



**Byrnes alias Robin Grahame Grahame Byrnes (Suing on their own Behalf and as the Treasurer and Committee Member Respectively of Robin Nest Ophanage) v Jojofa Company Limited & 4 others (Environment and Land Appeal E030 of 2024) [2025] KEELC 4005 (KLR) (19 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 4005 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT AND LAND APPEAL E030 OF 2024**

**EC CHERONO, J**

**MAY 19, 2025**

**BETWEEN**

**ROBIN BYRNES ALIAS ROBIN GRAHAME GRAHAME  
BYRNES ..... APPELLANT**

**SUING ON THEIR OWN BEHALF AND AS THE TREASURER AND  
COMMITTEE MEMBER RESPECTIVELY OF ROBIN NEST OPHANAGE**

**AND**

**JOJOFA COMPANY LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**ONGERI KWAMBOKA FAITH ..... 2<sup>ND</sup> RESPONDENT**

**GRACE ALUSA ONGERI ..... 3<sup>RD</sup> RESPONDENT**

**JACOB ASUMA ONGERI ..... 4<sup>TH</sup> RESPONDENT**

**BRAMUEL JUMA MALANGA ..... 5<sup>TH</sup> RESPONDENT**

*(Being an appeal from the Judgment of Hon. A.Odawo, Principal Magistrate  
in Bungoma CM-ELC NO. 216B of 2019 delivered on 24/08/2023)*

**JUDGMENT**

**Introduction.**

1. Vide a memorandum of appeal dated 19/06/2024, the Appellants herein who were the plaintiffs before the trial Court in Bungoma CMCC Case no. 216B of 2019 preferred this appeal challenging the judgment by Hon. A.Odawo delivered on 24/08/2023 dismissing their case against the Respondents.



2. The brief facts of the former suit is that the Appellants had sued the Respondents in their capacity as founders of Robin Nest Orphanage. It was their case that they funded the purchase and registration of land parcel no. E.Bukusu/North Kanduyi/2XX0(hereinafter referred to as the “suit land”) which is registered in the name of the said Robin Nest Orphanage. That on or about the 27/06/2017, the 2<sup>nd</sup> to 5<sup>th</sup> Respondents incorporated a company in the name and style of the 1<sup>st</sup> Respondent with the aim of defrauding them of the suit land. That on 15/12/2017, without their consent or knowledge, the Respondents secretly transferred the suit land to the 1<sup>st</sup> Respondent. The Appellants set out particulars of fraud against the Respondents and averred that the Respondents were now in forceful use of the suit land to their exclusion.
3. They sought for judgment against the Respondents jointly and severally for;
  - a. A declaration to issue that the registration of the 1<sup>st</sup> defendant as proprietor of title number East Bukusu/North Kanduyi/2XX0 is unlawful and the said registration be cancelled forthwith.
  - b. That the 1<sup>st</sup> defendant be ordered to transfer land parcel number East Bukusu/North Kanduyi/2XX0 to Robin Nest Orphanage and in default, the executive officer of this court be authorized to execute transfer documents to vest land parcel no. East Bukusu/North Kanduyi/2XX0 to Robin Nest Orphanage.
  - c. Eviction of the defendants from the suit land.
  - d. Costs of the suit.
4. The Respondents on their part filed a joint statement of defence dated 02/09/2019 in which they averred that the Appellants relations to Robin Nest Orphanage was limited to being link donors. They contend that the purchase of the suit land was not solely funded by donations sourced from the Appellants and that the said donation did not entitle them to any proprietary interests in the purchased land. They stated that the suit was res-judicata Bungoma CMCC NO.684 of 2011, Bungoma High Court Civil Appeal No. 69 of 2012 and BGM CMCCNo.272 of 2014.They averred that the allegations in the plaint were unfounded and sought to have the suit dismissed with costs.
5. The suit before the trial court proceeded by way of viva voce evidence with the Appellants calling two witnesses while the Respondents also called two witnesses.
6. PW1 Robin Lee Byrnes testified that she is a director of Robin Nest Children’s Home. She adopted her witness statement dated 17/06/2019 as her evidence-in-chief and produced 14 documents contained in their list of documents as P-Exhibit 1-14. She testified that she funded the purchase of the suit land in full and the same was meant for Robin Nest Orphanage. On cross examination, she testified that the children in the orphanage were driven out of the houses sheltering them in the suit land and that the 4<sup>th</sup> Respondent was renting out the houses for his personal benefit. That the other suits were in relation to the children and not the land and that she did not take part in the sale agreement process. She further testified that the orphanage’s constitution provides for arbitration and that they tried to arbitrate but the 4<sup>th</sup> Respondent failed to appear. In re-examination, she reiterated that she was part of the orphanage’s management and would attend meetings whenever she was in the country.
7. PW2 Simiyu Hagai Walekwa testified that he is a beneficiary of the orphanage which started in Webuye and moved to Bungoma after the purchase of the suit land. That the Appellants were responsible for his school fees until sometime in the year 2014 when they were packed in a police vehicle and taken to different children homes and the red cross. That the 4<sup>th</sup> Respondent co-ordinates staff at the children’s home while the Appellants sponsored the orphanage. He was uncertain on who runs the orphanage.



