



**Kurji v Dacha (Administrator of the Estate of James Romanus
Dacha - Deceased) & 3 others (Environment and Land Appeal
E005 of 2023) [2025] KEELC 89 (KLR) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 89 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E005 OF 2023**

E ASATI, J

JANUARY 23, 2025

BETWEEN

HIRANI KANJI KURJI APPELLANT

AND

**ANNE ACHIENG DACHA (ADMINISTRATOR OF THE ESTATE OF JAMES
ROMANUS DACHA - DECEASED) 1ST RESPONDENT**

ROSE ALUOCH OPIYO 2ND RESPONDENT

COUNTY LAND REGISTRAR - KISUMU COUNTY 3RD RESPONDENT

THE ATTORNEY GENERAL 4TH RESPONDENT

*(Being an appeal from the judgement and decree of Hon. W. K. Onkunya
SRM, delivered on 26. 01. 2023 in KSM CMC E & L CASE NO 55 OF 2018)*

JUDGMENT

Introduction

1. Hiran Kanji Kurji, the Appellant herein being dissatisfied with the judgement of W.K. Onkunya – Senior Resident Magistrate, Kisumu delivered on 26th January, 2023 in Kisumu CMC ELC Case No.55 of 2018 filed the present appeal vide the Memorandum of Appeal dated 13th February, 2023. He sought for orders that:
 - a. the appeal be allowed with costs to the Appellant;
 - b. the judgement be set aside and be substituted with a judgement dismissing the Plaintiff/1st Respondent's suit with costs to the Appellant.



- c. the Honourable court be pleased to make such orders and/or issues any other judicious directions in the interests of justice.
2. The ground of appeal as contained in the Memorandum of Appeal are that;
 1. the learned Trial Magistrate erred in fact and law when she failed to find and hold that the Appellant was an innocent purchaser for value without notice and that he carried out the requisite due diligence required of him by law before purchasing the suit land – Kisumu/Kogony/2202 and thereby arrived at a decision unsustainable in law.
 2. the learned Trial Magistrate erred in fact and law by failing to appreciate that the Plaintiff's suit lacked legal foundation having been brought in violation of the provisions of the Law of Contract Act.
 3. the learned Trial Magistrate erred in fact and law by failing to consider the fact that the Plaintiff/1st Respondent's case was devoid of material particulars and documentation in proof of her case, specifically the lack of a written sale of Land Contract, Consent of Land Control Board or Consent issued by Land Officer and Transfer Forms, which were pre-requisite documents before any legal transfer of the suit parcel could take place and that in the absence of such documents the purported acquisition by the 1st Respondent's husband of the suit parcel was irregular, un-procedural, improper, wrongful and fraudulent.
 4. The Learned Trial Magistrate erred in fact and law by misdirecting herself and ignoring evidence by the Appellant which demonstrated that he had followed the requisite procedures in acquiring the suit parcel.
 5. The learned Trial Magistrate proceeded on wrong principles in arriving at her decision and failed to apply the relevant precedents and tenets in law.
 6. The learned Trial Magistrate failed to apply herself judicially and to adequately evaluate the evidence and exhibits tendered before her on the issues of ownership of the suit parcel of land thereby arriving at a decision unsustainable in law.
 7. The learned trial Magistrate misdirected herself in ignoring the written submissions presented and filed by the Appellant in their entirety.

Background

3. A brief background of the appeal, as can be gathered from the record of appeal dated 4th December, 2023 and the Supplementary record of appeal dated 20th June, 2024, is that the Appellant was the 2nd Defendant in Kisumu ELC CASE NO.235 OF 2016 that was later transferred to the Magistrate's court and registered as Kisumu CMC E&L CASE NO.55 OF 2018 (the suit). The Appellant together with Rose Aluoch Opiyo (the 2nd Respondent herein) the County Land Registrar, Kisumu County (the 3rd Respondent herein) and the Attorney General (the 4th Respondent herein) was sued over a parcel of land known as Kisumu/Kogony/2202 (the suit land). The 1st Respondent herein who was the Plaintiff in the suit claimed vide the plaint dated 31st August, 2016 that she was the administrator of the estate of one James Romanus Dacha, deceased, who died on 31st May, 1992 and who was the registered owner of the suit land as at the time of his death.
4. That she had discovered sometime in the month of January, 2016 that a third party had encroached onto the suit land. That upon conducting search, she established that the suit land was on 15th January, 1993 transferred to the 2nd Defendant who in turn transferred the land to the Appellant on 18th



