOHN OTIENO MADEDE 3RD RESPONDENT
DISTRICT LAND REGISTRAR UGENYA/UGUNJA DISTRICT 4TH
RESPONDENT**

*(Being an appeal from the judgment and decree of the PM Hon.L.N.
Sarapai on 16/03/2023 in Ukwala SPM ELC No. 14 of 2018)*

JUDGMENT

Background to the appeal

1. This is a 2nd appeal to this court. The 1st appeal was against the judgment rendered by the lower court on 18/11/2020. In its judgment of 3/03/2022, this court set aside this particular judgment and ordered a retrial.
2. In the lower court, Seline Awuor Yinda (Seline) and her mother Mary Apondi Yinda (Mary) who were administratrices of the appellant's estate, filed suit against the respondents. They were respectively, the daughter and 2nd wife of the appellant.



3. In a plaint dated 10/08/2016, the 1st respondent was described as the appellant's daughter-in-law. She was married to the appellant's son Benard Okumu Yinda (Benard) who was a child of the appellant's 1st wife Ananstacia Apondi Yinda (Anastacia).
4. From the record, Mary is deceased and has not been substituted while Anastacia and Benard predeceased the appellant.
5. The administratrices averred that without the appellant's estate being administered, the 1st respondent caused land parcel nos. North Ugenya/ Doho/1071 (1071) and North Ugenya/ Doho/1073 (jointly they will be referred to as "suit properties") which were registered in his name to be transferred to the 2nd and 3rd respondents.
6. The appellant pleaded fraud, illegality, negligence and illegality but particularized fraud against the 1st to 3rd respondent but as for the 4th respondent, she particularized fraud and negligence.
7. Thus, the appellant sought several reliefs from the court which were orders of permanent injunction against the 1st to 3rd respondents or their agents, employees or assigns from interfering with the suit properties, a declaration the 1st- 3rd respondents' title documents over the suit properties were null and void and sought for their cancellation, finally, upon their cancellation, the suit properties be registered in the appellant's name.
8. In opposition to the appellant's claim the 1st defendant filed a defence dated 12/10/2016 which contained denials. She asserted the administratrices cannot jump ship at this point yet they not only participated in the sale of 1073 to the 2nd respondent but Mary received the proceeds of the sale.
9. It was her contestation the suit properties were part of 4 subdivisions of North Ugenya/Doho/913 (mother parcel) which was initially registered in the appellant's and Benard's names. She averred the other subdivisions which were North Ugenya/Doho/1072 and 1074 were sold by Linus.
10. It was her case since Linus held the suit properties in trust for Benard's family, the suit properties were reserved for her use and that of her family. Further, since the properties were in her name, she could dispose them including selling 1073 to the 3rd respondent.
11. Hence according to her, the process was above board and the appellant's claim should be dismissed with costs.
12. The 2nd respondent's defence dated 18/04/2018 contended Mary was mentally incapacitated thus the claim was incompetent and the confirmed grant was invalid.
13. According to the 2nd respondent, she was a purchaser for value without notice of fraud as by the time she purchased 1073, the 1st defendant was its registered owner.
14. Further, she stated she exercised due diligence and did not commit any illegality and that another 3rd party in HCCC ELC no. 201 of 2014 was also claiming the suit properties. She urged the court to dismiss the suit with costs.
15. She averred she had not chased Seline and Mary from 1073 as Mary's homestead was stationed at land parcel no. North Ugenya/Simur 2427 (2427) whereas Seline lived at her matrimonial home.
16. The 3rd respondent's defence dated 28/09/2016 asserted that he did not commit any fraud as at the time he purchased 1071, the 1st respondent was already its registered owner and, in any case, as the 1st respondent was Benard's widow, 1071 devolved to her by operation of the law.



