



Malakwen (Suing as the Legal Representative of the Late Raphael Kiptoo Beibei) v Engairo & 3 others (Environment and Land Case 102 of 2018) [2025] KEELC 6110 (KLR) (17 September 2025) (Judgment)

Neutral citation: [2025] KEELC 6110 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND CASE 102 OF 2018
CK NZILI, J
SEPTEMBER 17, 2025**

BETWEEN

**CHRISTINA BARABARA MALAKWEN PLAINTIFF
SUING AS THE LEGAL REPRESENTATIVE OF THE LATE RAPHAEL KIPTOO
BEIBEI**

AND

**BENJAMIN MWALE ENGAIRO 1ST DEFENDANT
TITUS KIPYAB 2ND DEFENDANT
LAND ADJUDICATION & SETTLEMENT OFFICER TRANS
NZOIA 3RD DEFENDANT
IBRAHIM WAFULA 4TH DEFENDANT**

JUDGMENT

1. The plaintiff, as the legal representative of the estate of the late Raphael Kiptoo Biebei, instituted this suit through an amended plaint dated 27/10/2023. She seeks: -
 - (a) Declaration that in the absence of a lawful transfer from the deceased to the 4th defendant, the title to land parcel No. Trans Nzoia/Kipsoen/269, measuring approximately 10.5 Ha originally Plot No. 269 Kipsoen Settlement Scheme, hereinafter the suit property, held by the 1st defendant, is null and void and should be cancelled.
 - (b) Declaration that the plaintiff is entitled to an absolute interest over land parcel No. Trans Nzoia/Kipsoen/269.



- (c) Nullification of a subsequent transfer regarding land parcel No. Trans Nzoia/Kipsoen/269, and for rectification of the register to restore the land to the deceased.
 - (d) An order that the 1st defendant moves out of the land parcel No. Trans Nzoia/Kipsoen/269, failing which himself, agents, servants, or anybody claiming under him be forcefully evicted from the suit property.
 - (e) An order preserving the land.
 - (f) Any other relief the court may deem just and fair to issue.
2. The plaintiff averred that her husband, the late Raphael Kiptoo Biebei, passed away on 15/1/1972, and immediately thereafter, she became mentally disabled until her recovery recently to find her current residence at her deceased uncle's home in Chepterit, Nandi County. The plaintiff averred that upon inquiries, she learned that her matrimonial home in Kitale was no longer there, only for inquiries at the Land Registry to establish fraudulent transfer of the land to the 4th defendant, which took place two months after his demise, yet at no time did her family sell the land to the 4th defendant.
 3. The plaintiff averred that the alleged sale and transfer had no accompanying documents. Equally, the plaintiff deposes that the subsequent transfers of the land to the 2nd defendant and the 1st defendant in 1989 and 1991, respectively, were undocumented. The plaintiff deposed that the 1st, 2nd, and 4th defendants are strangers to her; their ownership and occupation of the suit land is both illegal and fraudulent.
 4. The plaintiff averred that she has, as a result of the foregoing, been rendered homeless together with her nine children, hence the estate of the deceased is entitled to mesne profits.
 5. The 1st defendant opposed the suit by an amended defence dated 31/1/2024. He admitted that he was the absolute registered owner of the suit property, which he acquired lawfully without any of the alleged fraud or illegality as averred or at all. The 1st defendant denied ever receiving any alleged demand letter; otherwise, the suit was time-barred, disclosed no cause of action against him, and the plaintiff was not entitled to the relief sought.
 6. The 2nd defendant opposed the suit through a statement of defence dated 23/10/2018. The 2nd defendant averred that the transfer of the suit property was procedural, lawful, and above board, hence denied the alleged fraud or illegality as pleaded by the plaintiff against him. The 2nd defendant averred that in or about 1975, he became a bona fide purchaser of the suit land without notice and that by 1989, he ceased being the owner, after transferring it to the 1st defendant; otherwise, he denied any alleged fraud, illegality, or an unprocedural transaction.
 7. The 3rd defendant opposed the suit through a statement of defence dated 25/3/2020. It confirmed that the suit land measuring approximately 10.5 Ha was allocated to the late Raphael Kiptoo Biebei in 1969, and by a consent from the land control board dated 12/4/1972, followed by transfer forms, was later transferred to the 4th, 2nd and 1st defendants, respectively.
 8. The 3rd defendant averred that the said transfers of the suit property were conducted procedurally and lawfully, without the alleged fraud or illegality. The 3rd defendant termed the suit as time-barred.
 9. Through a reply to the defence dated 10/7/2018, the plaintiff averred that there being no legitimate transfer from her late husband to the 4th defendant; all the subsequent transfers were unlawful. Further, the plaintiff averred that in view of the illegal, unprocedural, and unlawful transfers alluded to above,