November, 2015. The 1st Respondent claimed that the said transfers were procured by fraud and sought for a declaration that the transfers and subsequent issuance of title deeds to the 1st Defendant, (the Appellant herein) were fraudulent, illegal therefore null and void, an order directing the Land Registrar to cancel the entries made in the register in respect of the suit land on 15th January, 1993, 25th March, 2014 and 18th November, 2015 and restore the name of the deceased as the registered proprietor of the freehold interest in the suit property, a permanent injunction and costs. The record shows that the Appellant filed a statement of defence dated 15th November, 2016 denying the 1st Respondent's claim. He averred in the alternative that if at all the suit land was ever registered in the name of the deceased, then the registration was procured by fraud as the suit land belonged to one Henry Gilbert Opiyo from whose heir the Appellant lawfully acquired the land. That the transaction between him and the 2nd Respondent herein was above board and that he did due diligence and paid all government levies. That the title document held by him was bona fide and that the same was issued by a government agency in fulfilment of a legal process.

5. He further averred that the 1st Respondent is a busy body, a fraud who was trying to benefit from the misery of other people by trying to make a false and fraudulent claim against the estate of a deceased person.
6. The record shows further that upon transfer of the suit to the lower court, the same was heard by the trial court which vide the judgement dated 26th January, 2023 found that the 1st Respondent had proved her case on a balance of probabilities and allowed her claim as contained in the plaint.
7. Aggrieved by the judgement, the Appellant preferred the present appeal.
8. Pursuant to the direction given on 19th February, 2024, the appeal was argued by way of written submissions.

Submissions

9. It was submitted on behalf of the Appellant that land sale contracts are subject to the formal statutory requirements set out in Section 3(3) of the [Law of Contract Act](#) which provides that;
10. 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 to by a witness who is present when the contract was signed by such party.
111. 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 Auctioneer's Act (Cap 526) nor shall anything in it affect the creation of a resulting, implied or constructive trust".
12. That no agreement was exhibited. That the trial Magistrate totally ignored the evidence of the 2nd Respondent who was emphatic that the suit parcel was not sold to James Romanus Dacha by Henry Gilbert Opiyo and the evidence of DW3, a Land Registrar who did not have the transaction documents in proof of the transfer from Gilbert Opiyo Nyagati to James Romanus Dacha, save for the green card and entries therein.



