Achira v Obutu & 4 others (Environment and Land Appeal E015 of 2023) [2025] KEELC 358 (KLR) (5 February 2025) (Judgment)

Neutral citation: [2025] KEELC 358 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ENVIRONMENT AND LAND APPEAL E015 OF 2023

M SILA, J

FEBRUARY 5, 2025

BETWEEN

DENNIS ONGUBO ACHIRA ..... APPELLANT

AND

THOMAS ATANGA OBUTU ..... 1ST RESPONDENT

GEORGE OGAKE PIUS ..... 2ND RESPONDENT

SIMEON NYAMBOGA SARARA ..... 3RD RESPONDENT

ATEMBA ONSONGO ..... 4TH RESPONDENT

ESTHER NYASANI MAKORI ..... 5TH RESPONDENT

(Being an appeal against the judgment of Hon. C.A.Ocharo, Senior Principal Magistrate, delivered on 14 November 2023 in the suit Kisii CMCC/ELC No. 14 of 2019)

JUDGMENT

1. The appellant herein is aggrieved by the judgment delivered against him in the suit Kisii CMCC/ELC No. 14 of 2019 and has preferred an appeal to this court. Several grounds have been listed which I will shortly get into. I will first set out the background of the suit, the evidence presented, and the reasoning of the court, before I get to the substance of the appeal.

2. The suit was commenced by the 1st – 4th respondents (respectively being the 1st – 4th plaintiff) through a plaint filed on 7 February 2019. When originally filed, the plaint had only the appellant as the sole defendant. That plaint went through a couple of amendments resting with the further amended plaint filed on 25 July 2023. In the amended plaint, part of what was amended was inclusion of the 5th respondent as the 2nd defendant. In the further amended plaint, the 1st respondent pleaded to be the registered owner of the land parcel South Mugirango/Bogetenga/3175 (hereinafter simply referred

to as parcel No. 3175) whereas the 3rd respondent pleaded to be the registered owner of the land parcel South Mugirango/Bogetenga/3179 (hereinafter simply referred to as parcel No. 3179), which they claimed to have purchased from the 5th respondent (sued as the 2nd defendant) out of the larger land parcel South Mugirango/Bogetenga/2481 (hereinafter simply referred to as parcel No. 2481). The 2nd and 4th respondents also asserted to have purchased portions of the land parcel No.2481 despite not having titles. All plaintiffs pleaded to have purchased their portions in the year 2010-2011. They pleaded that despite having knowledge that they were purchasers and in actual possession, the appellant (sued as 1st defendant) , through a sale agreement dated 5 July 2013, purported to purchase from the 5th respondent a portion measuring 50 x 200 feet out of the land parcel South Mugirango/ Bogetenga/3119 (hereinafter simply referred to as parcel No.3119), and obtained title thereto which was registered as South Mugirango/Bogetenga/3104 (the suit land or simply parcel No.3104). The 1st – 4th respondents pleaded that upon paying the purchase price and taking possession, there arose a constructive trust in their favour, and therefore the appellant held the suit land in trust for them. It was pleaded that the suit land overlaps 0.006 Ha of the land parcel No. 3175 owned by the 1st respondent; overlaps a portion of 0.007 Ha of the land parcel No. 3179 owned by the 3rd respondent; overlaps a portion of 25 x 100 feet owned by the 2nd respondent; and a portion of 25 x 100 feet owned by the 4th respondent. They contended that the appellant had continuously harassed the 2nd respondent through various criminal proceedings that were dismissed.

3. In the plaint, the 1st – 4th respondent sought the following orders :

    a. A declaration that there arose a constructive trust between the plaintiffs and the 2nd defendant and therefore the 1st defendant holds the suit land in trust for the plaintiffs in the following portions :0.006 Ha for the 1st plaintiff,25 x 100 feet for the 2nd plaintiff,0.007 Ha for the 3rd plaintiff,25 x 100 feet for the 4th plaintiff.

    b. A declaration that the said portions claimed by the 1st and 3rd plaintiffs form part of their respective parcels South Mugirango/Bogetenga/3175 and 3179 respectively.

    c. An order compelling the 1st defendant to transfer the portions claimed to by the 2nd and 4th plaintiffs in default of which the executive officer of this Honourable Court to execute the necessary documents.

    d. Costs of the suit.

4. The appellant filed defence wherein he asserted ownership of the suit land which he pleaded to have purchased from the 5th respondent. He pleaded that the 2nd respondent (2nd plaintiff) had unlawfully trespassed into his land, constructed a permanent structure, and carried out farming, as a result of which he was arrested and charged with the offence of Forcible Detainer vide Ogembo Criminal Case No. 195 of 2014 where he was found guilty. He asked that the suit be dismissed with costs.