the occupation and ownership of the suit property by the 1st defendant are unjustified, and she is entitled to mesne profits.

10. At the trial, Christina Bararaba Malakwen testified as PW1. She relied on an undated witness statement as her evidence-in-chief. PW1 told the court that her late husband passed on 15/3/1972 while living on the suit property, following which she was taken ill and was taken far away from the matrimonial home by her late uncle. PW1 told the court that after she became well, it was revealed to her that her matrimonial home had been taken over by some new owners, as per inquiries at the land registry in Kitale. She said that the inquiry revealed how the 1st, 2nd, and 4th defendants unlawfully and irregularly acquired her husband's land.
11. PW1 told the court that her late husband or family did not participate in the alleged sale and transfer to the 4th defendant, hence the subsequent transfers to the 2nd and 1st defendants were unlawful. PW1 told the court that she has six adult children who have nowhere to live or settle. PW1 relied on a copy of the official search certificate for land parcel No. Trans Nzoia/Kipsoen/269, death certificate, limited grant of letters of administration, leave to file the suit out of time, dated 14/5/2018, letter dated 1/3/1972, OB No. 58/28/3/2018, letter dated 28/2/1972, letters dated 28/2/1972 and 3/3/1972, undated transfer application for land control board consent, letter dated 28/9/1972 to the Director of Land Adjudication and Settlement, letter of land control board consent transferring the land to the 1st defendant from the 2nd defendant and also between the 4th and 2nd defendants, extract of title as P. Exhibits No. 1 - 6, PMFI(7) and P. Exhibits No. 8 – 15, respectively.
12. In cross-examination, PW1 told the court that between 15/1/1972 and 2018, she was mentally sick, and only came to discover the changes of the suit property after her full recovery. PW1 denied that her late husband authored P. Exhibit No. (5), since he was already dead on 1/3/1972. PW1 said that her father-in-law accompanied her to make the police report as per P. Exhibit No. 6. PW1 said that her treatment notes got destroyed by her children.
13. Similarly, PW1 acknowledged obtaining documents from the settlement scheme office as per P. Exhibit No. 9. PW1 said that her children were minors in 1972. She said that her late husband used to work as a milk records clerk during the colonial times, contrary to the certificate of death showing that he was a policeman.
14. PW1 admitted that she filed the suit 46 years after her late husband passed on. She confirmed to the court that, as per a letter dated 3/3/1972, she complained about the intended transfer of a report to the land settlement scheme office, after which, she became very sick. PW1 said that after the death of her husband, she was not certain if the land settlement scheme office became aware of the demise through her late brother-in-law, Richard Kiprotich. PW1 termed P. Exhibits No. 9, 10, 11, 12, 13, 14, and 15 as misleading; otherwise, her late husband was not alive at the time.
15. PW1 told the court that her late husband used to utilise the land as part of their matrimonial home before he passed on. She could not recall how she and her children left the homestead after she was taken ill; otherwise, when she recovered in 2018, they were living together at her late uncle's place in Nandi County.
16. Philip Chepkwony testified as PW2. He relied on a written statement dated 17/3/2020 as his evidence-in-chief, largely associating himself with the testimony of PW1. He told the court that by the time his late father passed on, he was 14 years old. PW2, however, confirmed that his mother was mentally sick, hence his uncle took them away from the suit property to his home in Nandi County.