13. Counsel relied on the case of *East Africa Fine Spinners Limited (in Receivership) & 3 Others -vs- Bedi Investment Limited* [1994]eKLR where it was held that where a party accepts an offer subject to contract, it means that the transaction remains in negotiation until a formal contract is settled and the formal contract is executed.
14. Counsel submitted that courts will only enforce what is lawful and that if there is any doubt as to the lawfulness of a transaction it will not be enforced.
15. That the trial court should not have protected the purported transaction between James Romanus Dacha and Henry Gilbert Opiyo for it was unenforceable and void in law. Counsel relied on the case of *Mapis Investment (K) Ltd -vs Kenya Railways Corporation (2005)*eKLR where the Court of Appeal held that if the illegality to a transaction is duly brought to the notice of the court and if the person invoking the aid of the court is himself implicated in the illegality, it matter not whether the Respondent has stated the illegality or he has not. That the court ought not to assist the Respondent.
16. Counsel submitted that there was no evidence that the 1st Respondent or the person from whom the 1st Respondent based her claim occupied the suit land. That the 1st Respondent had no written documents to show that her husband had been given the land by Henry Gilbert Opiyo. That she did not assert that she settled on the suit land.
17. That the 1st Respondent's evidence on the sale and purchase of the suit property consisted of hearsay and fell below the standard required to discharge the onus of proof placed on her as the Plaintiff. That the trial Magistrate relied on the endorsement on the Green Card as proof of sale and purchase which is a dangerous precedent and unknown in law.
18. Relying on the provisions of Section 6 and (8) of the [Land Control Act](#), Counsel submitted that the 1st Respondent did not avail any evidence that her late husband obtained consent to transfer.
19. That no coloured photographs, PIN details of the transacting parties, National Identity cards, numbers and tax PIN numbers in accordance with the requirements in section 110 and Third Schedule (Form R L.1) of the repealed Registered [Land Act](#), Cap.300, were exhibited. That DW3, the Land Registrar testified that the documents were missing.
20. Counsel submitted that the conclusion was that the transaction involving the purported sale of the suit land and transfer to James Romanus Dacha on 23rd March 1992 was a fraudulent affair.
21. That James Romanus Dache never purchased the suit land from Henry Gilbert Opiyo despite having obtained registration thereof.
22. In relation to grounds 1, 6 and 7 of appeal, Counsel submitted that the trial Magistrate failed to evaluate the evidence adduced in the trial as a whole. That it was erroneous to selectively consider evidence favouring one side without regard for the evidence adduced by the opposite side. Counsel relied on the provisions of Section 107 and 109 of the [Evidence Act](#).
23. Counsel submitted further that the Appellant's case is that he is an innocent purchaser from the 2nd Respondent for value without notice of the defects of the suit land, if any. Counsel relied on the case of *Hajji Abdu Nasser Katende -vs- Vithalidas Haridas & Co. Ltd (2008) E.A. 173* where the court of Appeal of Uganda while discussing the doctrine of bona fide purchaser for value without notice stated that;

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 purchase to successfully rely on the



bona fide doctrine as was held in the case of Hannington Njuki -vs- William Nyanzi Hccc No.434 OF 1996 must prove;

- i. that he holds a certificate of title,
- ii. he purchased the property in good faith,
- iii. he had no knowledge of the fraud,
- iv. he purchased for valuable consideration,
- v. the vendors had apparent title,
- vi. he purchased without notice of any fraud
- vii. he was not a party to the fraud.

24. A bona fide purchaser of a legal estate for value without notice has absolute unqualified and answerable defence against the claims of any prior equitable owner. The burden to establish or prove the plea lies on a person who sets it up. It is a single plea and is not sufficiently made out by proving purchase for value and leaving it to the opposite party to prove notice if he can”.
25. That the Appellant tendered evidence to prove that he purchased the subject land from the 2nd Respondent vide a sale agreement dated 21st August, 2015 for the sum of Kshs.8,000,000/=. That undertook all reasonable due diligence which showed that the 2nd Respondent was the registered land owner. That the registration of the 2nd Respondent was confirmed by the Land Registrar. That the suit land was transferred to the Appellant and title deed issued to him on 18th September, 2015. That no evidence was provided whatsoever by the 1st Respondent at the trial to prove allegations of fraud pleaded against the Appellant.
26. That being a registered proprietor of the suit land the Appellant is entitled to the right privileges and benefits under Section 26 of the Land Registration Act.
27. Counsel prayed that the appeal be allowed and the judgement be set aside and be substituted with a judgement dismissing the 1st Respondent’s suit with costs.
28. On behalf of the 1st Respondent it was submitted in regard to grounds 1, 6 and 7 of the appeal that the trial court did not fail to find that the Appellant was an innocent purchaser for value without notice.
29. That the trial court specifically found and stated that “from the evidence on record, the 2nd Respondent purchased the suit property from the 1st Defendant for valuable consideration and did not participate in the fraud”
30. That the Appellant’s complaint is based on a misreading of the findings of the court. That the true position is that the Appellant was not even an innocent purchaser for value without notice.
31. That the Appellant had failed to carry out due diligence. That the Appellant on cross-examination stated that all that he did was a search. That he did not apply for and obtain an extract of the register. That had he done proper due diligence, he could have discovered that there was a James Romanus Dacha between Henry Gilbert Opiyo and the 2nd Respondent, that the 2nd Respondent did not acquire title from Henry Gilbert Opiyo and without proof of how she acquired the land from James Dacha, she was trying to defraud him.
32. That while the Appellant entered into the land sale agreement on 21st August, 2015 and even paid Kshs.500,000/- on execution of the agreement, it was not until 2nd September, 2015 that he conducted



the search which was 2 weeks after signing the agreement and paying the deposit. Counsel submitted that the appellant conducted zero due diligence.

