



REPUBLIC OF KENYA



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**Mwanzia v Kimea & 4 others (Land Case Appeal E024 of 2021)  
[2025] KEELC 517 (KLR) (5 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 517 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
LAND CASE APPEAL E024 OF 2021  
A NYUKURI, J  
FEBRUARY 5, 2025**

**BETWEEN**

**FLORENCE MUNANIE MWANZIA ..... APPELLANT**

**AND**

**JOHN MUTHAMA KIMEA ..... 1<sup>ST</sup> RESPONDENT**

**PEREZ ANYANGO KALLOMBO ..... 2<sup>ND</sup> RESPONDENT**

**CHARLES WAKAHIU ..... 3<sup>RD</sup> RESPONDENT**

**KEVIN OMONDI KALLOMBO ..... 4<sup>TH</sup> RESPONDENT**

**CHIEF LAND REGISTRAR, NAIROBI ..... 5<sup>TH</sup> RESPONDENT**

*(Being an Appeal from the Judgment of the Learned Senior Principal Magistrate Hon. Ocharo, in Machakos Chief Magistrate E.L.C No. 44 of 2018 delivered on 3rd June, 2021)*

**JUDGMENT**

**Introduction**

1. The Appeal before this court was filed by Florence Munanie Mwanzia challenging the Judgment of Hon. Ocharo (Senior Principal Magistrate) delivered on 3<sup>rd</sup> June, 2021 in Machakos Chief Magistrates Court ELC Case No. 4 of 2018. In the impugned judgment, the learned trial magistrate dismissed the Plaintiff's (Appellant herein) claim and allowed the 3<sup>rd</sup> Defendant's (3<sup>rd</sup> respondent herein) counterclaim for eviction against the Plaintiff and transfer of the suit property to the latter.

**Background**

2. By a plaint dated 20<sup>th</sup> January 2017, amended on 2<sup>nd</sup> October, 2017 and further amended on 5<sup>th</sup> July, 2019, the Plaintiff sought the following orders as against the Defendants.



- a. A declaration that the Plaintiff is the bonafide purchaser of the parcel of land known as Plot No. 018 LR No. 337/2360 Mavoko Municipal within Machakos County.
  - b. That the Registrar of land at Machakos be and is hereby directed to execute and process the tittle deed for the Plaintiff herein in respect to the parcel of land known as Plot No. 018 LR No. 333/2360 Mavoko Municipal within Machakos County.
  - c. That the Registrar of land at Machakos be and is hereby directed to cancel the tittle deed in the name of the 2<sup>nd</sup> and 4<sup>th</sup> Defendants herein in respect to the parcel of land known as Plot No. 018 LR No. 337/2360 Mavoko Municipal within Machakos county.
  - d. In the alternative, the specific performance between the Plaintiff and Defendants pursuant to the contract be and are hereby ordered with a view to the 1<sup>st</sup> Defendant transferring the parcel of land known as Plot No. 018 LR No. 337/2360 Mavoko Municipal within Machakos County to the purchaser, the plaintiff.
  - e. Costs of the suit.
  - f. Any other relief that honourable court may deem fit to grant.
3. The plaintiff averred that in 1999, she lawfully purchased the plot No. 018 part of LR No. 337/2360 Mavoko Municipality, Machakos County (hereinafter referred to as the suit property) from the 1<sup>st</sup> defendant. That the 1<sup>st</sup> defendant had purchased the suit property in 1992 from one Japheth Billy Kallombo who later died in 1993.
  4. She accused the 2<sup>nd</sup> and 4<sup>th</sup> Defendants for taking out Grant of Letters of Administration for the estate of Japeth Billy Kallombo (Deceased) and subsequently unlawfully transferring the suit property into their names while aware that the plaintiff was the lawful purchaser hereof. She also accused the defendants of fraud for attempting to sell the suit property to third parties, attempting to refund her the purchase price and collusion.
  5. In an amended defence dated 25<sup>th</sup> April, 2017 and amended on 21<sup>st</sup> December, 2017, the 1<sup>st</sup> defendant denied the Plaintiff's claim and admitted that the plaintiff lawfully purchased the suit property from him. He further stated that upon the death of the deceased, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants tried to repossess the suit property and that administrators of the deceased's estate obtained Grant of Letters of Administration on 3<sup>rd</sup> November, 2004 vide succession cause No. 1259 of 1994. Further that the 1<sup>st</sup> defendant filed a civil claim No. 1259 of 2011 against the 3<sup>rd</sup> defendant and that the matter was settled out of court and the 1<sup>st</sup> defendant dully compensated.
  6. The 3<sup>rd</sup> defendant filed an amended defence and counter claim dated 1<sup>st</sup> October, 2019, wherein he denied the Plaintiffs claim. He sought for the dismissal of the Plaintiff's case and averred in the counterclaim that on 8<sup>th</sup> June, 2011 he purchased the suit property from the 1<sup>st</sup> and 2<sup>nd</sup> defendants, when the same was unoccupied. That the suit property was supposed to have been registered in the names of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants who were joint proprietors but due to mistake, it was not. He sought for the following orders:-
    - a. An order to eviction of the plaintiff from the Land reference number 337/2360 and demolition of the illegal temporary structures on the said property.
    - b. An order compelling the Registrar of Lands Nairobi to transfer the property to the 3<sup>rd</sup> Defendant.
    - c. Costs of this suit.



7. The 2<sup>nd</sup> and 4<sup>th</sup> defendants did not enter appearance of filed defence despite service.
8. The matter proceeded by way of viva voce evidence. Both the plaintiff and the 1<sup>st</sup> defendant testified as the only witness in their respective cases, while the 3<sup>rd</sup> defendant presented two witnesses.