8. DW1 Reverend Jackson Ongeri testified that the orphanage was the brain child of Deliverance Church, Webuye to assist kids affected by HIV/AIDS and was started in the year 2002. He adopted his witness statement dated 02/09/2019 as his evidence-in-chief. He produced into evidence 25 documents as D-Exhibit 1 to 25. He stated that the Appellants are not officials of the organisation and that they were not purchasers of the suit land. That the land was transferred from the name of the orphanage to that of the 1<sup>st</sup> Respondent as there were disputes and a resolution there was made by the committee as per minutes dated 03/11/2016-D-Exhibit 12. On cross-examination, he testified that the 1<sup>st</sup> Appellant was initially an official of the orphanage but has since ceased from being one. That the 1<sup>st</sup> Appellant was informed of the transfer of the suit property.
9. DW2 Bramwel Juma Lalanga adopted his witness statement dated 02/09/2019 as his evidence-in-chief. He testified that he is the Assistant Treasurer of Robin Nest Orphanage and that the 1<sup>st</sup> Appellant was once an official but was removed. It was his evidence that the home was closed by an order of the court. He testified that IKEA was funding the orphanage and that the transfer of the land was authorized by members in a meeting held on 03/11/2017.

### **The Appeal.**

10. This appeal is premised on six grounds of appeal contained in the memorandum of appeal as follows:
  - a. The learned trial magistrate erred in law and in fact by dismissing the plaintiff's case despite the overwhelming evidence demonstrated that the transfer of the suit property was marred with fraud, irregularities and illegalities.
  - b. The learned trial magistrate erred in law and in fact by failing to take into account the overwhelming evidence on the fake documents produced by the defendants to prove their case.
  - c. The learned trial magistrate erred in law and in fact by making a finding that the transfer of the suit property was above board yet the same was done through a resolution of non-members of the registered society.
  - d. The learned trial magistrate erred in law and in fact by failing to consider the plaintiff's evidence which clearly demonstrated fraud, considering that the beneficiary limited company was owned by the respondents and did not have any nexus with the orphanage or any.
  - e. The learned trial magistrate erred in law and in fact by failing to find that the fraudulent transfer did not abide by the express provisions of the Children's Act, 2001 and the attendant Regulations to wit Regulation 33 of the Children (Charitable Children Institutions) Regulations 2005.
  - f. That the learned trial magistrate erred in law and in fact by failing to take into consideration the plaintiff's evidence which revealed that the alleged transfer did not comply with the procedure envisaged under the *Land Registration Act*, 2012.
11. The appeal sought for the following prayers;
  - a. That this appeal be allowed.
  - b. That the judgment and decree issued at the Principal Magistrates Court in Bungoma MCELC No.216B of 2019 be set aside and a declaration issued that the registration of the 1<sup>st</sup> respondent as the proprietor of the title number East Bukusu/North Kanduyi/2XX0 is unlawful and the said registration be cancelled.