5. The 5th respondent (as 2nd defendant) appointed separate counsel and in her defence she denied that the titles of the plaintiffs were created on subdivision of the land parcel No. 3119. She denied selling land to the 2nd and 4th respondents. She pleaded that the suit land (parcel No. 3104) was a direct subdivision of land parcel No. 3119 which she owned and therefore the suit land was distinct from the parcels of land owned by the 1st and 3rd respondents, on both location and immediate origin. She contended that there is no specific claim against her in the suit and that the suit lacks merit.

6. When the plaint was filed on 7 February 2019, the 1st – 4th respondents applied for an order of injunction to restrain the appellant (who was then the sole defendant) from the suit land. In a ruling delivered on 25 June 2019, the order of injunction was granted alongside other orders, including an

order for the Kisii County Surveyor to visit the disputed land and come up with a report, and also for the 5th respondent (who was then not party to the suit) to go to the ground and show each of the parties the boundaries of the respective portions that they purchased, and that should that not be possible she be made a party to the proceedings as defendant. The land was duly visited by the Kisii County Surveyor on 21 August 2019 and a report dated 16 September 2019 was filed. In that report, the County Surveyor observed as follows :

i. That the appellant and the 2nd respondent claim the (same) position on the ground;

ii. That the position claimed by the appellant and the 2nd respondent has a structure on it and some unused building materials i.e stones and gravel;

iii. That the 1st, 3rd and 4th respondents' land exists on the ground save for their claims of encroachment by the appellant;

iv. That one Esther Nyasani Makori (now 5th respondent) was not ready to show all purchasers the boundary of their respective portions instead she was selective and at some point denying knowing some of the purchasers.

7. He further found as follows (slightly paraphrased to exclude obvious typing errors) :

i. That the parcel in dispute is in Sheet Number 25 of Bogetenga Registration Section.

ii. That parcel No. 3104 (the suit land) is in the names of Dennis Ongubo Achira (appellant) measuring approximately 0.09 Ha.

iii. That the 2nd respondent claims the entire of the suit land and has constructed a building on it.

iv. That the 1st respondent owns the parcel No. 3175 whereas the 3rd respondent holds title to the parcel No. 3179.

v. That the parcel No. 3119 was subdivided into the parcels No. 3103 and 3104.

vi. Parcel No. 3103 was further subdivided to the parcels No. 3171 – 3182 (serially); the shape and alignment of the suit land (No. 3104) was interfered with in this subsequent subdivision.

vii. The ground occupation is shown in an attached sketch.

8. The Surveyor concluded as follows :

> " In view of the above findings it is clear that the land being claimed by the 2nd plaintiff (now 2nd respondent) lies squarely on the title No. 3104 while the 1st and 3rd plaintiffs (now 1st and 3rd respondents) claim encroachment by the defendant (appellant) on the ground which as per the records the subdivision of parcel No.3103 interfered with the general alignment of parcel No. 3104 hence the claim of encroachment does not arise by virtue of precedent of subdivision."

9. From the report and documentation presented in the suit, it was apparent that all the parcels of land claimed by the parties herein originated from the land parcel South Mugirango/Bogetenga/2481 which was registered in the name of one Zablon Murumbwa Mosoti. The 5th respondent was married to a brother of Zablon and it would appear that he had a share in this land parcel No. 2481. This land parcel No. 2481 was subdivided into two portions to bring forth the land parcels South Mugirango/Bogetenga/3118 and 3119, the former of which got registered in the name of Zablon and the latter in the name of the 5th respondent. The new titles were registered on 13 December 2012 in the name of

Zablon. The transfer of the parcel No. 3119 by Zablon to the 5th respondent was effected on 5 July 2013. On 23 July 2013, the 5th respondent subdivided the land parcel No. 3119 to bring forth two parcels of land being the land parcels No. 3103 and 3104 (the suit land). She transferred the suit land to the appellant on 24 July 2013. What she retained, i.e parcel No. 3103, she transferred to Gideon Mosoti Makori (her son) on the same day, i.e 24 July 2013 and with that action she left no land in her name. Gideon Mosoti Makori proceeded to further subdivide the land parcel No. 3103 into the parcels No. 3171 – 3182. He transferred the parcel No. 3175 to the 1st respondent on 14 January 2014 and transferred the parcel No. 3179 to the 3rd respondent on 7 February 2014. In the titles, the parcel No. 3175 measures 0.12 Ha whereas the parcel No. 3179 measures 0.02 Ha.