33. Counsel submitted further that the evidence of the 2nd Respondent proves that the Appellant continued to make payments of the purchase price when the case was pending in court. That there is no proof of payment of the entire balance of the purchase price. That the Appellant got the land for free and cannot be said to be an innocent purchaser for value without notice.
34. Counsel referred the court to the case of Arthi Highway Developers Limited -vs- West End Butchery Ltd & 6 Others [2015]eKLR on the importance of doing proper due diligence. That the Appellant failed to take out a notice to claim contribution or indemnity from the 2nd Defendant under the provisions of Order 1 Rules 24 Civil Procedure Rules as there was abundant evidence that the 2nd Defendant had an illegal title and that she had been aided in the mischief by the 3rd Defendant. That this points to the fact that the Appellant was complicit in the matter leading to the illegalities.
36. In respect of grounds 2, 3, 4 and 5 of the appeal, Counsel submitted that the attack on the title issued to James Romanus Dacha had been raised in the wrong forum by the wrong person at the wrong time. That the sale and transfer to James Romanus Dacha was admitted. That the green card which was common evidence for both parties showed that the land moved from Henry Opiyo To James Dacha and then to the 2nd Respondent who transferred it to the Appellant.
37. Counsel relied on section 61 of the *Evidence Act* that in Civil proceedings, facts which are admitted need not be proved, and section 97 which would not allow a party to produce oral evidence to contradict the record (green card).
38. Counsel further submitted that the 2nd Respondent should have gone to court and filed suit to revoke the title of James Dacha and get the title in her name. That it is only a court of law that cancels title to land on the basis of fraud or illegality. That there was no basis in law for the 3rd Respondent to transfer James Dacha's land to the 2nd Respondent and to the Appellant without granting the 1st Respondent a hearing. That it was a breach of articles 40 and 47 of *the Constitution* of Kenya.
39. That the finding of the court nullifying the title held by the Appellant was based on a specific finding that the 2nd Respondent who sold him the land held a fraudulently obtained title and therefore she could not transmit a good title.
40. Counsel concluded that the appeal has no merit and prayed that it be dismissed with costs.

Issues for Determination

41. Seven grounds of appeal were presented in the Memorandum of Appeal. The grounds of appeal form the issues for determination herein.

Analysis and Determination

42. This being a first appeal, this court is under a duty to re-examine and re-analyse the evidence placed before the trial court with a view to arrive at its own independent conclusion. See section 78 of the *Civil Procedure Act* and *Selle & another vs Associated Motor Boat Company Ltd & Another (1968) IEA 123*) where it was held that a court handling a first appeal is not necessarily bound to accept the findings of fact and law by the court below but has a duty to re-examine the evidence placed before the trial court.



