



REPUBLIC OF KENYA



**KENYA LAW**

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**Maingi & another v Mwonga (Suing as the Legal Representative of the Estate of the Late Benson Mwonga Mulu) (Environment and Land Appeal E017 of 2021) [2025] KEELC 3803 (KLR) (15 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 3803 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT AND LAND APPEAL E017 OF 2021**

**EO OBAGA, J**

**MAY 15, 2025**

**BETWEEN**

**TOM MAINGI ..... 1<sup>ST</sup> APPELLANT**

**PIUS MUTONYE KISINGU ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ANNAH KAMENE MWONGA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE BENSON MWONGA MULU) ..... RESPONDENT**

*(Being An Appeal Against The Judgment Of Hon. J. N. Mwaniki, CM  
In The Chief Magistrates Court At Makueni Law Courts Delivered  
On 1St Day Of December, 2021 In MCELC Case No. 125 Of 2019)*

**JUDGMENT**

1. The Appellants appeal from the judgment of Hon. J.N. Mwaniki CM delivered on 1<sup>st</sup> December, 2021 in Makueni MCELC CASE NO. 125 of 2019.
2. In the subordinate court, the Appellants were the Defendants whereas the Respondent was the Plaintiff. The Respondent had filed an amended Plaintiff dated 26<sup>th</sup> March, 2021 seeking the following reliefs against the Defendants:-
  - a. An order declaring that the late Benson Mwang'a Mulu is the registered proprietor of land Parcel No. Okia/Kilala/1004.
  - b. That the Land Registrar Makueni be directed to cancel the registration land parcel No. Okia/Kilala/1004 in the 1<sup>st</sup> Defendant's name and do rectify the register to reflect the deceased's name.



- c. In the alternative, an order compelling the 2<sup>nd</sup> Defendant to excise 0.066 Ha from both land Parcel No. Okia/Kilala/985 and Okia/Kilala/987.
  - d. Compensation for damages amounting to Kshs.75,000/=.
  - e. Damages for breach of contract.
  - f. Costs of this suit.
3. The Defendants filed their respective Statement of Defence on 27<sup>th</sup> April, 2021 praying that the suit be dismissed with costs.
  4. The subordinate court delivered judgment in favour of the Respondent against the Appellants and issued the following orders: -
    1. A declaration be and is hereby made that the late Benson Mwonga Mulu is the rightful owner of land Parcel No. Okia/Kilala/1004.
    2. A declaration be and is hereby made that the transfer of land No. Okia/Kilala/1004 by the second Defendant Pius Mutonye Kisingu to the first Defendant Tom Maingi Muli was fraudulent.
    3. The Land Registrar Makueni be and is hereby directed and ordered to cancel registration of land No. Okia/Kilala/1004 in the name of Tom Maingi Muli and rectify the register to reflect the names of 1<sup>st</sup> Defendant's name and do rectify the register to reflect the names of Benson Mwonga Mulu.
    4. The Plaintiff is awarded the costs of the suit.
  5. Dissatisfied with the above outcome, the Appellants filed the Memorandum of Appeal herein dated 23<sup>rd</sup> December, 2021 on the basis of the following grounds:-
    1. That the learned trial Magistrate erred in law and fact in finding merits in the Respondent's claim.
    2. That the learned trial Magistrate erred in law and fact in finding that the late Benson Mwonga Mulu is the rightful owner of land No. Okia/Kilala/1004 despite of the fact that there was no evidence he purchased the specific title number.
    3. That the learned trial Magistrate erred in law and fact in finding that the late Benson Mwonga Mulu owned parcel of land No. Okia/Kilala/1004 before he died.
    4. That the learned Magistrate erred in law and fact in finding that the 2<sup>nd</sup> Defendant and one Peter Muunda Kisingu had legal capacity to sell land belonging to the deceased Nduya Muinde to the respondent's father Benson Mwonga.
    5. That the learned trial Magistrate erred in law and fact in finding that there was an existing valid sale agreement for parcel of land No. Okia/Kilala/1004 to Benson Mwonga Mulu despite the fact that the owner of the land one Nduya Muinde was deceased at the time of the alleged sale transaction.
    6. That the learned trial Magistrate erred in law and fact in finding that the 2<sup>nd</sup> Defendant's contention that he never sold the land to the late Benson Mwonga Mulu was a mere denial despite of the evidence that the 2<sup>nd</sup> Defendant did not own the land at the time the Respondent alleged it was sold to him.