10. Hearing commenced on 10 November 2021 when the 2nd respondent testified as PW-1. His evidence was that in the year 2010, the 5th respondent and the area subchief came to him, and the 5th respondent sold to him land measuring 25 x 100 feet for a consideration of Kshs. 170,000/=. He testified that what he purchased was from the land parcel No. 2481. They had a sale agreement dated 17 January 2010 which he produced as an exhibit. He testified that at that time the land was registered in the name of Zablon who was the 5th respondent's brother in law. He stated that they commenced the subdivision process and he produced the mutation form. He was never issued with a title deed as the land was sold to the appellant who now holds its title deed. The title deed is to the parcel No. 3104 which is the suit land. Before they filed suit, he had been charged with a criminal offence at Ogembo Law Courts and was found guilty. The verdict was reversed on appeal in Kisii Criminal Appeal No. 81 of 2013. He testified that elders sat in a meeting on 3 August 2013 to deliberate on the dispute and the 5th respondent was advised to correct the mistake. He stated that he found the 3rd and 4th respondents already on the land whereas the 1st respondent purchased his portion later. He stated that it is them (as plaintiffs) who purchased the land first, before the appellant, as the appellant's sale agreement was entered into on 5 July 2013. Cross-examined, he testified that at the time that he purchased the land from the 5th respondent, she had not title. No transfer forms were filled as she had no title.

11. PW – 2 was Atemba Onsongo, the 4th respondent. He testified that in the year 2010, the 5th respondent sold to her land measuring 25 x 100 feet for Kshs. 210,000/= and they wrote a sale agreement which he produced as an exhibit. He testified that he took possession and fenced the land. Subsequently he heard that the 5th respondent had sold land to the appellant. They attempted to settle the matter before the area chief but the 5th respondent denied selling her portion to a third party. He testified that the other plaintiffs also purchased land from the 5th respondent. He stated that the land was now vacant; he wanted to be given his land. He was not cross-examined.

12. PW- 3 was Isaya Oeri alias Nelson Oeri. He stated that in 2010 he was called by the 5th and the 3rd respondent as they were going to transact over land. He testified that the 5th respondent sold land measuring 25 x 100 feet to the 3rd respondent for Kshs. 100,000/= and the 3rd respondent later got title. Later, Mosoti the son of the 5th respondent called him as he was selling land measuring 30 x 100 feet to the 1st respondent.

13. PW – 4 was Thomas Atanga Ogutu, the 1st respondent. His evidence was that he purchased the land parcel No. 3175. After he obtained title, he learnt that someone else had purchased part of his land, and that there was a meeting where it was agreed that this portion be returned to him. He stated that the appellant and 5th respondent had taken from him a portion of 0.06 Ha. Cross-examined, he acknowledged that the appellant obtained his title to the land parcel No. 3104 on 24 July 2013 whereas he obtained his title to the parcel No. 3175 on 14 January 2014 which was a later date. He however stated that he purchased his land earlier. He affirmed that before one gets title a surveyor goes to the

ground. He contended that the boundaries were wrongly marked. He denied that what he has is a boundary dispute.

14. PW – 5 was Simeon Nyamboga Sarara, the 3rd respondent. His evidence was that through a sale agreement dated 2 October 2010, he purchased what is now the land parcel No. 3179 from the 5th respondent. He has his title and nobody resides on his land. He wished to have 0.007 Ha from the appellant's title No. 3104 on the basis that he purchased his land earlier than the appellant.

15. PW – 6 was Zablon Morumbwa Mosoti. He testified that the 5th respondent is his sister in law as she was married to his deceased brother, one Makori Mosoti, who died in 1974. When he died the land parcel No. 2481 got registered in his name. He subsequently subdivided it into two portions, i.e parcels No. 3118 and 3119. He retained the parcel No. 3118 and transferred the parcel No. 3119 to the 5th respondent. He stated that the 5th respondent sold to the 2nd respondent a portion measuring 25 x 100 feet for Kshs. 170,000/=. He averred that the 5th respondent gave her son, Jason Nyamoko Makori, Kshs. 70,000/= to treat his wife who was sick and the balance of Kshs. 100,000/= was taken by the 5th respondent and Gideon Mosoti Makori (Gideon). He added that the 1st respondent purchased a portion measuring 50 x 100 feet at Kshs. 240,000/= which he paid in full. Regarding the appellant, he testified that he heard that he intended to buy land measuring 28 x 840 feet from Gideon Mosoti Makori. He contended that he found him on the land and told him that there was no land to be sold to him as the land had been purchased in 2010. He then inquired from the 5th respondent who told him that she does not know anything as she was in hospital. He called the 2nd respondent and informed him that the land had been sold by Gideon to the appellant. He stated that he, together with the 2nd and 5th respondent, proceeded to the Land Registry at Kisii to report the fraud. Cross-examined, he testified that he did not know the appellant until this case. He testified that what the appellant purchased was the 2nd respondent's land. He stated that he was in court to testify for the 2nd and 3rd respondents and that there was a sale agreement that he signed.