### **Plaintiff's Evidence**

9. The plaintiff's testimony was that in 1999 she purchased the suit property from the 1<sup>st</sup> defendant at a consideration of Kshs. 160,000/= which she paid in instalments and in full. That upon completion of payment, she took possession of the same with the knowledge of the 1<sup>st</sup> and 4<sup>th</sup> defendants. She alleged that in October, 2016 the 1<sup>st</sup> Defendant admitted his indebtedness to her and attempted to refund her the consideration. She stated in cross examination that she did not see the need to provide evidence of payment of consideration as the same had been admitted by the 1<sup>st</sup> defendant. She further stated that having not been favored with completion documents she did not complete payment in the agreed period of 60 days. She confirmed that as at the time of purchase of the suit property she was aware the same was registered in the name of the deceased and that while she was in court she knows that the suit property was in the name of the 2<sup>nd</sup> Defendant. That marked the close of the Plaintiffs case.
10. The 1<sup>st</sup> defendant testified that he only received Kshs. 25,000/= from the Plaintiff and that the Plaintiff did not complete paying the purchase price of Kshs. 160,000/= in 60 days. He stated that the Plaintiff declined to receive the refund from him of the monies paid to him.
11. He maintained that he joined the transaction in which the family of the deceased was selling the suit property to the 3<sup>rd</sup> defendant so as to get his refund. In cross examination, he stated that he received a total of Kshs. 87,000/=. The record shows that this witness failed to present himself for further cross examination, when his attempts to stop other parties from cross examining him on his own documents failed. His application to expunge the documents he had produced in evidence was dismissed by the trial court.

### **3<sup>rd</sup> Defendant's Case**

12. The 3<sup>rd</sup> defendant's evidence was that at a consideration of Kshs. 800,000/=: he purchased the suit property from the 1<sup>st</sup> and 2<sup>nd</sup> defendants at a time when the 2<sup>nd</sup> Defendant was the registered proprietor thereof. He stated that he purchased the suit property when it was vacant. Further that he got a title deed which had been issued in the name of a different person on 26<sup>th</sup> November, 2012, yet he was the one who paid stamp duty. According to him, the Plaintiff entered the suit property in 2012. The 3<sup>rd</sup> Defendant's witness one Makarios Muthigani Wachira stated that he is the one who showed the 3<sup>rd</sup> Defendant the suit property which was vacant, but admitted in cross examination that he is the one who built iron sheet structures on the suit property for the Plaintiff, because he needed the money. He stated that when people trespassed on the suit property, he is the one who informed the 3<sup>rd</sup> defendant. That marked the close of the defence case.
13. Upon consideration of the pleadings, evidence and submissions, the trial court found that the 1<sup>st</sup> Defendant's objection to the succession cause of the deceased having been dismissed, it meant that the 1<sup>st</sup> Defendant had no proper title or capacity to pass good title to the Plaintiff. The trial court also found that the 1<sup>st</sup> defendant acted fraudulently in selling the suit property to the 3<sup>rd</sup> defendant and that 3<sup>rd</sup> defendant was an innocent purchaser for value and therefore deserving of the orders sought in his counterclaim. On that basis, the trial court dismissed the plaintiff's claim and allowed the 3<sup>rd</sup> Defendant's counterclaim.



14. Being aggrieved with the Judgment of the trial court, the appellant herein, filed a Memorandum of appeal dated 14<sup>th</sup> October, 2021 citing 8 grounds of Appeal as follows:-
- a. That the learned trial magistrate erred and misdirected herself on the law and facts when she ignored evidence to prove that the Plaintiff had purchased and indeed paid the entire agreed purchase price for the property known as LR. No. 337/2360 Mavoko Municipality.
  - b. That the learned trial magistrate erred and misdirected herself on the law and the facts when she ruled that the 1<sup>st</sup> Defendant did not have capacity to transfer good title to the Plaintiff despite overwhelming evidence to show that the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendant's had confirmed that the land known as LR. No. 337/2360 had been surrendered to the 1<sup>st</sup> Defendant and as such he could then transfer the same to the Plaintiff.
  - c. That the learned trial magistrate erred and misdirected herself on the law and the facts by suggesting the 2<sup>nd</sup> and 4<sup>th</sup> Defendants were intermeddling when they are in fact compromised the Succession cause No. 1259 of 1994 and gave authority to the 1<sup>st</sup> Defendant to deal in the suit land, having given authority to the 1<sup>st</sup> Defendant to deal, the 2<sup>nd</sup> and 4<sup>th</sup> defendants could not then purport to sell the land to the 3<sup>rd</sup> defendant as they lacked capacity to do so.
  - d. That the learned trial magistrate erred and misdirected herself on the law and the facts when having found that the 1<sup>st</sup> defendant's behavior in his dealings with the plaintiff amounted to fraud, proceeded to validate the same behavior by denying the plaintiff's claim.
  - e. That the learned trial magistrate erred and misdirected herself on the law and the procedure when she shielded the 1<sup>st</sup> defendant from cross-examination after his examination in-chief, and also by allowing introduction of a stranger to the suit whom she proceeded to issue judgment in favour of.
  - f. That the learned trial magistrate erred and misdirected herself on the law and the facts when she introduced matters of a succession cause that the Plaintiff was a stranger to and thus was unable to respond to the same.
  - g. That the trial magistrate erred and misdirected herself on the law and the facts when she failed to consider evidence to show that the 1<sup>st</sup> defendant has made no less than 4 attempts to steal and resell the suit land, and in all these attempts, the matter had been resolved in favour of the Plaintiff. These efforts had been made by a Senior Civil Servant and former PS Mr. Sammy Kyungu (as a mutual friend of the Plaintiff and the 1<sup>st</sup> defendant), the police at Mavoko, the Deputy own Clerk, Mavoko Municipality Mr. Patrick Malombe and the Land Fraud Investigation Unit at the DCI Nairobi.
  - h. That the entire Judgment of the learned trial magistrate epitomizes the greatest injustice to the appellant who stands to lose her entire land and the investments she has made of the land for the past 21 years, despite overwhelming evidence to show that the Appellant is the bona fide owner of this property.
15. Consequently, the appellant sought the following orders;
- a. This appeal be allowed and that the Judgment of the subordinate court be quashed and/or set aside and the same be substituted with an order allowing the Plaintiffs case,
  - b. The appellant also prays for costs of this appeal.