43. The evidence placed before the trial court by the 1st Respondent who was the Plaintiff in the suit comprised of her own testimony. She testified as PW1 and adopted the contents of her witness statement dated 27th July, 2016.
44. She had stated in the witness statement that she was the widow and administrator of the estate of James Romanus Dacha, deceased who died on 31st May, 1992. That she obtained Letters of Administration in respect of the estate of her late husband on 27th May, 1993. That the deceased was registered proprietor of the freehold interest in the suit property measuring 0.8 Ha or thereabout.
45. That the said property formed part of the estate of the deceased. That she later discovered that the suit land was registered in the name of the Appellant who had been registered as proprietor on 18th November, 2015. That the copy of the register showed that shortly after the death of the deceased, the 2nd Respondent herein (Rose Aluoch Opiyo) was somehow registered as proprietor of the land on 15th January, 1993, issued with a title deed on 25th March, 2014 and transferred the suit land to the Appellant on 18th November, 2015. That the transactions and entries in the register of the suit land were clearly illegal as the deceased could not have sold or transferred the land to the 2nd Respondent as he was already dead as at the date of the transfer and also because the land was family property.
46. The 1st Respondent produced Grant of Letters of Administration to the estate of the deceased and a copy of certificate of death of the deceased, title deed, green card, demand notice and notice to Attorney General. She testified that her husband bought the land from Gilbert Henry Opiyo who identified himself as the owner. That Gilbert Henry Opiyo was accompanied by the 2nd Respondent. That she visited the land with her husband before purchase. That after purchase, they took possession of the land, cleared it and planted trees.
47. On cross-examination, the 1st Respondent testified that her husband was not registered as a joint registered owner with Henry Gilbert Opiyo because the title deed was issued in her late husband's name.
48. That she did not know how the 1st and 2nd Defendants got registered as owners of the suit land. That the process by which the land was transferred from her deceased husband to the 2nd Respondents was not regular.
49. The evidence presented on behalf of the defence (including the Appellant) comprised of the testimonies of the 2nd Respondent, the Appellant and the Land Registrar.
50. The 2nd Respondent testified that she was the widow of Henry Gilbert Opiyo Nyagati deceased. Through her witness statement dated 19th November, 2018, she stated that the suit land belonged to her late husband. That her late husband transferred the suit land to her on 15th January, 1993 before he died on 26th February, 1998. That she was surprised to learn that the suit land was registered in the name of James Romanus Dacha on 23rd March, 1992. That if the land was registered in the joint names of James Romanus Dacha and her late husband on 23rd March, 1992, then it follows that upon the death of James Romanus Dacha on 31st May, 1992 his interest in the suit property automatically vested in her late husband.
51. That hence the transfer of the land from her husband to her was regular and legal for all purposes. That upon registration, she became the proprietor of the suit land. That she transacted with the Appellant in her capacity as proprietor of the suit land and that the transaction was valid. She produced letter from Assistant Chief dated 16th August, 2018, certificate of death for Henry Gilbert Opiyo Nyagati and her National identity card. She testified further that she was aware that the suit land was also



- registered in the name of James Romanus Dacha who wanted to purchase the land in the year 1992 when they entered into an agreement with her husband. That she was objecting to the sale. That Dacha went ahead and changed the land into his name. That her husband discovered the change of names in his land while he was still alive and removed Dacha's name from the title and replaced it with the 2nd Respondent's name.
52. On cross-examination, she stated that the land she sold to the Appellant was separate and distinct from the land where she put up her home. That the Appellant paid her Kshs.8,000,000/- for the land and that there was no outstanding balance. That the suit land was land that her husband was given by his father.
 53. The Appellant testified as DW2. He adopted the contents of his witness statement dated 16th November, 2016 as his evidence in chief. He had stated in the said witness statement that if at all James Romanus Dacha got registered as proprietor of the suit land, the registration was fraudulent, illegal and a nullity ab initio as the land was the property of one Henry Gilbert Opiyo. That he was a purchaser for valuable consideration without notice. That the transaction between him and the 2nd Respondent was well above-board.
 54. That he is in actual possession of the suit land. He stated in court that before buying the land, he bought search through which he confirmed that the land belonged to the 2nd Respondent. That the purchase price was Kshs.8,000,000/- of which he paid Kshs.500,000/- at execution of the agreement and the balance by several cheques of Kshs.500,000. He produced copy of the land sale agreement dated 21st August, 2015, Letter of Consent of the Land Control Board, application to the Land Control Board, Transfer form, KRA stamp duty, declaration pay in slip, application for registration copy of title deed in his name, copy of the titled in the name of the 2nd Respondent, copy of receipts dated 18th November, 2015 and customer transaction receipt from National Bank.
 55. DW3 was the Land Registrar. He gave the details of the suit land and concluded that as per the records, the registered owner is Hiram Kanji Kurji.
 56. On cross-examination, he stated that copy of green card is a summary of what is in the record of the register. He testified that the registered owner had requested for a change of name, then he transferred the land to James Romanus Dacha. That James Romanus Dacha in turn transferred the land to Rose Aluoch Opiyo on 15th January, 1993.
 57. The first ground of appeal is that the learned trial Magistrate erred in fact and law when she failed to find and hold that the Appellant was innocent purchaser for value without notice and that he had carried out the requisite due diligence required of him by law before purchasing the suit land parcel number Kisumu/Kogony/2202 and thereby arrived at a decision unsustainable in law.
 58. It was the Appellant's case in his testimony and statement of defence that he was a purchaser for value and that he did due diligence before buying the suit land. He testified that he learnt of the existence of the suit land and of the fact that the same was being sold from his lawyer. That he bought a certificate of official search that confirmed that the land was registered in the name of the 2nd Respondent herein who was the seller. That he went to the ground with a map and a qualified private surveyor by the name of Mr. Mbok who confirmed that the land was parcel number 2202.
 59. That he also saw the title deed in the name of seller. That thereafter, he entered into a land sale agreement. He paid the purchase price. He went to the Land Control Board and that the land was subsequently transferred to him.