16. With the above evidence, the 1st – 4th respondents closed their case.

17. DW – 1 was Solomon Bichanga Moffat Ndege. He holds a power of attorney in respect of the appellant who lives in the USA. He testified that the suit land belongs to the appellant and he produced the title thereof which was issued on 24 July 2013. He was not present when the land was purchased and could not tell its size at the time of purchase.

18. DW – 2 was the 5th respondent. She had a pre-recorded witness statement which she adopted as her evidence. In it, she stated that she sold to the appellant the suit land, being a portion out of her land parcel No. 3119. She stated that the immediate origin of the appellant's land and the land of the 1st and 3rd respondents was distinct; that the appellant acquired his land way before the 1st and 3rd respondents acquired theirs; that she did not sell or participate in any sale of land agreement with the 2nd and 4th respondents who were strangers to her. She averred that their allegations are baseless and unfounded on any evidence. On the claim by the 1st and 3rd respondents, she stated that each has his own parcel of land and their claim based on trust is without any basis at all. She stated that the parcels of the 1st and 3rd respondents have distinct origin and do not relate to her parcel of land. In court, she reiterated that she did not sell land to the 2nd respondent and never issued him with title. She did however state that she sold land to the 1st defendant and gave him title.

19. Cross-examined, she asserted that she never sold land to the 2nd respondent and that the agreement he produced was fake. Regarding the 1st respondent, she repeated that she sold to him land but stated that he did not finish paying for it then she heard that he obtained title. She did not sue him for obtaining the title. She acknowledged that she knows the 3rd respondent and that she also sold to him land but

he did not complete payment. She also did not sue him. On the 4th respondent, she stated that she did sell to him land then he sold it to the 2nd respondent. She stated that he did not pay for it but she has not sued him. She testified that the 1st – 4th respondents are all in occupation of the land.

20. With the above evidence the defendants closed their case.

21. Counsel were invited to file their submissions, which they did, culminating in the impugned judgment delivered on 14 November 2023. In the judgment, the trial court upon assessing the issues was of opinion that the 5th respondent was not truthful. She had this to say :

> " Though the 2nd defendant attempted to deny this fact, her demeanour betrayed her. She was not being truthful and in fact her testimony was impeached at cross-examination, when she eventually admitted selling land to the plaintiffs.
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> Section 28 (b) of the *Land Registration Act* provides as follows :
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> > "unless the contrary is expressed in the register, all registered land shall be subject to the following interests as may be for the time being noted on the register :
>
> Trusts including customary trusts.
>
> The 1st defendant (sic) title is subject to the plaintiffs' right of possession which was an overriding interest on the title which was acquired by the 1st defendant while the plaintiffs were already in occupation."

22. She further stated that :"The 2nd defendant in her testimony testified that she had not sold land to the plaintiffs. On further examination, she recanted the stand and confirmed to have sold land to two of the plaintiffs, the 1st and 3rd plaintiffs. She had earlier claimed not to have received payment from the plaintiffs specifically the 2nd and 4th plaintiffs a statement that was contrasted by the sale of land agreement which show that she received payment directly or through her son who received the money on her behalf while she was in hospital. Part of this payment was used to settle hospital bills and other on dowry as stated by PW-6 in testimony and statement.

> On the direction of the area chief and elders, she was to help in solving the dispute by showing the plaintiffs and the 1st defendant their respective parcels and boundaries, the 2nd defendant was reluctant to do the same and became evasive."

23. She held that in purchasing the land parcel No. 3104, the 1st defendant encroached into the portion of the plaintiffs denying them the enjoyment of their land. She held that the claim of the 2nd and 4th respondents was evidenced by their sale agreements with the 5th respondent and also supported by various witnesses and their statements, including PW-6. She held that when the 5th respondent was disposing the suit land to the appellant, she was well aware of the plaintiffs' interest and it was immaterial that they do not hold title to the portions they occupy. She found that the appellant was fully aware that there were already persons in possession and that he failed to undertake due diligence to ascertain the actual size and boundary of the suit land and confirm that it was free of encumbrances. She held that the appellant was informed by PW-6 that the land he intended to purchase was already sold and there was no land free for sale.