16. The appeal was canvassed by way of written submissions. On record are appellant's submissions dated 3<sup>rd</sup> December, 2021 and the 3<sup>rd</sup> respondent's submissions dated 2<sup>nd</sup> February 2022.

### **Appellant's Submissions**

17. Counsel for the appellant submitted that the trial magistrate was mistaken as to the true meaning of intermeddling under the *Law of Succession Act* and referred to the case of *Gitau & 2 others versus Wandai and 5 others* (1989) KLR 23 for the proposition that intermeddling means taking possession, disposing or otherwise intermeddling with the deceased's free property. Counsel argued that as at 1993 when Mr. Japheth Billy Kallombo passed on, he had already sold the suit property to the 1<sup>st</sup> respondent vide the sale agreement of 31<sup>st</sup> July, 1992.
18. It was further submitted for the appellant that the deceased's kin had a duty on obtaining Grant of Letters of Administration, to transfer the suit property to the appellant, hence acts done by the 1<sup>st</sup> respondent could not be deemed as intermeddling. Counsel argued that when the deceased's family filed succession cause 1259 of 1994, the 1<sup>st</sup> Respondent protested but that the dispute was settled by compromise when the Deceased's family being 1<sup>st</sup> and 4<sup>th</sup> Respondents granted the 1<sup>st</sup> Respondent the land, as per the consent dated 7<sup>th</sup> June, 2011 at page 219 of record of appeal.
19. Counsel for the appellant further submitted that a title deed was secretly issued in respect of the suit property and that the appellant is apprehensive that the said property may be sold and she may be evicted from the same. Counsel also submitted that the fact of the appellant's purchase of the suit property was undisputed and that the 1<sup>st</sup> respondent had the right to sell the suit property to the appellant.
20. Counsel also submitted that the appellant having developed the suit property, she was entitled to the same and that the 1<sup>st</sup> respondent could not lawfully sell the suit property to another person, counsel argued that this was a clear case of fraud by the Respondents against the appellant and that the orders sought be granted.

### **3<sup>rd</sup> Respondent's Submissions**

21. Counsel for the 3<sup>rd</sup> respondent submitted that the evidence on record showed that the appellant did not pay full consideration while the 1<sup>st</sup> respondent had not paid full consideration to the deceased and was therefore not entitled to transfer the suit property to him. Counsel faulted the appellant for alleged failure to conduct due diligence and seek clarification from the deceased's family before purchase of the suit property.
22. Reliance was placed on the case of *Saving & Loan (K) Limited Versus Kapnyenje Karangaita Gakombe & Another* (2015) eKLR and submitted that the doctrine of privity of contract envisaged that a contract cannot confer rights or impose obligations on persons other than parties to such contract.
23. On the second ground of appeal, counsel submitted that when the 1<sup>st</sup> Respondent objected to the deceased's succession cause, the same was dismissed and that therefore, there is no appeal against the said dismissal as it is a judgment in rem binding anyone that the suit property belonged to the 2<sup>nd</sup> and 4<sup>th</sup> Respondents. Counsel argued that since the court that made the decision being a High Court, this court cannot sit on appeal of that decision.
24. On whether the 1<sup>st</sup> respondent and the 2<sup>nd</sup> and 4<sup>th</sup> respondents entered a consent granting the suit property to the former, counsel submitted that what the Respondents were engaging in amounted to intermeddling with the property of a deceased person without the court's authority and that there



was no evidence to demonstrate that there was an out of court settlement. Reliance was placed on the case of Benson Mutuma Muriungi versus C.E.O Kenya Police Sacco & Another (2016) eKLR on the meaning of the term “intermeddling”. Counsel submitted further that the trial court was not wrong in having found that the 1<sup>st</sup> respondent’s conduct was fraudulent but at the same time declining the appellant’s claim, since the 1<sup>st</sup> respondent could not lawfully transfer good title to the appellant.

25. Counsel submitted that as there was no privity of contract between the appellant and the 2<sup>nd</sup> and 4<sup>th</sup> respondents, the trial court was right in its findings. On the appellant’s argument that the court shielded the 1<sup>st</sup> respondent from cross examination, counsel referred the court to the proceeding of the trial court and submitted that no such shielding was done by the trial court but that the 1<sup>st</sup> respondent failed to attend court for cross examination even after being given more opportunities.
26. Concerning the appellant’s grounds of appeal that the trial court was wrongs to introduce matter of succession where the appellant was a stranger, counsel submitted that the suit property was subject to succession proceedings and therefore matters of succession raised before the trial court were relevant matters. Counsel further argued that the appellant’s argument that the matter between the appellant and the 1<sup>st</sup> respondent had been mediated by one Sammy Kyungu, is a matter that did not arise from evidence and that the ground is irrelevant. Counsel argued that there was no proof that the findings of the trial court resulted in injustice as argued by the appellant.
27. Counsel argued that the appellant begun developing the suit property when the case was in court thereby offending the doctrine of lis pendens and can only therefore blame herself. Counsel argued that the trial court’s findings were sound and accurate and urged this court to uphold the trial courts judgment.