17. He contended the appellant held 1071 in trust for the 1st respondent and her children and it sufficed the transfer to him was lawful and technicalities should be overlooked.
18. Just as the 2nd respondent, he averred he conducted due diligence before purchase and the administratrices were not in possession of 1071. He stated other proceedings had subsisted between the appellant and 3rd parties in SRMCC no. 3 of 2004 and Kisumu ELC 201 of 2014. He sought for dismissal of the appellant's case with costs. The 4th respondent did not file a defence.
19. On 31/10/2022 which was after the 1st appeal was remitted to the lower court for retrial, the parties' counsels informed the lower court that they had reached a consent for the parties and their witnesses to adopt their evidence on record including produced documents. This was adopted as an order of the court and the parties' cases were marked as closed.
20. Subsequently, the learned trial magistrate ordered counsels to file their respective written submissions. Upon confirming submissions had been filed, the matter was reserved for judgment on 16/03/2023.
21. In this impugned judgment, the learned trial magistrate dismissed the appellant's suit, with each party bearing their respective costs. The appellant was aggrieved by this decision, hence the appeal.
22. It is noteworthy that during the hearing, Seline was the appellant's sole witness and testified as PW1 and she produced several documents in support of the appellant's case.
23. Margaret Achieng Otieno who is Seline's step sister and Benard's sister testified as DW1 and she was the 1st respondent's only witness. She did not produce any documents.
24. The 2nd and 3rd respondents respectively testified as DW3 and DW2. Michael Owuor Saba who was an area chief testified as DW4 and he produced a letter that he wrote dated 23/05/2018 as DEx. 1. It appears he was an independent witness.

Appeal to this court

25. Aggrieved by this decision, the appellant in his amended memorandum of appeal dated 13/04/2023 raised several grounds of appeal which contended the learned trial magistrate erred in law and fact by:
 - a. Failing to deal with the issue of whether the 1st respondent had powers to sell/transfer the suit properties to the 2nd and 3rd respondents.
 - b. Relying on the 1st respondent's evidence yet she neither testified, filed a witness statement nor defence.
 - c. Relying on evidence that was inconsistent, irregular and unsupported by law or evidence.
 - d. Failing to find the 4th respondent culpable in committing fraud during the transfer of the suit properties to the 2nd and 3rd respondents.
 - e. Holding the 2nd and 3rd were bonafide purchasers for value without notice of defect in title.
26. Accordingly, the appellant implored this court to allow the appeal with costs and set aside the impugned judgment with costs.

Submissions.

27. As directed by the court, the appeal was canvassed by written submissions. The law firm of M/s. Bitala & Kakinga Advocates which appear for the appellant filed written submissions dated 2/08/2024. Although he argued all the grounds of appeal, he summarised them into 4 issues.



28. They were whether the learned trial magistrate erred in law and fact by failing to determine whether the 1st respondent had capacity to sell or transfer the suit properties to the 2nd and 3rd respondents, whether there was any trust between the 1st respondent and the appellant, whether the learned trial magistrate erred in relying on inconsistencies and irregularities that were unsupported by law and facts and whether she erred in finding the 2nd and 3rd respondents were bonafide purchasers for value without notice of defect in title.
29. The 1st -3rd respondents' law firm on record M/s. Sala Mudany Advocates filed written submissions dated 27/05/2024 and identified 3 issues as arising for resolution which were whether the appellant is entitled to the reliefs sought, whether the 2nd and 3rd respondents are innocent purchasers for value and whether the appellant is entitled to costs.
30. Just like in the lower court, the 4th respondent did not participate in the proceedings.
31. Upon identifying and considering the issues for determination, this court will in its analysis and determination consider the parties' rival arguments as contained in their submissions. The judicial precedents and provisions of law that were relied upon by them in buttressing their arguments will also be considered.

Issues for determination.

32. As this is a first appeal, this court is called upon to re-evaluate, re-examine, and reassess the evidence from the trial court and come up with its own deduction. Madan, JA (as he then was) succinctly stated the role of an appellate court in *United India Insurance Co. Ltd vs East African Underwriters (Kenya) Ltd (1985) EA 898* as follows:

“The court of appeal will not interfere with the discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to various factors in the case. The court of appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

33. Having evaluated the records and rival submissions the issues that arise for resolution are: -
 - a. Whether the appellant proved her case of fraud to the required standards.
 - b. Whether the 2nd and 3rd respondents were bonafide purchasers for value and their titles to the suit properties indefeasible.
 - c. What orders should this court issue including an order as to costs?

Analysis and Determination

34. The issues that have earlier been identified as arising for determination shall be considered consecutively.



a. Whether the appellant proved his case to the required standards.

35. This was the crux of the issue for determination. The legal framework on the legitimacy of title documents is governed by Sections 24 and 25 *Land Registration ACT*. Even so, a title document can be challenged on grounds set out in Section 26 of this Act.

36. Section 24 recognizes the registered owner as the absolute owner of the land and this proviso of the law provides as follows: -

“Subject to this Act—

- (a) 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; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.’

37. While Section 26 of the *Land Registration Act* states as follows;

“26

- (1) 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 and 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 the ground of fraud or misrepresentation 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.”

38. By these statutory provisions, courts consider title documents as prima facie evidence of ownership of land. This proprietorship allows the registered owner to enjoy rights of possession, occupation, and quiet use of his land. Still, the registered owner’s proprietorship can only be challenged on grounds set out in Section 26.