24. She found that the 1st – 4th respondents had proved their case and she entered judgment in their favour as prayed with costs.

25. Aggrieved, the appellant filed this appeal on the following grounds inter alia that the trial court erred in holding that the appellant did not do due diligence yet he had done a search; that the trial court erred in cancelling the title of the appellant when no fraud or misrepsentation was pleaded; and that the trial court failed to take into consideration that the appellant was a bona fide purchaser.

26. The appeal was argued through written submissions and I have taken note of the submissions filed. I take the following view of the matter.

27. This is a first appellate court and this court has a duty to reevaluate the evidence and draw its own conclusions taking into consideration that it did not have the benefit of seeing or hearing the witnesses who testified.

28. It is apparent to me that the claim of the 1st and 3rd respondents is separate from that of the 2nd and 4th respondents. The 1st and 3rd respondents do actually have titles in their names, that is titles to the land parcels No. 3175 measuring 0.12 Ha and the land parcel No. 3179 measuring 0.02 Ha. Their complaint was that the appellant's title to the suit land has encroached into their respective parcels of land by areas measuring 0.006 Ha, for the 1st respondent, and 0.007 Ha for the 3rd respondent. The case of the 2nd and 4th respondents was that they purchased land from the 5th respondent measuring 25 x 100 feet but they have not got titles thereto and it was insinuated that whatever they purchased got comprised in the title held by the appellant in the parcel No. 3104. These clearly were two different causes of action and I would think that they were best heard through separate suits, one for encroachment, and the other for specific performance of sale agreements for land alleged to have been subsequently sold to a third party. Be that as it may, the suit was heard and I believe no prejudice was caused to any party. Nevertheless in my assessment I will consider the two causes of action separately.

29. I will start with the case of the 1st and 3rd respondents, which as I have elaborated above, claimed that the appellant's land parcel No. 3104 has encroached into their land parcels No. 3175 and 3179. It will be recalled that all titles in dispute were previously comprised in the parcel No. 3119 which was created on 13 December 2012 and first registered in the name of Zablon Morumbwa (PW-6). Zablon transferred this land parcel No. 3119 to the 5th respondent on 5 July 2013. This parcel No. 3119 was subdivided into the parcels No. 3103 and 3104 on 23 July 2013, and on the following day, i.e 24 July 2013, she transferred the parcel No. 3104 to the appellant.

30. The 1st respondent's complaint was that 0.006 Ha of his land is taken up in the appellant's title No. 3104. There is absolutely no basis for this claim. I have carefully gone through the statement of the 1st respondent which he adopted as his evidence in chief together with his oral evidence given in court. He merely stated that in 2010 he purchased land from the 5th respondent. He never exhibited the sale agreement nor stated what size of land he purchased. We have no evidence of when he purchased the land that he has title to, from whom, and what size was indicated in the sale agreement. There is also no evidence that what is shown in the title i.e 0.12 Ha is not what he purchased, or is not what he is in occupation of. The report of J.R.R Aganyo & Associates produced does not say what area the 1st plaintiff is in occupation of. Neither does the report of the County Surveyor. I really see no basis for the 1st respondent claiming that his land has been encroached by a portion measuring 0.006 Ha from the parcel No. 3104. Apart from the foregoing, it will be observed that the parcel No. 3104 was created on 23 July 2013. The title No. 3175 was created subsequently, for it was a subdivision of the parcel No. 3103. As pronounced by the County Surveyor in his report, the claim of encroachment from the parcels No. 3175 and 3179 does not arise by virtue of precedent of subdivision i.e for reason that their titles came later than the parcel No. 3104 that was already in existence when their titles were created.

31. The reasoning above applies for the 3rd respondent's title No. 3179. In as much as he did produce a sale agreement, dated 2 October 2010 showing that he purchased land measuring 25 x 100 feet, that does not help him at all. You cannot claim that an earlier created title was hived off a title that came later. In essence when the titles to the parcels No. 3175 and 3179 were being created, they ought to have respected the already established boundary of the parcel No. 3104. The subdivision of the parcel No. 3103 which resulted inter alia into the parcels No. 3175 and 3179 could not go beyond the boundaries of the parcel No. 3103 so as to encroach into the parcel No. 3104 that was already in existence.