17. PW2 told the court that he was the one who went back to Kipseon farm, only to find that their houses had been demolished in 1977. PW2 said that he reported the same to his uncles, Richard Kiprotich and Paul Ngetich. From then on, they started following up with the lands office, as per P. Exhibit. No. 9.
18. PW2 told the court that he was 64 years old. He said that when he discovered the demolition in 1977, he was only 19 years old, so he left the issue with his uncles to follow up, for his mother was sick. PW2 told the court that his late father used to work as a supervisor in a white settler's farm. PW2 said that his mother only visited the land in 2018 after her full recovery. He denied that his late father sold the land in 1972; otherwise, he was buried on the same land. PW2 clarified that his mother has been mentally ill and has been attending different hospitals until she started recovering in 2017, as per PMFI-7. PW2 said that he did not report in 1977, when he found people on the suit property, regarding the fraud or illegality. PW2 said that P. Exhibit No. 2 shows that his late father passed on at Kitale District Hospital.
19. Irene Chebutok Sang testified as PW3. She confirmed that the plaintiff was suffering from schizophrenia, a type of mental illness. PW3 said that a patient of that nature would be detached from reality, behave in a child-like manner, exhibit wandering behavior, pick rubbish, be unkempt, wear anything, be unable to make her own decisions, lack insight, and may not even know that they are sick, would be delusional, and would occasionally suffer from common hallucinations.
20. PW3 told the court that the history of PW1 showed that she initially started her medication at Kitale District Hospital in 1974 and was later transferred to a psychiatric clinic as patient No. Psy005/2014, in Kapsabet District Hospital. PW3 told the court that PW1 had been her patient on and off since 2014 to the present, as per P. Exhibit No. 7(a) and (b), dated 22/3/2018.
21. From the court record, it appears that after the plaintiff's case was closed, leave was sought to amend the amended plaint. Equally, parties consented on 4/3/2025 and opted to proceed with the suit from where it had stopped with the previous court.
22. David Mwate Engairo testified as DW1. He relied on a witness statement dated 29/11/2024 as his evidence-in-chief. He relied on a copy of a title deed for land parcel No. Trans Nzoia/Kipsoen/269, land control board consent dated 13/12/1989, and copies of photographs as D. Exhibit No. 1, 2, and 3. He told the court that his late father bought the land from the 2nd defendant and took possession in 1979, without any interruption or complaint from anyone until recently.
23. DW1 told the court that he was born in 1963 and that, according to the history of the suit property, the original allottee was not the 2nd defendant. He said that he was uncertain whether his late father had made any inquiry at the land settlement scheme offices to ascertain the history of the suit property, or how the 2nd defendant became the owner of the land. DW1 admitted that he had no sale agreement or transfer forms between the initial allottee and the 2nd defendant; otherwise, he was not privy to any information regarding the demise of the plaintiff's late husband in 1972.
24. DW1 told the court that when his late father moved into the suit property in 1981, he found two vacant houses on the land, but did not ascertain who the owner was. DW1 said that he was certain that his late father must have conducted due diligence to confirm that the 2nd defendant was the bona fide owner of the land. Further, DW1 said that he was uncertain whether the 2nd defendant had initially bought the land.
25. Christina Atieno Nyanga testified as DW2. As the County Land Adjudication and Settlement Officer, Trans Nzoia, since 2018, DW2 said that their records indicated that the land was discharged in favour of the 1st defendant on 28/5/1991. DW2 said that the initial allottee of the land was the late Raphael Kiptoo Biebei, as per a letter of offer issued in 1969. Again, DW2 said that the initial allottee attended