### **Analysis and determination**

28. The court has carefully considered the appeal, the entire trial court record and the parties’ rival submissions. The mandate of this court as a first appellant court is to re-evaluate, reanalyze and re-assess the evidence on record and make its own independent conclusions, bearing in mind that it had no advantage of seeing or hearing the witnesses, and make due allowance for that. This position was stated in the Cases of *Selle & Another –vs- Associated Motion Boat Co. Ltd & Others* (1968) EA 123 and *Peters –v- Sunday Post* (1958) EA 424.
29. While a first appeal is decided on facts and law, the first appellate court is ordinarily the final court on facts and therefore on appeal, parties deserve a fair, independent and full consideration of the evidence as anything short of that would amount to an injustice. Therefore, the role of this court being the first appellate court is to apply its mind to the entire case, re-evaluating both questions of fact and law and considering all issue arising from the case.
30. Having considered the appeal herein the issues that arise are as follows;
  - a. Whether the appellant lawfully acquired the suit property through purchase.
  - b. Whether it was proved that the 1<sup>st</sup> Respondent’s objection in Nairobi HC Succession cause no. 1259 of 1994 was settled out of court granting lawful ownership of the suit property to the 1<sup>st</sup> respondent and therefore granting him capacity to pass good title to the appellant.
  - c. Whether the trial court misdirected itself by acknowledging fraud on the part of the 1<sup>st</sup> respondent but dismissing the appellant’s claim.
  - d. Whether the trial court shielded the 1<sup>st</sup> respondent from cross-examination thereby prejudicing the appellant.



- e. Whether the trial court allowed introduction of a stranger to the suit being the 3<sup>rd</sup> respondent herein and unjustly allowed his claim.
  - f. Whether the trial court improperly introduced succession matters in the dispute, in which matters the appellant was a stranger and unable to respond to.
  - g. Whether the trial court was at fault for failing to recognize the dispute had been mediated in four instances; and
  - h. Whether the trial court's decision in granting the suit property to the 3<sup>rd</sup> respondent amounted to injustice in view of the fact that the appellant had developed the suit property for 21 years.
31. As the issues raised in the appeal on one hand dispute what happened before the trial court and on the other hand are a challenge on the reasoning applied by the trial court in arriving at its decision, I will first address the appellant's complaints concerning what transpired before the trial court, before delving into her challenge on the court's findings and determination.
32. On the appellant's argument that the trial court disregarded the fact that the dispute had been mediated four times by her friend a PS, the town clerk of Mavoko Municipality, the police and the DCI; it is the finding of this court upon perusal of the record, that that matter did not arise in the pleadings or testimonies of witness or within the proceedings and therefore the trial court could not consider a matter that did not arise before it. That ground of appeal therefore fails.
33. Regarding the issue of whether the trial court shielded the 1<sup>st</sup> respondent from cross-examination, the record shows that on 1<sup>st</sup> September, 2020, the 1<sup>st</sup> respondent testified and was partly cross-examined by counsel for the appellant before raising objections on being cross-examined on documents he had filed and relied upon on his evidence in chief. The trial court made a ruling delivered on 8<sup>th</sup> September, 2020 overruling the objection and ordered further cross-examination of the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent further filed an application dated 5<sup>th</sup> October, 2020 seeking that his documents be expunged from the court record. This application was also dismissed. The trial court then listed the matter for cross-examination of the 1<sup>st</sup> respondent but he failed to attend court and therefore his case was closed. In view of these chain of events, I find and hold that there is nothing on record to suggest that the trial court shielded the 1<sup>st</sup> respondent from being cross-examined and therefore that ground of appeal fails.
34. The appellant also argued that the trial court introduced questions of succession which were strange matters to her and which she was unable to respond. This court has considered the parties pleadings. The allegation that the suit property was subject of succession cause in Nairobi HC P & A No. 1259 of 1994 was raised vide paragraph 3 of the 1<sup>st</sup> respondent's amended defence dated 21<sup>st</sup> December, 2017; upon which the appellant responded by filing reply thereto dated 25<sup>th</sup> March, 2019. In addition, the appellant conceded in evidence to the fact that at the time of purchasing the suit property, the same had previously been owned by a person who later died. For those reasons therefore, it cannot be true that questions of succession were strange to her and were introduced by the trial court. The question of succession was raised and responded to in the parties' pleadings and the same was not a strange issue to the appellant and therefore that ground of appeal also fails.
35. In addition, it is baseless for the appellant to contend that the trial court introduced the 3<sup>rd</sup> respondent herein to the suit and that he was a stranger to the proceedings. This is because it is the appellant who sued the 3<sup>rd</sup> respondent and so it is her who brought him to the suit before the trial court as there was no suo motto order of joinder of the 3<sup>rd</sup> respondent to the suit before the trial court. Therefore, that ground of appeal also fails.