32. If at all the issue raised by the 1st and 3rd respondents was in the manner in which these two titles were created, in relation to the parcel No. 3104, then such suit could not proceed without the person who did the subdivision and brought forth the titles No. 3175 and 3179 being a party, and that would be George Mosoti, and also the Land Registrar and Director of Surveys, as the complaint would be that the subdivision of the parcel No. 1303 was not proper for failure to consider their occupation or what they had purportedly earlier purchased. The County Land Registrar made this very clear in his report and I am at a loss as to why the trial Magistrate did not take his opinion seriously and apply it in determination of the suit.

33. Moreover, if at all the 1st and 3rd respondents thought that there was any issue on encroachment from the parcel No. 1304, that would comprise nothing more than a boundary dispute, which they ought to have referred to the Land Registrar for determination pursuant to Section 18 of the *Land Registration Act*. It ought to be considered that if it was a boundary dispute, and it certainly was, then it was determined through the report of the County Surveyor, and that report is categorical that these two parcels No. 3175 and 3179 cannot claim encroachment from the parcel No. 3104. The surveyor is the expert and he pronounced himself on the same. No law was cited to challenge this conclusion of the County Surveyor.

34. The long and short of it is that the cases of the 1st and 3rd respondents were for dismissal and I hereby substitute the judgment of the trial court with an order that the cases of the 1st and 3rd respondents are dismissed with costs to the appellant and the 5th respondent.

35. Let me now turn to the cases of the 2nd and 4th respondents.

36. I will start with that of the 4th respondent as it does not appear to have much issue. He claimed to have purchased land measuring 25 x 100 feet from the 5th respondent. In his evidence, he stated that whatever he purchased is vacant. The report of the surveyor shows that this land claimed by the 4th respondent exists on the ground and is not part of the land being comprised in the appellant's title No.3104. There is no question of it being encroached or it encroaching the parcel No. 3104. It means that it falls within a parcel of land which the 4th respondent ought to have identified, and if he asserts title thereto, then sue for it. There was really no suit by the 4th respondent against the appellant. The 4th respondent could not seek an order that the suit land is held in trust for him yet the land he claims does not form part of the suit land. The report of the County Surveyor shows that whatever he claims is intact on the ground. If it is specific performance of the agreement that he had with the 5th respondent, so that he can get title, then he ought to have sued for specific performance, but this was not the suit presented to court. There is certainly no order for specific performance that is sought or any order seeking transfer of the land that he claims to have purchased. I therefore see no basis for any judgment in favour of the 4th respondent. Even if there was substance in his case, as I have explained, judgment could only be entered in his favour for land that does not comprise the land parcel No. 3104 but for some other title. He needs to sue whoever owns that other land or seek specific performance of his agreement. There was no point in the 4th respondent suing the appellant or 5th respondent in respect

of a trust. I substitute the judgment entered in his favour with the order that his suit is dismissed with costs to the appellant and 5th respondent.

37. I now turn to the case of the 2nd respondent who appears to me to be the main protagonist in the dispute with the appellant. His case is that in 2010, he purchased land measuring 25 x 100 feet at a consideration of Kshs. 170,000/= vide the sale agreement dated 17 January 2010 which he produced as an exhibit. He stated that he took possession and began development, although in his evidence he never elaborated exactly when he took possession or commenced development. He of course claims that what he purchased is what is now comprised in the title held by the appellant and asserts that the appellant purchased this land knowing that he had an interest in it. This alleged sale to the 2nd respondent was categorically denied by the 5th respondent and I will take a keen look at it.

38. What was produced is an alleged sale agreement dated 17 January 2011 between Esther Nyasani Makori as vendor and George O. Pius as purchaser. The agreement is handwritten and it does not say who drew it and it was never mentioned in the evidence the person who actually hand wrote the said agreement. Be that as it may, it is recorded that Esther Nyasani Makori being the owner of land No. 2481 at South Mugirango Central Location has sold approximately 25" 100 feet to George Ogake Pius for Kshs. 170,000/-. It is recorded that Kshs. 20,000/= is received and the remaining amount will be paid before the family. It is recorded that the vendor and purchaser have signed and that Gideon M. Makori is witness of the seller and Francis O. Makori and George Ochora Morwani are witnesses of the buyer. Overleaf is another recording which states that "today on 18/02/2011 George Pius has given Esther Nyasani Kshs. 60,000 + 5,000 + 5,000 = 70,000. Present, Esther Nyasani, George Pius, Mosoti Makori, Jared Makori and George Ochora (and there are signatures against these names). This agreement was reached in this office by both parties (signature) Assistant Chief Bomonyama (stamped with stamp of Assistant Chief Bomonyama Sub-Location)."