7. That the learned trial Magistrate erred in law and fact by finding that the transfer of parcel of land No. Okia/Kilala/1004 from the 2<sup>nd</sup> Defendant to the 1<sup>st</sup> Defendant was fraudulent despite the fact that the 2<sup>nd</sup> Defendant confirmed that he transferred it to the 1<sup>st</sup> Defendant.
  8. That the learned trial Magistrate erred in law and fact in ordering the Land Registrar Makueni County to cancel registration of land No. Okia/Kilala/1004 in the name of Tom Maingi Muli and rectify the register to reflect the name of Benson Mwonga Muli whereas there was no proof of fraudulent transfer and registration of the land.
  9. That the learned trial Magistrate erred in law and fact in making determination in this matter without making a finding first on the production of the exhibits whose production was objected.
6. Based on the foregoing, the Appellants prays that the appeal be allowed with costs.
  7. Parties agreed to dispose of the appeal by way of written submissions.
  8. In the Appellants' submissions dated 25<sup>th</sup> February, 2025, Counsel identified two issues for determination as follows: -
    - i. Whether the late Benson Mwonga was a legal purchaser in accordance to the law of land parcel No. Okia/Kilala/1004?
    - ii. Whether the trial court erred in directing the land registrar to cancel the registration of land No. Okia/Kilala/1004?
  9. Counsel highlighted that the Respondent's case was anchored on the sale agreement dated 22/9/2003 allegedly entered between Pius Mutonye, the 2<sup>nd</sup> Appellant and Peter Muunda Kisingu who purportedly sold a portion of land to Benson Mwonga Mulu. Counsel contended that Pius Mutonye was not a party to the purported sale agreement and neither was land parcel Okia/Kilala/1004 mentioned.
  10. Counsel contended that the 2<sup>nd</sup> Appellant was not a party to the alleged sale agreement that was adduced by the Respondent. That whilst the purported sale agreement is dated 22<sup>nd</sup> September, 2003, the certificate of confirmation of grant was issued on 24<sup>th</sup> September, 2009 in respect of the deceased owner of the land.
  11. Counsel contended that if there was sale of any part of land Parcel No. Okia/Kilala/713 before the certificate of confirmation of grant was issued, then the purported sale was done contrary to the provisions of Section 45 (1) of the *Law of Succession Act* and hence the sale of the unidentified portion of land by PW2 and his wife Mutonga Kisingu was unlawful, null and void ab initio.
  12. Counsel contended that the sale of the land by the 2<sup>nd</sup> Appellant to the 1<sup>st</sup> Appellant was above board since the 2<sup>nd</sup> Appellant had already acquired a good title to the land since he was named in the certificate of confirmation of grant as a beneficiary. Counsel further contended that due process was followed by the 2<sup>nd</sup> Appellant before passing title to the land to the 1<sup>st</sup> Appellant. It was argued that the Respondent did not demonstrate fraud in the transfer process since the 2<sup>nd</sup> Appellant was the absolute registered owner of the suit land.
  13. Counsel submitted that the Respondent did not tender enough evidence and that her case was not proved to the required standard of proof. Counsel urged the court to allow the appeal and that the judgment of the trial court be set aside.



14. In the Respondent's submissions dated 16<sup>th</sup> January, 2025, Counsel contended that the 2<sup>nd</sup> Appellant's brother (Peter Muunda Kisingu) who testified as the Respondent's witness confirmed to having sold the subject land to the Respondent's late father. Counsel added that PW2 stated that at the time the parcel of land was being sold, it belonged to the 2<sup>nd</sup> Appellant and that there was no other sale agreement for transfer of land that had been done.
15. Counsel maintained that the sale agreement was valid and that the 2<sup>nd</sup> Appellant was in breach of contract for failing to execute transfer documents to the suit parcel of land.
16. Counsel went on to submit that the 2<sup>nd</sup> Appellant did not tender any evidence that indicated if there had been a sale of land transaction between himself and the 1<sup>st</sup> Appellant. It was therefore contended that the assertions that the 1<sup>st</sup> Appellant is the owner of the parcel No. Okia/Kilala/1004 are unjustified.
17. Counsel submitted that the trial court was well within its mandate to order the Land Registrar to cancel the name of the 1<sup>st</sup> Appellant from the land register since the Respondent had established that indeed the Benson Mwonga (deceased) purchased the suit property. The court was urged to dismiss the appeal with costs.
18. Having considered the memorandum of appeal, the record of appeal and the parties' respective submissions, the following are the apparent issues for determination: -
  - a. Whether the learned trial magistrate erred in law and fact by misinterpreting the evidence so as to ultimately arrive at the wrong findings?
  - b. Whether the Appellants are entitled to the orders sought?
19. This being a first appeal, the court is bound by the duty of the first appellate court as clearly set out in the case of *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123 where the Court of Appeal held as follows: -

“I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High 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 nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v. Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270)”

20. Similarly, in *Kenya Ports Authority v Kuston (Kenya) Limited* [2009] 2 EA 212 the Court of Appeal held that: -

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”