- c. That the 1<sup>st</sup> respondent be ordered to transfer land parcel no. East Bukusu/North Kanduyi/2XX0 to Robin Nest Orphanage and in default the Executive officer be authorized to execute transfer documents to vest the suit land to Robin Nest Orphanage.
  - d. The respondents be evicted from the suit land
  - e. The appellants be awarded the costs of the appeal.
12. When this appeal came up for directions, the parties agreed to have the same canvassed by way of written submissions.
  13. The Appellants filed their submissions dated 24/02/2025 where they contend that the main issue for determination in this appeal is whether they demonstrated that the transfer of the suit land to the name of the Respondents was illegal, fraudulent and unlawful. It was argued that the alleged approval for the transfer of the suit land to the name of the 1<sup>st</sup> Respondent was marred with irregularities with the minutes resulting to the impugned resolution having been stamped by deliverance Church which was a distinct entity from Robin Nest Orphanage with no connection whatsoever to each other. Reliance was placed in Section 8 and 11 of the *Evidence Act* and the case of DPP v Kilborne 1973 AC and Kinyanjui Kamau v George Kamau Njoroge (2015) Eklr. They argued that the burden of proof in the instant case is on a balance of probabilities and cited the case of Arthi Highway Development Limited v. West End Butchery Ltd & 6 Others Civil Appeal No. 246 of 2013. They urged the court to re-evaluate the evidence and find that they had discharged their burden of proof on the required standard.
  14. It was further submitted that the Respondents used fake and forged documents to support their case. Specifically, the Appellants submitted that *the constitution* presented by the Respondents referred the orphanage as Robin's Nest Orphanage, a name that did not align to that in the certificate of registration of the orphanage. It was further submitted that the impugned transfer was effected without the knowledge and approval of all Board members and with the input of non-members as can be seen from the evidence. They relied on the provisions of Sections 36 of the *evidence Act* on the importance of authenticating documentary evidence before admission. Reliance was placed in the case of Esther Wanjiku Donde T/A Cyber Kids v. Kenya Commercial Bank Limited Civil Appeal No. 242 of 2017.
  15. It was further submitted that the participation of non-members in a meeting convened by a legal entity with a decision making organ invalidates the meeting alongside the resolution passed thereafter. They cited the case of Auto Japan (Mombasa) Limited v Malik Ali Zaka & 2 Others (2021) eKLR which cited with approval the case of East African Portland Cement Ltd v. Capital Markets Authority & 4 Others (2014) eKLR. It was therefore their argument that the trial court erred in finding that they failed to demonstrate that the Board lacked the capacity to transfer the suit land.
  16. It was submitted that the transfer of the suit property to the 1<sup>st</sup> Respondent was adverse to the interests of the children and contrary to the provisions of Section 8 of the Children's Act and Regulation 33 of the Children's (Charitable Children Institutions) Regulations 2005 which refer to all actions undertaken by social welfare institutions regarding children ought to be in their best interest and issuance of notices to the local council of any change of premises for an institution such as the one in question.
  17. Lastly, the Appellants submitted that the Respondents failed to comply with the mandatory requirements for transfer of land as per Section 36 and 46 the *Land Registration Act* and regulation 49 of the Land Registration Regulations which is subject to sections 37(1) of the LRA.
  18. The Respondents on the other hand filed submissions dated 21/05/2025 in which they submitted on four issues. On the first issue, it was submitted that the Appellants lacked the locus standi to institute



the current suit as they were not officials or Board members of the orphanage as reflected in D-Exhibit 9. They relied in the case of *Julian Adoyo Ongunga & Another v Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fannuel Evans Amudavi-Dcd) {2016} eKLR*.