39. In the circumstances of this case, the appellant pleaded and particularized fraud against the respondents and it is paramount to appreciate the meaning of fraud. Fraud has been defined by the Black’s Law Dictionary, 11th Edn, pg 802 in the following words: -

- “1. A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment. Fraud is usu. a tort, but in some



cases (esp. when conduct is willful) it may be a crime.)- Also termed intentional fraud...

2. A reckless misrepresentation made without justified belief in its truth to induce another to act.
3. A tort arising from a knowing or reckless misrepresentation or concealment of material fact made to induce another to act to his or her detriment. Additional elements in a claim of fraud may include reasonable reliance on the misrepresentation and damages resulting from this reliance.
4. Unconscionable dealing; esp., in contract law, the unfair use of the power arising out of the parties' relative positions and resulting in an unconscionable bargain."

40. When one pleads illegality or fraud, Order 2 Rule 10 (1) (a) of the Civil Procedure Rules (CPR) provides that such claims have to be particularised, and this proviso states: -

- "(1) Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing—
- (a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and"

41. It is settled law that fraud must procedurally be specifically pleaded and proved on parameters beyond a balance of probability but below that of beyond reasonable doubt. This principle of law was well elucidated in the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & Hulashiba Nansingh Darbar (Civil Appeal 106 of 2000)* [2000] KECA 223 (KLR) (Civ) (1 December 2000) (Judgment) where Court of Appeal held: -

"It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts." Emphasis added

42. Accordingly, having set down the law, I now turn to the pleadings, evidence and the appeal. It is noteworthy the appeal only challenges the findings of the learned trial magistrate on certain particulars of fraud as presented by the appellant's pleadings. For this reason, this court will restrict itself to matters raised on appeal.

43. Turning to the impugned judgment, the learned magistrate concluded probate proceedings were never conducted during various transactions.

44. My understanding of this reasoning is that the dealings between the 1st to 3rd respondents were tainted with illegalities and fraud as the suit properties which were initially registered in the appellant's name, were upon his demise and without probate proceedings being conducted over his estate, transferred to the 1st respondent who then transferred it to the 2nd and 3rd respondents.



45. Despite this conclusion, the learned trial magistrate reasoned that because the administratrices never lived on the suit properties, acquiesced to the illegalities, there appeared to be an existing trust over the suit properties, and Mary had benefited from the transactions, the claim of fraud could not stand.
46. The appellant's counsel contends the conclusion on lack of the absence of probate proceedings aligns with Section 45(1) of the *Law of Succession Act* (LSA) which prohibits intermeddling with, any free property of a deceased person. Counsel argues in the absence of such a grant of letters of administration, the dealings between the 1st to 3rd respondents were tainted with fraud.
47. According to counsel, having not obtained the grant of letters of administration, the 1st respondent could not pass a better title to the 2nd and 3rd respondents.
48. The learned trial magistrate did not mis-appreciate or misapply Section 45(1) of the LSA. However, could the elements considered by the learned trial magistrate in dismissing the appellant's claim be deemed valid defences on allegations of fraud? If so, were they proved to the required standards? My answer to this is in the negative.
49. Section 45(1) of the LSA is couched in mandatory terms and does not make provisions for exceptions. The learned trial magistrate fell in grave error when she reasoned that the non-occupation by the administratrices or the existence of a trust justified the fraud.
50. These are not valid defences of fraud. Occupancy and trust do not bar claims to fraud. I must also emphasize that in fact, there were no disclosures by the 1st to 3rd respondents as to the nature of the trust that the 1st respondent derived from the appellant.
51. The suit properties which were derived from the mother parcel show they were all registered in the appellant's name. It is clear neither Benard nor the 1st respondent's alleged trusts were ever registered over the suit properties.
52. They also did not produce any court order that made a positive finding of trust that would enable the 1st respondent to interfere with the appellant's registration.
53. The only valid defence that the respondents tendered was that the alleged administratrices participated in the process of selling the suit to the 3rd respondent.
54. The 1st -3rd respondents' counsel contends the administratrices should not benefit from their participation in their wrongdoing and relies on the Court of Appeal decision of *Maina & 87 others v Kagiri* [2014] KECA 880 (KLR) which stated:-

“This Court is a court of law and a court of equity; Equity shall suffer no wrong without a remedy; no man shall benefit from his own wrongdoing; and equity detests unjust enrichment.”
55. Bearing in mind the binding nature of *Maina* (Supra), the lower court and this court could and cannot allow the administratrices to benefit from their unlawful act or conduct if such actions were connected to the transfer of the suit properties to the 1st – 3rd respondent.
56. However, the onus was on the 1st to 3rd respondent to prove the administratrices were active participants in the fraudulent process. I have assessed the evidence on record and find the 3rd respondent's evidence was uncorroborated and unsubstantiated.