36. I will now address the appellant’s challenge of the trial court’s reasoning in arriving at its conclusion that the appellant was not entitled to the suit property and subsequently granting it to the 3<sup>rd</sup> respondent. The facts of this case show that the unsurveyed plot no. 018 was allocated to one Japheth Billy Kallombo in 1991. That during his lifetime and specifically in 1992, he sold the suit property to the 1<sup>st</sup> respondent at Kshs. 35, 000/= . The said Japheth Billy Kalombo then died in 1993, before a certificate of title was issued in his name. In 1999, the 1<sup>st</sup> Respondent entered into a sale of land agreement in regard to the suit property with the appellant.
37. In 1994, Periz Anyango Kalombo and Joab Benaiah Ochieng petitioned the High court in Nairobi Succession Cause no. 1259 of 1994 seeking grant of Letters of administration in respect of the estate of Japheth Billy Kallombo, whereof a grant was made to them on 26<sup>th</sup> October, 1994. That grant was confirmed on 29<sup>th</sup> October, 2002 granting the suit property which was still not titled to Perez Anyango Kalombo (the 2<sup>nd</sup> respondent herein) to hold it in trust for Kevin Omondi Kallombo and Japheth Billy Kolombo; each of the beneficiaries having half share. Then on 8<sup>th</sup> June 2011, the 3<sup>rd</sup> defendant entered into two separate sale agreements in regard to the suit property with the 1<sup>st</sup> respondent and the 2<sup>nd</sup> respondent respectively, with each agreement stating that he purchased the suit property at a consideration of Kshs. 800, 000/= and duly paid each vendor in the agreements.
38. The evidence on record also shows that on 30<sup>th</sup> May, 2011, the 1<sup>st</sup> respondent filed a summons claiming the suit property. No ruling or consent order in respect of this summons was presented in evidence by any of the parties and therefore I find and hold that the 1<sup>st</sup> and 3<sup>rd</sup> respondents’ allegations that the summons was dismissed and or allowed or compromised is not proved. For those reasons, I find and hold that the trial was wrong in its finding that the 1<sup>st</sup> respondent’s objection in Nairobi H.C Succession Cause 1259 of 1994 was dismissed as that finding was not supported by any evidence.
39. Further, the evidence on record show that the title for the suit property was first registered on 16<sup>th</sup> November, 2012 in accordance to the confirmed grant in Nairobi Succession Cause No. 1259 of 1994. In that respect, Grant 1.R no. 142856 for LR No. 337/2360 was issued for a lease period of 99 years with effect from 1<sup>st</sup> January, 1991 to Perez Anyango Kalombo as Trustee of Kevin Omondi Kalombo (half undivided share and Japheth Billy Kalombo (half undivided share).
40. Article 40(1) and (6) of *the Constitution* of Kenya protects the right to acquire and own property in respect of only lawfully acquired property and states as follows;
- 40 Protection of right to property
1. Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property-
    - a. Of any description; and
    - b. In any part of Kenya
  2. ....
  3. ....
  4. ....
  5. ....
  6. The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.



41. Section 26 of the [Land Registration Act](#) provides for indefeasibility of title and instances where title may be impeached as follows;

Certificate of title to be held as conclusive evidence of proprietorship

- (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.

42. Therefore, where a person is registered as proprietor of land, then they have absolute and indefeasible ownership, unless it is proved that such registration was obtained by fraud, want of procedure, illegality or corruption. Thus, validity of a title is demonstrated in its root. A title without proof of lawful acquisition is not protected in law.

43. In the case of *Munyu Maina vs. Hiram Gathiha Maina* [2013] eKLR, the Court of Appeal held as follows:

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

44. Also, in the case of *Alice Chemutai Too – Vs – Nickson Kipkurui Korir & 2 Others* [2015] eKLR the court held that:

It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part. I had occasion to interpret the above provisions in the case of *Elijah Makeri Nyangwara –vs- Stephen Mungai Njuguna & Another*, Eldoret ELC Case No. 609 B of 2012 where I stated as follows:- "...it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent titleholder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally, or through a corrupt scheme. The titleholder need not have contributed to



these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions. “I stand by the above words and I am unable to put it better than I did in the said dictum.

45. To lawfully acquire property through purchase, among other requirements, the vendor must be the lawful owner thereof and have capacity to dispose the same. As the appeal herein turns on whether or not the 1<sup>st</sup> respondent had capacity to lawfully sell the suit property to the appellant, this court will focus on the question of capacity in determining the validity of the appellant’s purchase and ownership of the suit property.
46. On whether the appellant had demonstrated that she was the bona fide owner of the suit property, the burden of proof on that question rested on her.
47. Section 107 of the *Evidence Act* provides as follows;
  - (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
  - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
48. Therefore, the burden of proof in a suit is static and rests on the plaintiff. In the instant, it is not disputed that there was a sale agreement in regard to the suit property between the appellant and the 1<sup>st</sup> respondent in which the consideration/purchase price was Kshs. 160, 000/=. While the appellant maintained that she paid the 1<sup>st</sup> respondent the entire consideration of Kshs. 160,000/=, the 1<sup>st</sup> respondent stated in his evidence in chief that he was paid Kshs. 25, 000/= only. He then stated in cross examination that he was paid a total of Kshs. 87, 000/=. On the question of proof of payment, the appellant stated that there was no need for her to prove that she paid the entire consideration of Kshs. 160,000 as that fact had already been admitted by the 1<sup>st</sup> respondent in his offer to refund the appellant the consideration.
49. On whether the appellant demonstrated that she had paid the entire consideration of Kshs. 160, 000/=: this court has had occasion to look at the letter dated 3<sup>rd</sup> October, 2016 written by Kasyoka & Associates Advocates for the 1<sup>st</sup> respondent which the appellant stated that it was an admission of payment of the entire consideration. That letter states as follows;

“Our Ref: KK/GEN/16/MKD Date: 03/10/2016

Your Ref:

Florence Munanie Mwanza

Kenya Institute of Curriculum

Development,

Box 30231

Nairobi

Re: Sale Of Plot Unsurveyed Plot At Athi

River Measuring 50’by 100’ Part Of L.r No.

337/2360-athi River John M. Kimea To



Yourself

We refer to the above matter:-

Our client agrees that he sold you the above captioned property at an agreed price of kshs. 160,000/=.

As you well know the property had not been excised from LR. NO. 337/2360 which was the mother title registered in the name of the late Japheth Billy Kalombo ('the deceased'). The latter passed on before the transaction was completed.

Unfortunately the Administrator of the estate of the deceased has declined to acknowledge our clients claims for the subject plot. Consequently our client has lodged a claim of the plot in the administration cause being HC.S.C. NO. 1259/94 which is still pending before the High Court in Milimani.

The above notwithstanding our client proposes to refund you the purchase price.

Kindly do receive herewith our client's banker's cheque in the sum of kshs. 50,000/=. Our client proposes to pay the balance in 3 months time.

Kindly do acknowledge receipt so that we can bring this matter to an amicable settlement.

He had no fraudulent intentions at all and regrets any inconvenience.

We enclose herewith copies of the claim papers HCSC. NO. 1259/94 for perusal.