- a land control board meeting in 1972 to transfer the suit property to the 2nd defendant, who eventually transferred it to the 1st defendant.
26. DW2 told the court that the procedure includes a buyer applying for a transfer from the land control board, the two parties appearing before the land control board meeting, issuance of a land control board consent, acknowledgement of the consent by a Land Adjudication and Settlement Officer, payment of registration and stamp duty fees, issuance of revenue receipts, forwarding of the documents for processing to the Director of Land Adjudication and Settlement and the preparation of a charge.
 27. With respect to this suit, DW2 relied on appendix B dated 1/3/1972, letter of consent dated 17/4/1972, letter dated 25/4/1972, official transfer dated 19/6/1972, letter to the Commissioner requesting for transfer between Raphael Kiptoo and the 4th defendant dated 19/6/1972, notification of advance dated 9/5/1972, memorandum of satisfaction dated 9/5/1972, letter of consent dated 29/10/1972, appendix A signed by the parties, an application for consent between the 1st and 2nd defendants, and letter of consent dated 13/12/1989 and 1/3/1972 as D. Exhibits No. 4 - 15.
 28. DW2 told the court that the paper trail produced above showed that all the necessary procedures on the transfer of title to the sit property were fully complied with right from the 1st allottee to the present current registered owner, the 1st defendant, with no complaints along the way from the plaintiff, until 40 years after the land was discharged.
 29. DW2 told the court that the transfer dated 19/6/1972, as per D. Exhibit No. 7, was done before a Land Adjudication and Settlement Officer, which was a different entity from her office. DW2 admitted that D. Exhibit No. 7 did not indicate a signature that was appended to it by the transferee. Further, DW2 said that the witness and attester of the document appeared to be different people. DW2 said that she was not aware whether the documents used to effect the transfers were ever rejected as alleged, as in P. Exhibit No. 12 dated 28/9/1972.
 30. DW2 acknowledged that from the documents she has produced, it would appear that the transfer of title and the signature appended to the said documents may have occurred after the death of the plaintiff's late husband on 15/1/1972. DW2 insisted that the Land Administration department, which handled the transfers, did not fall under her office. DW2 told the court that, as per D. Exhibit No. 4, the consideration paid between the initial allottee and the 4th defendant and the date were missing.
 31. After the close of the defence case, parties were directed to file written submissions by 30/7/2025. The plaintiff relies on written submissions dated 9/8/2025. The plaintiff set out four issues for determination. Regarding her claim being statute-barred, the plaintiff submitted that she was mentally ill for several years until 2018, for which she had produced medical records to support her claim. The plaintiff relies on Sections 7 and 22 of the *Limitation of Actions Act* and submitted that time stopped running during her mental incapacity and began to run again in 2018, when she filed this suit.
 32. On whether the transfer of Plot No. Trans Nzoia/Kipsoen/269 to the 4th defendant, as facilitated by the 3rd defendant, was fraudulent; the plaintiff submitted that it was indeed fraudulent as per the particulars set out in paragraph 17 of the amended plaint dated 27/10/2023 otherwise the late Raphael Kitoo was the allottee and occupant of Plot No. 269 in the Kipsoen Settlement Scheme, whose remains upon death were interred thereon.
 33. Further, the plaintiff submitted that her late husband did not sell or transfer the suit land as alleged by the defendants. Otherwise, the land control board consent application used was both undated, it did not indicate the consideration paid, and it referred to a consent application dated 1/3/1972, yet her deceased husband died on 15/1/1972. Further, the transfer was not signed by either the transferee or the senior settlement officer. The plaintiff submitted that the old transfer forms were forwarded



for cancellation, and new transfer documents and forms were signed without explanation as to who signed them.