57. The 3rd respondent stated Mary sold 1071 to him and the administratrices together with Tonny who was Benard's son and himself visited the land's office and thereafter, he was informed of the transfer of 1071 to the 1st respondent's name, and he thereafter executed a written sale agreement.
58. The agreement for sale to show the administratrices' culpability was never produced. As for the 2nd respondent, it emerged from her evidence that she never had any dealings with the administratrices.
59. Accordingly, I must find the learned trial magistrate fell in grave error when she departed from her conclusion and dismissed the appellant's case.

b. Whether the 2nd and 3rd respondents were bonafide purchasers for value and their title indefeasible

60. The Court of Appeal in the decision in Samuel Kamere v Lands Registrar, Kajiado Civil Appeal No 28 of 2005 [2015] eKLR expounded on the principles of considering whether a party was a bonafide purchaser for value when it stated thus:-

“...in order to be considered a bona fide purchaser for value, they must prove; that they acquired a valid and legal title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property...”

61. The learned trial magistrate in arriving at her finding that the 2nd and 3rd respondents were bonafide purchasers for value without notice of defect in title considered the entries in the green cards.
62. The appellant's counsel contends this finding was erroneous as these respondents never presented an iota of evidence to show they had conducted due diligence.
63. Of a contrary argument, the 1st -3rd respondents' counsel contends at the time of purchase, the suit properties were already registered in the 1st respondent's name, they conducted due diligence and followed due process in transferring the properties to themselves.
64. These arguments and findings of the learned trial magistrate call upon this court to examine the record and determine this issue. For starters, the 2nd and 3rd respondents did not produce any document to demonstrate they purchased the suit properties including sale agreements as envisaged by Section 3(3) of the *Law of Contract Act*.
65. Further, they did not produce any completion documents towards perfecting the alleged transactions such as a land control board application and consent, payments of stamp duties and or transfer documents amongst others.
66. Worse is, they were all privy the 1st respondent's title was questionable. I say this because, the 3rd respondent testified that before purchase, he was aware 1071 was in the appellant's name and that he knew it was being transferred to the 1st respondent's name.
67. Whereas, the 2nd respondent testified she was informed 1073 was registered in Benard's name and she was alive of the 1st respondent's registration process well before she purchased it. Thus, I must find they were not innocent purchasers for value without notice of the defects in the suit properties' title.

c. What orders should this court issue including an order as to costs?

68. In light of the above analysis and findings set out therein, I find the appeal is successful in its entirety. I hereby set aside the judgment and decree of the learned trial magistrate rendered on 16/03/2023 and since costs follow the event, I award costs to the appellant.



69. Having set aside the judgment, I will substitute it with reliefs sought in the appellant's claim with necessary modifications. The upshot of the above is that I hereby issue the following final disposal orders: -

- a. The appeal is allowed in its entirety.
- b. A permanent injunction is hereby issued against the 1st to 3rd respondents either by themselves, their agents, and/or employees or assigns from interfering with and/or dealing with land parcel nos. North Ugenya/ Doho/1071 and North Ugenya/ Doho/1073 either by selling, transferring or constructing therein.
- c. A declaration is hereby issued that titles to land parcel nos. North Ugenya/ Doho/1071 and North Ugenya/ Doho/1073 were fraudulently acquired by the 1st, 2nd and 3rd respondents and their registrations are null and void.
- d. The Land Registrar, Ugenya/Ugunja district is hereby directed to revoke/cancel the title deed for land parcel nos. North Ugenya/ Doho/1071 and North Ugenya/ Doho/1073 in the respective names of John Otieno Madede and Emily Apondi Murende and instead, register the name of Linus Yinda Opondo.
- e. Costs of the lower court suit and the appeal are awarded to the appellant.

Orders accordingly.

DELIVERED AND DATED AT SIAYA THIS 24TH DAY OF JANUARY 2025.

HON. A. Y. KOROSS

JUDGE

24/01/2025

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

In the Presence of:

M/s. Murugi h/b for Mr. Kakinga for the appellant

Mr. Sala for the 1st- 3rd respondents

N/A for the 4th respondent

Court assistant: Ishmael Orwa