19. Secondly, it was submitted that the Appellants' title which was anchored on fraud had not been proved to the required standards as contemplated in the case of *Benson Muchiri Muthoka & Another v Risper Wanjiku Thuku (Sued as the Administrator of the Estate of the Late Elijah Thuku Muthoka and Legal Guardian of HW, SWT and SM(Minors) [2020] eKLR*. It was submitted that the claim that the provisions of the Children's Act had been violated were unreasonable as the orphanage had not been registered as a children's home. They argued that the title in the name of the 1<sup>st</sup> Respondent was properly obtained and ought to be protected under the law. Reliance was placed in the case of *Adriano Waseya v. Julias Nakaya Kabole [2020] eKLR*.
20. On the admission of documents produced before the trial court, the Respondents argued that the Appellant did not raise the issue of their authenticity before the trial court and the same could not be considered at this stage. It was further argued that the trial court did not error in finding that the title in the 1<sup>st</sup> Respondent's name was above board. On the issue of costs, they urged the court to award them costs of this appeal.

### **Analysis and determination.**

21. I have read the memorandum of appeal, the record of appeal, written submissions filed by the parties and the court record generally and although the appeal is premised on six ground, I have identified the following as probable issues that commend for determination:
  - a. Whether the suit property was lawfully transferred to the 1<sup>st</sup> Respondent.
  - b. Whether this appeal is merited.
  - c. Who will bear the costs of this appeal
22. In determining whether or not the learned trial magistrate was justified in arriving at decision she did, this court is obligated and indeed under a duty to re-evaluate the evidence and the materials placed before her to determine whether the learned magistrate made the correct determination. As an appellate court of first instance, this court is not bound by the findings of fact and law made by the lower court and may on re-evaluation reach its own conclusion and findings. This principle was aptly enunciated in the case of *Selle & Another -vs- Associated Motor Boat Co. Ltd & others (1968) EA 123* where the court of Appeal stated as follows:-

“this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen or heard the witnesses and should make due allowance in this respect”.
23. There is no doubt that the Appellants' claim before the trial court was based on fraud and misrepresentation. It is trite law that fraud, illegality and misrepresentation must be pleaded and proved to the required standard. Order 2 Rule (4) and 10 of the Civil Procedure Rules require that fraud, illegality and misrepresentation be pleaded and the particulars be specifically set out including the issue of possession by himself and through tenants. From the plaint dated 17/06/2019, the Appellants' in paragraph 12 set out particulars of fraud which can be summarized as follows;



“the respondents transferred the suit land to themselves without members approval, consent or lawful authority”.

The Respondents in their statement of defence dated 02/09/2019 acknowledged that indeed the Appellants had pleaded fraud against them and averred that the claim was unfounded, that the Appellants consent and knowledge as claimed was unnecessary in the circumstances and therefore the claim for fraud was vexatious putting the Appellants to strict proof thereof.