34. Regarding whether the 4th defendant could pass a good title to the 2nd defendant, the plaintiff submitted that the 4th defendant had no good title to pass, since he acquired the same fraudulently. The plaintiff submits that the title acquired by the 4th defendant was illegal, unprocedural, and therefore void ab initio. Reliance was placed on Gatimu (Suung as a Personal Representative of the Estate of the Late Isaack Gitari H. Gatimu) -vs- Njoroge & another [2024] KEELC 5324 (KLR), NRB C.A Appeal No.339 of 2018 KECA 742 and NRB C.A Appeal No.465 of 2019 KECA 144.
35. The first defendant filed submissions dated 26/8/2025 and submitted on issues as summarized below. On the validity and legality of the sale by Rahael Kiptoo to Ibrahim Wafula, the 1st defendant submitted that from the plaintiff's documents, the initial sale was initiated by the deceased on 15/3/1972. Equally, the 1st defendant submitted that the letter dated 28/2/1972, from the settlement officer to the senior settlement officer Kitale, indicated that the deceased wished to transfer the suit land to Ibrahim Wafula.
36. The 1st defendant also submitted that the plaintiff, vide the letter dated 3/3/1972, opposed the sale of the suit land to Ibrahim Wafula, a clear indication that she was fully aware of the transaction. That notwithstanding, the 1st defendant submitted that spousal consent was not a requirement at the time and that there is no evidence that the deceased lacked the mental capacity or was coerced to transfer the suit land. Further, the 1st defendant also submitted that the plaintiff has failed to discharge the burden of proof on fraud.
37. Regarding whether the subsequent transfers were procedural, lawful, and valid, the 1st defendant submitted that the transfers are well-documented and demonstrate a clear, lawful progression of ownership. Again, the 1st defendant submitted that the plaintiff failed to produce any evidence to invalidate the transactions of land which he has had, developed, and resided on the suit property for over 44 years.
38. The 1st defendant submitted that he is a bona fide purchaser for value without notice, having carried out due diligence and paid consideration to the 2nd defendant, who had bought the suit land in 1979, from Ibrahim Wafula in 1975 and therefore, it did not form part of the deceased's estate at the time he acquired it. Reliance is placed on Dina Management -vs- County Government of Mombasa & 5 others [2023] eKLR and Harcharan Sign Sehmi & another -vs- Tarabana Company Limited & 5 others [2025] KESC 21 (KLR), Divecon Ltd -vs- Samani [1995–1998] EA 48 as cited in Industrial Court of Kenya at Nairobi Case No. 1150 of 2013, Eunice Chebukwa Wanjala -vs- Kenya Commercial Bank Ltd cited in Danson Ndeti -vs- Board of Trustees National Social Security Fund [2015] KEELRC 491 (KLR).
39. Further, it is the 1st defendant's submission that the suit is time-barred under Section 7 of the [Limitation of Actions Act](#), having been filed 26 years after the 1st defendant obtained title, otherwise the plaintiff should not cite mental illness to circumvent the statutory limitation, more so when she does not meet the exceptions under Sections 22, 26 and 27 of the [Limitation of Actions Act](#).
40. The issues calling for my determination are:
 - (1) If the plaintiff has capacity and the suit is properly before the court
 - (2) If the deceased sold and transferred the said land to the 4th defendant.
 - (3) If the 4th defendant lawfully sold and transferred the suit land to the 2nd defendant.
 - (4) If the 1st defendant was a bona fide purchaser for value without notice of any adverse interest of the plaintiff.