Yours faithfully,

(signed)

For: Kasyoka & Associates

Advocates

CC: 1. Client

2. The Directorate of Criminal Investigation

Kiambu.”

50. Essentially, in the above letter, the 1<sup>st</sup> respondent stated that he agreed to have sold the suit property to the appellant at “an agreed price of kshs. 160,000/=” and therefore “proposed” to refund the appellant “the purchase price”. Although the 1<sup>st</sup> respondent did not expressly state that he received Kshs. 160,000/= from the appellant, however, having specified that the “agreed price was Kshs. 160,000/=” and that he “proposed to refund the purchase price”, in my view, the purchase price in this case is Kshs. 160,000/= and by stating that he proposed to refund “the purchase price” he was effectively conceding to the fact that he proposed to refund the sum of Kshs. 160,000/= as the same was “the purchase price”. This being the case, I agree with the appellant that the letter of 3<sup>rd</sup> October, 2016 was an admission on the part of the 1<sup>st</sup> respondent of having received the entire purchase price who was then proposing to refund the same because a refund can only occur for purposes of returning what was paid earlier by the party who is to be refunded.
51. Therefore, this court finds that the appellant and the 1<sup>st</sup> respondent entered into a sale of land agreement in regard to the suit property at a consideration of Kshs. 160,000/= which sum was paid by the appellant in full.
52. The appellant, the 1<sup>st</sup> respondent and the 3<sup>rd</sup> respondent agree that the 1<sup>st</sup> respondent purchased the suit property from the late Japheth Billy Kallombo. None of these parties challenged the capacity of Japheth Billy Kallombo to sell the suit property and they all agree that Japheth Billy Kallombo



was the owner of the suit property as of 1992 when he entered into a land sale agreement with the 1<sup>st</sup> respondent. In his testimony in chief, the 1<sup>st</sup> respondent relied on documents filed. One of such documents is the sale agreement between the 1<sup>st</sup> respondent and Japheth Billy Kalombo dated 31<sup>st</sup> July, 1992. That agreement clearly stated that the suit property was sold by the deceased to the 1<sup>st</sup> respondent at a consideration of Kshs. 35,000/= which sum was paid in full at the execution of the sale agreement. The sale agreement having been executed on 31<sup>st</sup> July 1992 before an advocate, I have no doubt in my mind that Mr. Japheth Billy Kallombo lawfully sold the suit property to John Muthama Kimea the 1<sup>st</sup> respondent herein on 31<sup>st</sup> July, 1992 at a consideration of Kshs. 35,000/=, which sum was paid in full at the execution of their agreement.

53. Therefore, the 1<sup>st</sup> and 3<sup>rd</sup> respondents' allegations that the 1<sup>st</sup> respondent still owed some balance to Japheth Billy Kalombo was not factual or correct, but was only meant to be self-serving so as to fraudulently deprive the 1<sup>st</sup> respondent of the relevant capacity to dispose of the suit property to the appellant. As all the parties herein concede to the fact that the suit property was lawfully owned by Japheth Billy Kallombo, it is therefore clear that he had the relevant capacity to sell the same to the 1<sup>st</sup> respondent, as at the time of sale on 31<sup>st</sup> July, 1992. And since the evidence on record show that the 1<sup>st</sup> respondent paid the entire consideration at the signing of the sale agreement, I find and hold that the sale between Japheth Billy Kallombo and John Muthama Kimeu is a valid sale.
54. Therefore, in regard to ownership of the suit property as of 1994 when the suit property was included in the assets of the late Japheth Billy Kalombo, the same did not form part of his estate as he had already sold it before his demise and had received the entire consideration thereof. The death of a vendor of property who is not owed any balance of the consideration, does not translate the sold property into the deceased's estate. Death does not confer rights to the deceased or his estate, that did not exist during the deceased's lifetime.
55. Therefore, as at 1999 when the 1<sup>st</sup> respondent entered into a sale agreement with the appellant he had capacity to sell the suit property to the appellant as he was the equitable and true owner of the suit property. This court appreciates the fact that the 1<sup>st</sup> respondent had filed objection in Nairobi HC Succession Cause No. 1259 of 1994 not as an heir of Japheth Billy Kallombo but claiming ownership of the suit property on the basis of his purchase of the same. While the 1<sup>st</sup> respondent's counsel confirmed in his letter of 3<sup>rd</sup> October, 2016 that the 1<sup>st</sup> respondent's claim was still unresolved and pending as of 2016, this court takes the view that since the 1<sup>st</sup> respondent's claim is that of ownership of title as against the late Japheth Billy Kalombo, the view of this court is that the same is a claim for land within the ambit of Article 162(2) (b) of *the Constitution* of Kenya as read with Section 13 of the Environment and Land Court and does not constitute a claim concerned with the collection and preservation of the estate, identification of beneficiaries and distribution of the assets of Japheth Billy Kalombo. Therefore, the 1<sup>st</sup> respondent's claim in the Nairobi Succession Cause No. 1259 of 1994 is not a succession claim but a claim regarding title to land, hence not within the jurisdiction of the Probate and Administration court, but within the jurisdiction of this court or the Magistrates Court with the jurisdiction of the ELC.
56. In that regard, agree with the reasoning in case of Priscilla Ndubi & Another –vs- Gerishon Gatobu Mbui Meru HCC Succession Cause no. 720 of 2013 where the court faced with an issue touching on a claim of ownership of land in respect to the estate of a deceased person, held as follows;

Applying the test of law in Section 76 of the *Law of Succession Act*, the fact that there was an agreement between the deceased and the applicant for sale of the suit land is important to these proceedings. It seems also that consideration may have passed between the two parties. I am aware that this court does not have jurisdiction to determine the validity or



enforceability of the said agreement. Environment and land court does; it is the court which constitutionally mandated to determine such matters.