39. As stated earlier, the 5th respondent denied signing such agreement. When a document is disputed it must be proved and the *Evidence Act*, Cap 80, Laws of Kenya, makes provision on how documents are proved.

40. Before I go to the *Evidence Act*, lets recall that Section 3 (3) of the *Law of Contract Act*, elaborates the ingredients that a sale agreement for land needs to comply with in order to make it enforceable. It provides as follows :

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(3) No suit shall be brought upon a contract for the disposition of an interest in land unless —

(a) the contract upon which the suit is founded—

(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 party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

41. From the foregoing, sale agreements for land require to be signed by the parties and the signatures of the parties need to be attested by a witness who was present when the contract was signed. Thus a sale agreement for land needs to be attested.

42. Turning to the *Evidence Act*, proof of documents that require attestation is covered in Section 70 – 73 of the *Evidence Act*, Cap 80, which provides as follows :

> 70. Proof of allegation that persons signed or wrote a document.
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> If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.
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> 71. Proof of execution of document required by law to be attested.
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> If a document is required by law to be attested it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there is an attesting witness alive and subject to the process of the court and capable of giving evidence:
>
> Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document which has been registered in accordance with the provisions of any written law, unless its execution by the person by whom it purports to have been executed is specifically denied.
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> 72. Proof where no attesting witness found.
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> Where evidence is required of a document which is required by law to be attested, and none of the attesting witnesses can be found, or where such witness is incapable of giving evidence or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.
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> 73. Admission of execution of attested document.
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> The admission of a party to an attested document, of its execution by himself, shall be sufficient proof of its execution as against him though it be a document required by law to be attested.

43. From the foregoing (Section 73) we see that if a party to an attested document admits the document then that is proof enough of its execution. However, if the party to the document denies executing it, then it must be proved as provided by Section 71, and that means that at least one attesting witness must to prove its execution, if there is one alive, and if no attesting witness is found, then it needs to be proved that the signature of the attesting witness is in his handwriting and the signature of the person executing the document is in the handwriting of that person as provided under Section 72.

44. In our case, the 5th respondent denied signing the sale agreement. It means that it was necessary for the 2nd respondent to prove that indeed the 5th respondent signed the sale agreement, and pursuant to Section 71 of the *Evidence Act*, he needed to call one of the persons who were indicated to have witnessed the signing of the sale agreement. None of the persons who were alleged to have witnessed the disputed sale agreement were ever called as witnesses. It was never said that they are not alive, but if they are not alive, no person was called to prove that it is indeed their signatures and that of the 5th respondent which are on the alleged sale agreement. In other words the sale agreement was never proved to have been executed by the 5th respondent as required by law. The result is that the 2nd respondent

failed to prove that he had any sale agreement for the suit land with the 5th respondent as required by law.

45. Apart from the foregoing, I also find inconsistencies on the part of the evidence of the 2nd respondent as compared to the evidence that was presented when he was tried for the offence of Forcible Detainer in Ogembo Criminal Case No. 195 of 2014. I will reproduce the assessment of the evidence as noted in the judgment of the trial court. She recorded as follows :

> "DW-1 was George Ogake Pius. He stated that on 26/12/2010 he bought land from one Esther Nyasani Makori. He(r) son Jason Nyamoko and his uncle Zablon Murumbwa approached him and told him that Jason's wife was ill and they needed the money. He called the assistant chief and they entered an agreement in the absence of Jason's mother ... In cross-examination DW-1 stated that he bought the land on 20/12/2010. The land was registered in the name of Zablon Murumbwa, brother in law to Esther. By the time he paid kshs. 60,000/= they had not signed any sale agreement..."
>
> DW-2 was Zablon Murumbwa Mosoti. He stated that on 20/12/2010 Jason Makori sold to George Ogake Pius land measuring 25 x 100 feet for Kshs. 170,000/=. Jason's wife was sick and he needed money so he asked for Kshs. 15,000/=. Later on he asked for more money and George gave him Kshs. 55,000/= via M-Pesa.
>
> DW- 3 was Jason Nyamoko. He stated that George Ogake Pius bought land from Esther Nyasani Makori his mother in December of 2012. He started working on the land. He later heard that his elder brother sold Georges land on the lower side (sic). The accused told him that he had been charged with trespass and he came to say that the accused was on his land. In cross-examination the witness confirmed that he was the one who sold the land to the accused.
>
> DW-4 was Nelson Nelson Oeri who stated that he was a witness when the accused bought the land. Mosoti was the seller. The person buying stayed far away so his father was the one present. This was in 2011. He did not see the title deed but the land was under Zablon Mosoti's name.
>
> DW-5 was Phespis Ombui Oroo the Assistant Chief Bomanyama sublocation. George Ogake Pius purchased a plot measuring 25 x 100 in 2010 at a cost of Kshs. 170,000/= fromm Jason Nyamongo Makori. The vendor was given Kshs. 15,000/= cash and Kshs. 55,000/= via M-Pesa and this was indicated in the agreement. Later on Jason's mother was given Kshs. 60,000/= and Kshs. 20,000/- he later learnt that someone had purchased the land. In cross-examination he confirmed that according to the agreement the seller was Jason Nyamoko and not Esther.
>
> DW-6 was George Ochoro Murwani and an employee of George. On 20/12/2010 George told him that he had found land and so they went on the ground and after taking measurements paid for the same in several instalments. He confirmed that he witnessed the agreement being made. Esther did not sign the agreement dated 20th" (underlining mine).