- (5) Whether the 3rd defendant lawfully, procedurally, and regularly allowed the sale, transfer, and registration of the suit land in favour of the 4th, 2nd, and 1st defendants.
- (6) Whether the plaintiff is entitled to the reliefs sought.
- (7) What is the order as to costs?
41. It is trite law that parties are bound by their pleadings, and issues for the court's determination flow from the pleadings. See *Raila Odinga & Another -vs- Independent Electoral Boundaries Commission & Others* [2017] eKLR.
42. The plaintiff filed this suit pursuant to leave to file the suit out of time granted on 24/5/2018 by Hon. Mr. Justice Ombwayo in Eldoret ELC No. 81 of 2019 (OS). She contends that she became mentally ill after her husband passed on 15/1/1972. The plaintiff terms the transfer of the land to the name of the 4th defendant, two months after his demise, dated 1/3/1972, irregular, void, and null. The plaintiff relies on leave to file the suit, time issued on 23/2/2018, and a limited grant dated 3/5/2018.
43. The leave to file a suit out of time granted on 14/5/2018 and the limited grant of letters of administration ad litem dated 9/5/2018 have not been challenged or set aside through any proceedings. The court finds that she has the capacity to sue in this matter on behalf of her late husband, who died on 15/1/1972. The certificate of death issued on 23/2/2018, under the *Births and Deaths Registration Act*, Cap 149, Laws of Kenya, requires this court to take it as prima facie evidence of the dates and facts contained therein, without any other proof of such entry.
44. It is a trite law that when a title deed is under challenge, it is not enough to waive an instrument of title without proof that the process of acquisition of the same was regular, procedural, and lawful. The core issue by the plaintiff is that the process by which the title to the land moved from the name of her late husband after his demise to that of the 4th defendant was irregular, unprocedural, and unlawful, hence the subsequent entries in the register and the beneficiaries thereto hold no valid title capable of protection by law.
45. On their defence, the 1st and 2nd defendants deny any illegality or fraud. The 2nd defendant takes the view that he conducted due diligence at the Land Settlement Scheme office, which confirmed that the 4th defendant was the true owner and occupier of the land as per D. Exhibit. No. 15.
46. The 2nd defendant terms himself as an innocent purchaser for value without any notice; otherwise, he equally lawfully and procedurally sold and transferred the land to the 1st defendant, whose title is protected by law. Regarding the 3rd defendant, it is pleaded that though the initial allottee of the land in 1969 was the late Raphael Kiptoo Beibei, he transferred the same to the 4th defendant by a land control board consent dated 12/4/1972, whereupon it came to the name of the 2nd defendant and currently that of the 1st defendant, regularly and procedurally, with no alleged fraud or illegality.
47. In *Sehmi & Another -vs- Tarabana Co. Ltd* (supra), the court held that the doctrine of innocent purchaser for value was a judicial principle of law, of property in land that a purchase of a legal estate for value without notice was an absolute, unqualified and unanswerable defence against the claim of any prior equitable owner or encumbrance. The court said that the burden of proof lay on the person claiming to be a bona fide purchaser to establish the ingredients of innocence, purchase for value, and a legal estate.
48. There is no dispute that the initial allottee of the suit property was Raphael Kiptoo Beibei. He is said to have passed on on 15/1/1972, as per the death certificate, before the court.