24. The next question is whether the Appellants proved the same to the required standards as held in *Arthi Highway Developers Ltd vs. West End Butchery Limited & 6 Others* (2015) eKLR as well as *Virjay Morjaria vs. Nansingh Madhusingh Darbar & Another* (2000) eKLR. “It is well established that fraud must be specifically pleaded and that particulars of the fraud must be stated on the face of the pleadings. The acts alleged to be fraudulent must of course be set out and then it should be stated that those acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved and it is not allowable to leave fraud to be inferred from the acts”.
25. The Appellants’ contention was that the Respondent through secrecy and without the approval / authority of members and without any consideration illegally obtained registration of the suit land. The Respondents on their part and by way of a rebuttal argued that membership of the orphanage resolved to transfer the ownership of the suit land in the name of the 1<sup>st</sup> Respondent and that the transfer process was lawful. It was the Appellants’ case that the said membership that allegedly approved the transfer of the suit land did not reflect a true membership capable of making such changes.
26. Numerous documents were produced by the Appellant in support of their case. P-Exhibit 1 was a green card of the suit land, P-Exhibit 2 was a general power of attorney between the 1<sup>st</sup> and 2<sup>nd</sup> Appellants, P-Exhibit 3 was a copy of title in the name of Robin Nest Orphanage issued on 05/12/2017, P-Exhibit 4 was a copy of CR12 for the 1<sup>st</sup> Respondent, P-Exhibit 5 was a Sponsorship agreement, P-Exhibit 6 was an agreement dated 30/06/2008 between one Nicodemus Wakabili Kunikina and the orphanage, P-Exhibit 7 was a bank statement for the orphanage, P-Exhibit 8 was a copy of Constitution for the Orphanage, P-Exhibit 9 was a copy of western union transactions, P-Exhibit 10 was a letter dated 11/07/2012 from the state law department on the office bearers of the orphanage as at 02/08/2004, P-Exhibit 11 was a copy of annual return forms for the year 2005, P-Exhibit 12 was a copy of an application form for registration of an orphanage, P-Exhibit 13 was a copy of affidavit sworn by Nicodemus Wakabili Kunikina with regard to the sale agreement dated 07/06/2008 and lastly P-Exhibit 14 was a registration certificate for the orphanage.
27. The respondents produced into evidence the following documents D-Exhibit 1 a copy of title deed for the suit land in the name of the 1<sup>st</sup> Respondent, D-Exhibit 2 a copy of land sale agreement dated 26/12/2008, D-Exhibit 3 a copy of post card, D-Exhibit 4 a copy of sponsorship agreement, D-Exhibit 5 an email dated 24/08/2004 from the 1<sup>st</sup> Appellant to the 3<sup>rd</sup> and 4<sup>th</sup> Respondents, D-Exhibit 6 a copy of constitution for the orphanage, D-Exhibit 7 a copy of email dated 04/11/2003, D-Exhibit 8 a certificate of registration of the orphanage, D-Exhibit 9 a letter from the state law department dated 17/12/2010 on the office bearers of the orphanage, D-Exhibit 10 copy of minutes dated 14/12/2008, D-Exhibit 11 a copy of minutes dated 03/11/2017, D-Exhibit 13 a copy of proceedings of Children Case No.43/2010, D-Exhibit 14 copy of judgment for Civil Case No.684/2011.
28. D-Exhibit 15 a copy of ruling in Civil Appeal No.69/2012, D-Exhibit 16 a copy of a further ruling in Civil Appeal No.69/2012, D-Exhibit 17 a copy of final ruling in Civil Appeal No. 69/2012, D-Exhibit 18 a letter to the Registrar of Societies dated 10/02/2011, D-Exhibit 19 a copy of notification of change of officials for the orphanage dated 10/02/2011, D-Exhibit 20 a copy of notification of entry



permit dated 08/06/2009, D-Exhibit 21 a copy of acknowledgment from the immigration office dated 20/05/2009, D-Exhibit 22 a deed for declaration of trust, D-Exhibit 23 a copy of trust deed for the orphanage, D-Exhibit 24 a report on the status of the orphanage.

29. From the record, it is not in dispute that the 1<sup>st</sup> Respondent is the current registered proprietor of the suit land. This fact can be confirmed from the green card produced as P-Exhibit 1 and the copy of certificate of title produced as D-Exhibit 1. Section 24 (a) the *Land Registration Act* provides thus;

“the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”

30. Under the provisions of Section 25 (1) of the *Land Registration Act*, a purchaser for valuable consideration or by an order of the courts is protected. The 1<sup>st</sup> Respondent has a title deed registered in its name and consequently, the provisions of Section 24 (a) and 25 of the *Land Registration Act* apply.

31. However, the provisions of Section 26 of the *Land Registration Act*, provides as follows:

“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.