46. It will be seen that the evidence presented during the criminal trial by and on behalf of the 2nd respondent was that it was one Jason Nyamongo, a son of the 5th respondent who sold to him the land and the sale was entered into on 20 December 2010. The evidence was that the 5th respondent did not sign the agreement. Yet what was produced in the case herein was a sale agreement dated 17 January 2011 and it is asserted that the 5th respondent signed it. This contradiction in evidence presented in the two separate cases calls into serious doubt the purported sale agreement of 17 January 2011. The

evidence presented in the criminal trial in fact supports the assertion by the 5th respondent that she never signed any sale agreement with the 2nd respondent.

47. Apart from the fact that the sale agreement was not proved, there is also no proof of any payment of money by the 2nd respondent to the 5th respondent that was proved in this suit. Within the criminal trial, it was said that Jason was first paid Kshs.15,000/= in cash then Kshs. 55,000/= via M-Pesa. M-Pesa records can be availed, and the fact that the 2nd respondent did not produce such record means that it would have been adverse to his allegation that he paid money to the 5th respondent. It was said in the criminal trial that the 5th respondent was later paid Kshs. 60,000/= and Kshs. 20,000/=. This does not tally with what is alleged in the sale agreement produced which shows Kshs. 20,000/= paid on 17 January 2011, then Kshs. 60,000/= , Kshs. 5,000/=, and another allegedly Kshs. 5,000/= (total Kshs. 70,000/=) paid on 18 February 2011 to the 5th respondent.

48. Whatever the case, the moneys in the document said to be the sale agreement do not total up to the Kshs. 170,000/= indicated in the purported sale agreement, such that even if the sale agreement was proved, there would be no proof of payment of the whole of the purchase price, so as to entitle the 2nd respondent qualify to be called a bona fide purchaser. Without proof of payment of the whole of the alleged purchase price of Kshs. 170,000/= the 2nd respondent cannot assert any right of ownership of the disputed land and it cannot be claimed that the suit land is held in trust for him.

49. I am aware that in her judgment the trial court was of opinion that the 5th respondent could not be believed and that her evidence was inconsistent. I actually find no inconsistency in the evidence of the 5th respondent. All along, including in the criminal case, she maintained that she never sold any land to the 2nd respondent. Even in the suit herein that is exactly what she stated in her witness statement and during cross-examination. At no time did she ever concede that she sold land to the 2nd respondent. I may not have seen the witnesses but I find no inconsistency in the evidence of the 5th respondent on the issue of whether she sold any land to the 2nd respondent.

50. I do not actually have too much sympathy for the 2nd respondent. In his own evidence presented at the criminal trial, he stated that save for a pit latrine, he let the land stay vacant until 2013. It is after the appellant called a dispute that he started building on the land. It cannot be contended that he was acting in good faith. He knew that there was a dispute and any reasonable person would have waited until the dispute is resolved before proceeding to undertake any developments on the land. Developing land that is in dispute cannot help one's cause. The 2nd respondent is therefore the sole author of any loss that he stands to suffer.

51. From the foregoing, it will be seen that I do not find any merit in the case of the 2nd respondent and I proceed to substitute the judgment entered in his favour by the trial Magistrate with an order that his suit is dismissed with costs.

52. In essence it is my finding that this appeal is merited. The judgment of the trial court is substituted with an order that the case of the 1st – 4th respondent is dismissed with costs. The appellant shall also have the costs of this appeal.

53. Judgment accordingly.

DATED AND DELIVERED THIS 5TH DAY OF FEBRUARY 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Mr. Omwanza for the appellant

Ms. Nyandoro h/b for Ms. Sagwa for the 1st – 4th respondents

Mr. Omandi for the 5th respondent

Court Assistant : Michael Oyuko.