49. D. Exhibit No. 4, shows that the transfer of the land from him to the 4th defendant took place after a land control board consent was issued on 17/4/1972, vide an application dated 1/3/1972 as per D. Exhibits. No. 2, 4, P. Exhibit No. 3, D. Exhibit. No. 6, transfer forms that he signed, dated 19/6/1972. (D. Exhibit. No. 7), registration of the transfer dated 19/6/1972 (D. Exhibit. No. 9), D. Exhibits. No. 8, 9 and 11 are dated 19/6/1972. D. Exhibit No. 10 is dated 9/5/1972. It confirms the 4th defendant as the transferee. D. Exhibit. No. 11 is dated 13/1/1971. D. Exhibit. No. 12, 13, 14, and 15 are transfers between the 4th and 2nd defendants.
50. The law and practice is that when a registered proprietor's root of title is under challenge, the court must go beyond the instrument and establish if the acquisition of title was legal, formal, and free of any encumbrance, including any or all other interests which need not be noted on the register. See *Munyuu Maina -vs- Hiram Gathiba Maina* [2012] eKLR.
51. Acquisition of title as held in *Daudi Kiptugen -vs- Commissioner of Lands & Others* [2015] eKLR, is not an end result, and the court has to establish if the proper process was followed; otherwise, the court must protect genuine owners of land from fraudsters as held in *Mwangi James Njehia -vs- Janetta Wanjiku Mwangi & Another* [2021] eKLR.
52. The Black's Law Dictionary, 9th Edition, defines fraud as a knowing misrepresentation of the truth or concealment of a material fact. What the plaintiff is alleging is that the transfers of the suit property from the name of her husband to the name of the 4th defendant took place while he was deceased, as shown by the certificate of death before the court. She insists that the deceased or his estate was not involved in the alleged sale and transfer.
53. Exhibit No. 9 shows that the plaintiff had objected to the alleged sale of the land between the deceased and the 4th defendant. The letter is dated 3/3/1972. Despite the objection, the 3rd defendant appears to have proceeded to effect the transfer despite the red flags raised as per P. Exhibits. No. 11, 12, 13, 14, and 15. The plaintiff has testified that by the time her late husband died on 15/1/1972, going by P. Exhibit No. 2, she was mentally unstable until 2018. She disputes P. Exhibit. No. 5, since her late husband had passed on, he could not have been the author of a letter to transfer dated 1/3/1972. PW1 insists that she made a complaint over the sale per the OB extract produced as P. Exhibit. No.6.
54. In *Sehmi & Another -vs- Tarabana* (supra), an innocent purchaser was defined as one who acts in good faith. His conduct must not raise any doubt as to whether, indeed, he did not have any notice or knowledge of the existence of a rival interest in the suit property.
55. Exercise of due diligence according to the court is expected of any reasonable purchaser. Reasonable inquiry into the status of the estate or land sought to be purchased is key. Equitable interest in the suit property and its existence by a rival weakens the concept of an innocent purchaser.
56. There is already evidence in terms of P. Exhibit. No. 8 of a letter dated 3/3/1972 written by S.K. Kibor, a Settlement Officer for Kipsoen Scheme, to his counterpart, the Senior Settlement Officer, Kitale, that the plaintiff, as the wife of the plot holder No. 269, was opposed to the transfer of the land to the 4th defendant on account of lack of residence for herself and the nine children. The 3rd defendant's statement of defence, and its witnesses, are silent on the receipt, effect, and action that may have been taken to consider the equitable interests of the plaintiff as the spouse of the plot holder. The letter predates the consent from the land control board dated 12/4/1972. DW 3 did not dispute P. Exhibit. No. 8.
57. In *Jacinta Wanja Kamau -vs- Rosemary Wanjiru Wanyoike & Another* [2013] eKLR, the court observed that before the appellant could seek protection as a purchaser, he had to first prove that she