32. It is under this provision that the Appellants seek to impeach the 1<sup>st</sup> Respondent’s title. They have set out their case on how the Respondents connived to remove her name from being an office bearer of the orphanage through secrecy and deceit and without the authority and approval of the rightful members, deregistered the orphanage as the proprietor of the suit land. At this juncture, I wish to refer to Section 109 of the *Evidence Act* which provides that:

‘The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.’

33. The Appellants contend that they were not notified of the changes in the composition of the officials. Upon evaluation of the evidence presented, it is evident that at the time the orphanage was being registered as indicated in P-Exhibit 10, the 2<sup>nd</sup> Appellant was duly recognized as the treasurer. A perusal of the trust deed marked as D-Exhibit 22 reveals that it contains no express provision governing the removal of trustees or office bearers. Neither does any of the document’s produced by either of the parties.

34. Nonetheless, it is my considered view that principles of natural justice require that, at the bare minimum, any intended removal of an official must be preceded by adequate notice to the affected party, affording them an opportunity to respond, justify their continued tenure, or voluntarily relinquish the position. Additionally, once such a change is effected, the individual concerned ought to be formally notified of the removal.



35. It is not lost to this court that the 2nd Appellant was designated as treasurer, presumably due to her role in mobilizing resources and managing donations. In the present case, no evidence has been adduced to show that such notice was ever issued to the 2nd Appellant. Her testimony, which remained unchallenged, demonstrates that she was entirely unaware of any such changes. Therefore, the changes purportedly made in the meetings held on 04/04/2008 and 12/12/2008 pursuant to D-Exhibit 11 and 12 were flawed for lack of notice.
36. The above notwithstanding, Courts have emphasized the futility and vanity of basing claims to land on dubiously acquired titles, because, as they say in Latin, *ex nihilo nihil fit* (out of nothing comes nothing). In the case of *Munyru Maina V. Hiram Gathiba Maina, Civil Appeal No. 239 of 2009*, the Court said;
- “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 would not be noted in the register.” (Emphasis Supplied)
37. It is trite that transaction to land is a process and whosoever claims ownership has to provide documents to that effect. From the proceedings in the lower court, except for evidentiary evidence of a certificate of title and excerpt of the green card, the Respondents did not produce proof of consideration, whether monetary or through a gift, consent of the Land Control Board as this was a controlled transaction in respect to agricultural land, proper transfer forms and payment of stamp duty. I therefore find that though the 1<sup>st</sup> Respondent is registered as a proprietor of the suit property and Sections 24 and 25 of the *Land Registration Act* apply to him, its registration is impeachable for having been acquired unprocedurally and through a corrupt scheme.
38. I note from the record of appeal that parties disgraced into issues such as the capacity of the Appellants to agitate the suit but as I have stated elsewhere in this judgment, I have considered that the Appellants have demonstrated beneficial interest in the suit land and have the capacity to sue. Further, it is imperative to note that this is an issue that was not raised before the trial court. On the issue raised by the Appellants regarding compliance with the provisions of the Children’s Act and Regulations, it is not in contention that the orphanage was not a registered children’s home and these provisions therefore do not apply.
39. The upshot of my finding is that the Learned Magistrate actually erred in her finding as the transfer of the suit land from the 1<sup>st</sup> Respondent to the Appellant was devoid of supporting documents. Consequently, I find that the 1<sup>st</sup> Respondent’s Certificate of Title cannot stand and the same is liable to be impeached.
40. It is against the foregoing that I find this appeal merited and the same is hereby allowed with costs as prayed.

It is so ordered.

**DATED AND SIGNED AND DELIVERED AT BUNGOMA THIS 19<sup>TH</sup> DAY OF MAY, 2025.**

.....

**HON.E.C CHERONO**

**ELC JUDGE**



In the presence of;

1. Mr. Okaka H/B for Anwar for the Respondent
2. Appellant/Advocate-absent.
3. Bett C/A.