60. The record shows that the trial court considered the issue of whether or not the Appellant was an innocent purchaser for valuable consideration. The trial court considered the case of *Katende -vs- Haridar & Company Limited* [2008] 2 E.A. 173, quoted in *Nakuru Court of Appeal Application No.291 of 2013 Weston Gitonga & 10 Others -vs- Rugu Gikanga & Another* [2017]eKLR and the case of *Nairobi ELC No.128 of 2011 Esther Ndegi Njiru & Another -vs- Leonard Gatei* [2014]eKLR, the court found that the Appellant did not carry out due diligence to ascertain the true status of the suit property before purchasing it. That the 1st Defendant (2nd Respondent herein) did not have a good title to pass to the Appellant.
61. I have keenly re-examined the evidence on this issue. The certificate of official search produced as exhibit D4 to demonstrate that the Appellant did search does not show who purchased it or conducted the search. Nonetheless, the same is dated 2nd September, 2015 while the appellant's land sale agreement was made on 21st August, 2015, the transfer form exhibit D.8 was executed on 21st August, 2015. The Consent of the Land Control Board was issued on the same date the certificate of official search was issued. This shows that the Appellant entered into the agreement and signed the transfer form before conducting search, if any.
62. Secondly, there is no evidence that the Appellant tried to find out the history of the land. He did not buy copy of register and although he stated that he visited the land with a map and in the company of a qualified surveyor, he had no evidence to demonstrate this.
63. The 2nd Respondent did not have a good title to pass to the Appellant. While she alleged that the suit land was transferred to her by her late husband who "removed" the name of James Romanus Dacha and replaced it with hers, there was no evidence to prove this. There was also no evidence that the process of removing the name of a deceased registered proprietor of land from the register and replacing it with the name of the 2nd Respondent was lawful. DW3 (the Land Registrar) confirmed that there were no documents to show how the land moved from the deceased James Romanus Dacha to the 2nd Respondent. He only stated that James Romanus Dacha transferred the land to Rose Aluoch Opiyo (the 2nd Respondent) on 15/1/1993. This could not have been lawfully possible as James Romanus Dacha was already deceased as at that date.
64. The 2nd Respondent again claimed that the land was registered in the joint names of her husband and James Romanus Dacha and that when Dacha died, the land reverted to her husband who in turn transferred the land to her. This claim was however not supported by the evidence placed before the trial court.
65. In respect of the title held by the deceased, DW3 the Land Registrar testified that the records in the registry showed that the land was transferred from the husband of the 2nd Respondent Mr. Henry Gilbert Opiyo Nyagati to the deceased. There was however no evidence to show how the land moved from the deceased to the 2nd Respondent.
66. I find that the trial court analysed the evidence presented before her correctly. She relied on relevant authorities and came to the correct finding.
67. The second ground of appeal is that the learned trial Magistrate erred in fact and in law by failing to appreciate that the Plaintiff's suit lacked legal foundation having been brought in violation of the provisions of the *Law of Contract Act*.
68. The Appellant placed reliance on the provisions of Section 3(3) of the *Law of Contract Act* and submitted that no agreement between the deceased and the husband of the 2nd Respondent was exhibited.