57. Similarly, in the case of the Estate of Alice Mumbua Mutua (2017) e KLR, the court stated as follows;
- the function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries and distribution of the assets.
58. Essentially therefore, a claim for land against the estate of a deceased person where the claimant seeks ownership of such land and where the claim has nothing to do with collection and preservation of the deceased estate, identification of the survivors and beneficiaries of the estate and or distribution of the deceased asset is a claim that has got nothing to do with probate and administration of the estate of a deceased person, but the same is a claim for land which ought to be heard in a court with jurisdiction to hear land disputes, in this case it is the Environment and Land court, or a magistrate court with jurisdiction to determine land matters. Such a claim cannot be determined within a succession cause of the deceased's estate. Therefore, the fact that one of the parties to a land dispute is deceased in a claim which has nothing to do with succession, that does not translate the dispute from a land dispute to a succession dispute.
59. For the above reasons therefore, it is apparent that the 1<sup>st</sup> respondent who is not an heir of the estate of Japheth Billy Kalombo filed his claim for title to land in a court and within succession proceedings where the court has no jurisdiction. In any case, the 2<sup>nd</sup> and 4<sup>th</sup> respondents herein did not file any defence disputing the 1<sup>st</sup> respondent's sale agreement with the late Japheth Billy Kallombo.
60. There being no decision of a competent court, faulting the 1<sup>st</sup> respondent's ownership of the suit property, and the 1<sup>st</sup> respondent having paid the entire consideration in 1992 to Japheth Billy Kallombo, it is clear that the suit property was not owned by the late Japheth Billy Kalombo in 1994 when Perez Kalombo included it in the succession proceedings for the estate of the late Japheth Kalombo. Therefore, that inclusion was unlawful. The 1<sup>st</sup> respondent having lawfully purchased the suit property from Japheth Billy Kalombo, had the necessary capacity to sell the same to the appellant and therefore the appellant's purchase thereof is lawful. In the premises, the trial court was wrong in finding that the 1<sup>st</sup> respondent had no capacity to sell the suit property to the appellant.
61. The appellant produced an affidavit sworn on 15<sup>th</sup> August, 2003 by the 1<sup>st</sup> respondent in which the 1<sup>st</sup> respondent confirmed having purchased the suit property from Josephat Kalombo and having sold to the appellant. She also produced an agreement by the 1<sup>st</sup> and 2<sup>nd</sup> respondents dated 7<sup>th</sup> June, 2011 showing that the 2<sup>nd</sup> respondent was aware that the suit property had been sold to the 1<sup>st</sup> respondent by her late husband, whereof she confirmed that indeed her late husband sold the suit property to the 1<sup>st</sup> respondent and the estate has no claim over the same. The evidence contained in the above documents was not controverted in any way therefore, I find and hold that as the inclusion of the suit property as part of the assets of the estate of Japheth Billy Kallombo was unlawful, the subsequent registration of the 2<sup>nd</sup> respondent as holding the same in trust for the heirs of Japheth Billy Kallombo was unlawful. The 1<sup>st</sup> respondent having lawfully purchased the suit property from Japheth Billy Kalombo and having lawfully sold it to the appellant at a consideration, only meant that the suit property was a liability on the estate and ought to have been transferred to the lawful owner thereof and in this case, the appellant. In the premises, I find and hold that the registration of the suit property in the name of Periz Anyango in trust for Omondi Kallombo and Japheth Billy Kallombo, is held in trust for the appellant who is the true owner thereof and should be transferred to her. Omondi Kalombo and Japheth Billy Kallombo (if this is not the late Japheth Billy Kallombo) can only inherit that which lawfully belonged



to Japheth Billy Kallombo; and the suit property having been sold by the latter during his lifetime, is not part of his estate to benefit his heirs. Therefore, the two beneficiaries named in the title cannot lawfully benefit from that which did not belong to the late Japheth Billy Kallombo.

62. In view of the fact that the 1<sup>st</sup> respondent lawfully owned and subsequently lawfully sold the suit property to the appellant in 199, which position the 1<sup>st</sup> respondent also confirmed on 5<sup>th</sup> August, 2003 and 7<sup>th</sup> June, 2011, as per the documents on record, therefore the 1<sup>st</sup> respondent had no capacity to sell the suit property to the 3<sup>rd</sup> respondent on 8<sup>th</sup> June, 2011, or on any other date as he had already sold the same to the appellant. Therefore, I find and hold that the sale agreement entered into between the 1<sup>st</sup> respondent and the 3<sup>rd</sup> respondent dated 8<sup>th</sup> June, 2011 is invalid for want of capacity on the part of the 1<sup>st</sup> respondent as he could not sell land that he did not own, having already sold the same to the appellant.
63. Regarding the sale agreement of 8<sup>th</sup> June, 2011 between the 3<sup>rd</sup> respondent and the 2<sup>nd</sup> respondent, I take the position that as the late Japheth Billy Kallombo had, during his lifetime lawfully sold the suit property to the 1<sup>st</sup> respondent, which property had long been sold to the appellant, the 2<sup>nd</sup> respondent could not lawfully sell the same to the 3<sup>rd</sup> respondent or any other person. This is because the suit property did not belong to the 2<sup>nd</sup> respondent or her late husband Japheth Billy Kollombo. In addition the 2<sup>nd</sup> respondent was aware that the appellant had lawfully purchased the suit property from the 1<sup>st</sup> respondent. For those reasons, I find and hold that the sale agreement between the 2<sup>nd</sup> and 3<sup>rd</sup> respondents dated 8<sup>th</sup> June, 2011 and the transfer document in favour of the 3<sup>rd</sup> defendant dated 5<sup>th</sup> July, 2011 are not valid, and the same are null and void for want of capacity on the part of the 2<sup>nd</sup> respondent who did not have legal ownership of the suit property and which property did not form part of the estate of the late Japheth Billy Kallombo.
64. An innocent purchaser or a bona fide purchaser is defined in the Black's Law Dictionary 11<sup>th</sup> Edition as follows;
- someone who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims".
65. Essentially, an innocent purchaser is one who in good faith, purchases the property of another honestly believing that the seller has good title to pass to him or her, and without knowing that other persons have a claim on the property he or she has purchased.
66. In the case of *Katende vs- Haridar & Co. Ltd* (2008)2 E.A 173 the court of Appeal of Uganda stated as follows;
- For the purpose of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove that
- a. he holds a certificate of title;
  - b. he purchased the property in good faith;
  - c. he had no knowledge of the fraud;
  - d. he purchased for valuable consideration;
  - e. the vendors had apparent valid title;