- was a purchaser. The sale and transfer of deceased land before letters of grant are issued is outlawed under Section 82 (b) of the Laws of Succession Act.
58. Ignorance of the law is not a defence. The defendants have not refuted the death certificate as well as its contents or entries. The defendants have not said that they were not aware of the death or the status of the plot holder as of 1/3/1972. Such a transaction would, in law, be void ab initio, if undertaken after the death of a plot owner. A thief acquires no right or interest that he can transfer under the [Law of Succession Act](#). See *Re Estate of Christopher Aide Adela (Deceased)* [2019] eKLR.
 59. The plaintiff has said that she was mentally ill, which is the reason she could not advance her complaint set in P. Exhibit. No. 8. The plaintiff has produced medical reports to show that she was suffering from mental illness. PW3 attested to her mental sickness from 1972 to 2018.
 60. In *MMG -vs- Tribunal Appointed to Investigate the Conduct of Hon. Justice MMG (Petition 10 (E013) of 2022)* [2023] KESC 73 (KLR) (12 September 2023) (Judgment), the court cited Section 2 of the [Mental Health Act](#) on the definition of mental illness. It said that the Act was silent on the resultant mental effects of the mental capacity of a person with mental illness. After comparative analysis, the court said that mental incapacity must be diagnosed by a qualified professional and by way of medical evidence. The court defined mental incapacity to include a person's inability to make a decision, understand information about a decision, or communicate a decision.
 61. In this suit, rival evidence was not tendered to dislodge the fact that the plaintiff was under mental illness between 1972 and 2018. In *Stephen Kimini Wangondu -vs- The Ark Ltd* [2016] eKLR, the court observed that expert evidence can only be challenged by another expert. The court held that expert evidence must form part of all other evidence presented before it; otherwise, it cannot apply in a vacuum.
 62. Looking at the circumstances surrounding the sale, and transfer relocation from the land to Nandi County, as confirmed by her son, PW2, and the doctor, the court finds that her failure to follow up the objection as per P. Exhibit. No. 8 was due to her mental impairment.
 63. Due diligence entailed establishing the whereabouts of the family of the plot owner. Waiver of the said spousal rights or interests as contained in P. Exhibit. No. 8, between 1972 and 2018, was not addressed by the defendants. Beneficial interest arising from matrimonial property has been part of Kenya's legal history since the application of the Matrimonial Homes Act 1970, up to Article 45 of [the Constitution](#). A surviving spouse has a life interest in the deceased's property. See *PNN -vs- ZWN* [2017] KECA 753 KLR.
 64. The plaintiff has poked holes in the paper trail produced by the defendants, especially on whether the 4th defendant obtained proper title, which he could transfer to the 2nd and 1st defendants.
 65. The 2nd and 4th defendants failed to testify in this suit. DW3 was not the maker of all the documents relied upon by the defendants, which had glaring errors as pointed out by the plaintiff during cross-examination. The evidence of DW1 and DW2 did not seal those loopholes to show that the documents used to transfer the suit property from the deceased to the 4th defendant were actually signed and executed by the deceased during his lifetime. DW1 and DW2 were not the witnesses, attestors, or signatories to the paper trail produced by DW2. DW2 was unable to tell the court the implications of the certificate of death, as well as the plaintiff's objection as contained in P. Exhibits No. 2 and 8. The 3rd defendant produced no forensic report to support its pleadings that the transfer of the land was effected by the deceased during his lifetime.



66. In *Raila Odinga & Another -vs- IEBC* (supra), the court observed that while the legal and evidential burden rests with the plaintiff, the defendant has to rebut that evidence to assert that there was compliance with the law, and if there were irregularities, it did not affect the end result. See also *Mbuthia Macharia -vs- Annah Mutua Ndwigwa & Another* [2017] eKLR.
67. Going by the evidence of the plaintiff against that offered by the defendants, I find that the plaintiff's evidence is more consistent, truthful and believable. She has discharged the burden of proof that the process of transfer of the deceased's land to the 4th defendant was based on misrepresentation of facts, since the deceased was incapable of signing, executing, or participating in the process of transfer after he passed on on 15/1/1972.
68. Consequently, since the 2nd and 1st defendants derived their title from the 4th defendant, who had nothing to sell or transfer to them as his title was obtained in an illegal or unprocedural manner, the 1st and 2nd defendants fail the tests of innocent purchaser for value, as set out in *Sehmi & another -vs- Tarabana Company Limited & 5 others* (Petition E033 of 2023) [2025] KESC 21 (KLR) (11 April 2025) (Judgment).
69. The upshot is that I find the plaintiff entitled to the reliefs sought with costs.

JUDGMENT DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 17TH DAY OF SEPTEMBER 2025.

In the presence of:

Court Assistant - Dennis

Kiarie for the plaintiff present

Teti for the 1st defendant present

Chilaka for the 3rd defendant present

4th defendant absent

HON. C.K. NZILI

JUDGE, ELC KITALE.