69. In response, Counsel for the 1st Respondent herein submitted that the sale and transfer to James Romanus Dacha was admitted and that the green card which was common evidence for both parties showed that the land moved from Henry Gilbert Opiyo to James Romanus Dacha then to the 2nd Respondent who finally transferred it to the Appellant.
70. I have considered the pleadings, evidence and submissions on this point. It is acknowledged that the 2nd Respondent's husband never sued the deceased in his life time to try and revert the title from the deceased. The 2nd Respondent testified on cross-examination that there was an agreement between her husband and the deceased to which she was opposed. The existence of the agreement having been admitted and given that the transaction went beyond the sale agreement – the land was actually transferred and registered in the name of the deceased and title deed issued to him and given that the suit is based on fraud, I find that the provisions of section 3 (3) of the law of contract were not contravened hence the trial court did not error in not holding that the suit was brought in violation of the provisions of Section 3(3) of the *Law of Contract Act*.
71. The next ground of the appeal is that the trial court erred in fact and in law by misdirecting herself and ignoring the evidence by the Applicant which demonstrated that he had followed the requisite procedures in acquiring the suit land.
72. As already held herein, the Appellant failed at the point of doing due diligence. There is no evidence that he conducted search before signing the land sale agreement. There is no evidence that he looked into the history of the land by buying copy of register. There is no evidence that he visited the land office to interrogate the records. There is no evidence that he visited the ground, although he claimed to have gone to the ground with a surveyor, there was no evidence to that effect.
73. And if the court were to believe that he did go to the ground, then he did not make sufficient inquiries as to ownership of the land. He testified that there were many trees on the land but produced no evidence that he tried to find out whose they were. He made himself easy prey to fraudsters.
74. The other process that the Appellant undertook including signing a land sale agreement, paying the purchase price and other levies related thereto and attending Land Control Board could not cure the bad title held by the seller.
75. A reading of the judgement of the trial court shows that the trial court considered the evidence of the Appellant and found that although the court sympathised with him, the 2nd Respondent did not have a good title to pass to the appellant as the suit property was unlawfully acquired from a deceased person without undertaking succession.
- I find that this ground has not been proved.
76. Grounds 5 and 6 of appeal are that the trial Magistrate proceeded on wrong principles in arriving at her decision and failed to apply the relevant precedents and tenets in law and that she failed to apply herself judiciously and adequately evaluate the evidence and exhibits tendered before her on the issue of ownership of the suit parcel of land thereby arriving at a decision that was unsustainable in law.
77. Having taken the submissions by both Counsel on this point into account and as already held herein, I find that the trial court did not misdirect itself. The trial court considered the aspect of transmission of land belonging to a deceased person and found that the manner in which the land moved from the name of the deceased to the 2nd Respondent was fraudulent as the provisions of the *Law of Succession Act* were not complied with. She considered the aspect of whether or not the 2nd Respondent could pass a good title to the Appellant. She considered whether the Appellant qualified as an innocent purchaser



for valuable consideration without notice and found that the title held by the Appellant was not good title.

78. The Appellant's title could not enjoy the protection provided by article 40 of *the Constitution* and Sections 24 and 26 of the *Land Registration Act*.
79. In ground 7 of the appeal the appellant faults the trial court of misdirecting itself in ignoring written submissions presented and filed by the appellant.
80. Perusal of the judgement shows that the trial court did rely on the submissions filed by the parties in her judgement.
81. In conclusion I find that the grounds of appeal have not been proved. I find no reason to interfere with the findings and the decision of the trial court. No explanation or demonstration of the process of transfer of the suit land from the deceased husband of the 1st Respondent to the 2nd Respondent was given. There was no prove of sufficient due diligence on the part of the purchaser/appellant. The appeal is therefore without merit, it is hereby dismissed. Costs to the 1st Respondent.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT Kisumu AND DELIVERED THIS 23RD DAY OF JANUARY, 2025 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen - Court Assistant.

Maganga for the Appellant.

Mwaura h/b for Kobimbo for the 3rd and 4th Respondents.

Ndolo h/b for Otieno David for the 1st Respondent.