- f. he purchased without notice of any fraud;
- g. he was not party to any fraud;

67. The 3<sup>rd</sup> respondent argued that he was an innocent purchaser for value. I have considered the fact that he entered into two different sale agreements with the 1<sup>st</sup> and 2<sup>nd</sup> respondents in which it was separately stated that he paid each of the said respondents Kshs. 800,000/= . From the evidence on cross-examination, the 3<sup>rd</sup> respondent confirmed that he only paid Kshs. 800,000/= and not Kshs. 1,600,000/=, which in effect means that one of the sale agreements is a deliberate misrepresentation. In my view, such deliberate misrepresentation cannot be done by an innocent purchaser.
68. I take the view that for a purchaser to be described as innocent purchaser, they must demonstrate good faith. And one such opportunity to demonstrate good faith is to provide a search certificate. The 3<sup>rd</sup> respondent alleged to have done a search before purchase of the suit property. No such search was produced by him to demonstrate due diligence. In addition, as the suit property was registered on 26<sup>th</sup> November, 2012 the search if any could not have yielded anything as 8<sup>th</sup> June, 2011 when the 3<sup>rd</sup> respondent is alleged to have purchased the suit property. In any case, the 3<sup>rd</sup> respondents two agreements dated 8<sup>th</sup> June, 2011 made reference to the L.R number of the land, being L.R No.337/2360. As of 8<sup>th</sup> June 2011, the suit property was not yet registered and therefore it is apparent that the agreements could only have been drafted after title had been registered and not in 2011 as purported. This means that the agreements were backdated and the intention of false representation which is fraud.
69. I have also considered the transfer document produced by the 1<sup>st</sup> defendant the same is dated 5<sup>th</sup> July, 2011 and states that Perez Anyango Kalombo as being the registered proprietor yet the certificate of title produced by the parties clearly show that the suit property was registered on 26<sup>th</sup> November, 2012 and therefore the transfer could not precede the registration which means that the same was procured fraudulently.
70. The evidence of the 3<sup>rd</sup> respondent was that he was sold a vacant plot and that the appellant was not in possession. Yet DW3 his friend, one Makarios Muthigani Wachira confirmed that the appellant had a structure on the suit property which he himself built at a fee. He also stated that when the plaintiff trespassed on the suit property it was him that reported the trespass to the 3<sup>rd</sup> respondent and that he did the construction for the appellant because he needed the money. I do not find this witness' testimony as reliable as the same is contradictory because it is not possible that he was reporting a crime of trespass that he himself was doing, albeit on behalf of the appellant. The evidence on record point to the fact that the appellant took possession of the suit property upon purchase in 1999 and as at the point of purchase of the same by the 3<sup>rd</sup> respondent, the appellant was already in possession hence the 3<sup>rd</sup> respondent was aware of the claim by the appellant.
71. In addition, although the 3<sup>rd</sup> respondent alleged to have purchased the suit property at Kshs. 800,000/= the evidence produced did not show completion of payment of the entire purchase price. For those reasons, I find and hold that the 3<sup>rd</sup> respondent has not demonstrated that he was an innocent purchaser for value without notice. His activities point to a collusion between him and the other respondents for purposes of defrauding the appellant of the suit property.
72. In the premises, I find and hold that the 3<sup>rd</sup> respondent failed to prove his case on the required standard and therefore trial court was in error in allowing his counter claim. Therefore, the 3<sup>rd</sup> defendant counter claim is hereby dismissed with costs to the appellant. On the other hand, I find and hold that the appellant proved her case on required standard and therefore the trial court was wrong in dismissing it.



73. In the premises, I find and hold that the appeal herein is merited and the same is hereby allowed. I set aside the lower court's judgment in its entirety and substitute it with the following orders;
- a. The 3<sup>rd</sup> defendant's counterclaim is hereby dismissed with costs to the plaintiff.
  - b. The plaintiff's suit is allowed and the court enters judgment for the plaintiff against the defendants as follows;
    - i. A declaration be and is hereby made that the plaintiff is the bona fide purchaser of the parcel of land known as L.R. No. 337/2360 Mavoko Municipality Machakos County.
    - ii. The 2<sup>nd</sup> defendant, Periz Anyango Kallombo, who is holding L.R. No. 337/2360 (the suit property) in trust for the plaintiff, is directed to transfer the same to the plaintiff Florence Munanie Mwanzia within 30 days of the date hereof and in default, the Deputy Registrar of this court is authorized to execute all necessary documents to transfer the suit property to the plaintiff.
    - iii. The costs of the suit shall be borne by the 1<sup>st</sup> to 4<sup>th</sup> defendants.
74. The appellant is awarded the costs of this appeal and the same shall be borne by the respondents herein.
75. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 5<sup>TH</sup> DAY OF FEBRUARY, 2025 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

In the presence of;

Mr. Musyoki for the appellant

Mr. Ayieko for the 2<sup>nd</sup> and 4<sup>th</sup> Respondent

Mr. Mutunga for the 3<sup>rd</sup> respondent

Court Assistant: M. Nguyai