21. The Respondent's claim over land Parcel No. Okia/Kilala/1004 before the trial court was on the basis of fraud. It was alleged that since the land had already been sold to the Respondent's father, Benson Mwonga (Deceased) by the 2<sup>nd</sup> Appellant, then the subsequent sale and transfer to the 1<sup>st</sup> Appellant was fraudulent.
22. Among the particulars of fraud against the 2<sup>nd</sup> Appellant under paragraph 10a. of the amended plaint was that he sold the very same parcel of land to the 1<sup>st</sup> Appellant when he had earlier on sold it to Benson Mwonga (Deceased).
23. Among the undisputed facts of the case is that the suit property parcel number Okia/Kilala/1004 is a subdivision of Okia/Kilala/945. The latter parcel No. Okia/Kilala/945 is again a subdivision of the larger Parcel No. Okia/Kilala/713.
24. It is also common ground that land Parcel No. Okia/Kilala/713 devolved to Pius Mutonye Kisingu as per the certificate of confirmation of grant dated 22<sup>nd</sup> September, 2009.
25. In the Respondent's evidence before the trial court, she testified that the suit property was sold to her father by the 2<sup>nd</sup> Appellant and Peter Muunda Kisingu who testified in support of her case as PW2. In paragraph 3e of the amended Plaint, it was averred that there was an agreement in place that the 2<sup>nd</sup> Appellant would hold Parcel No. Okia/Kilala/713 in trust for the other members of their family.
26. After perusing the sale agreement dated 22<sup>nd</sup> September, 2003, it is remarkably curious that the name of the 2<sup>nd</sup> Appellant is not anywhere on the sale agreement. The sale agreement was executed by PW2 and his wife Mutonga Kisingu as the vendors and Benson M. Mulu and Ruth K. Mwonga as the purchasers.
27. As at September 2003, Parcel No. Okia/Kilala/713 was still in the name of Nduya Muinde as the same had not yet devolved to the 2<sup>nd</sup> Appellant. In his evidence before the trial court, the 2<sup>nd</sup> Appellant refuted claims that he sold the suit property to Benson Mwonga (Deceased).
28. It is manifestly clear that the Respondent's father purchased the land of a deceased Nduya Muinde when the land had not gone through the process of succession and legally devolved to its rightful heir, Pius Mutonye Kisingu.
29. Section 45 (1) of the [Law of Succession Act](#) prohibits intermeddling with the property of a deceased person. The said provision outlines as follows: -
  1. Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
30. In Re Estate of John Gakunga Njoroge [2015] eKLR, the Court expressed itself as follows: -
 

“A person can only lawfully deal with the estate of a deceased person pursuant to a Grant of Representation made to him under the [Law of Succession Act](#). In this regard, the jurisdiction of the Court to protect the estate of a deceased person is set out in Section 45 of the [Law of Succession Act](#).....

For the transaction between the applicants and the beneficiaries of the estate of the deceased entered into before the Grant of Letters of Administration to them and before the Confirmed Grant, the contracts of sale are invalid for offending the provisions of sections 45 and 82 of the [Law of Succession Act](#). Even if the sale transactions were by the administrators, the dealings with immovable property of the estate is restricted by the provisions of the



powers and duties of the personal representatives under section 82 (b) Proviso (ii), which provides that:

“no immovable property shall be sold before confirmation of the grant: The persuasive authority of Wakiaga J. in *Stephen Waweru Ng’ang’a v. Kimani Ng’ang’a*, Nyeri HC P& A No. 1 of 2011 would be relevant in a claim against the beneficiaries who sold their interest so that they should not defraud the innocent purchasers of their money.”

31. The above interpretation of the law has been endorsed by various Courts and authorities abound in that regard. The Court of Appeal in *Winnie Kinyua Kaburu v Ali Juma Abdirahman & another* [2018] eKLR held as follows: -

“We now turn to the question of whether the learned Judge erred by holding that the 2<sup>nd</sup> respondent could not enter into an agreement of sale of her deceased father’s plot without letters of administration. This is an issue of law that is clearly answered by the various sections of the Law of Succession alluded to in the body of this judgement. A party who has no letters of administration has no legal capacity or authority to transact or deal with the estate of the deceased. In the words of Section 45 of the Act that is tantamount to intermeddling.”

32. In the above case, the Court of Appeal went on to hold as follows: -

“We therefore find the learned Judge’s conclusion that the 2<sup>nd</sup> respondent could not have validly entered into a sale agreement is anchored in law, this ground of appeal fails as no amount of other evidence such as the alleged receipt of deposit and the appellant taking possession of the suit property would change the position of a null and void transaction. And as the Judge posited albeit obiter the appellants’ remedy lay in seeking refund of the alleged deposit which could not have been addressed in the said suit as there was no counter-claim.

33. The High Court endorsed a similar finding in the case of *In re Estate of Isaac Kaburu Marete (Deceased)* [2017] eKLR.

34. It is therefore clear that the sale agreement dated 22<sup>nd</sup> September, 2003 as the basis through which the Respondent derived her claim to the suit property was null and void ab initio. The sale agreement was executed by vendors who did not have lawful authority to deal with the estate of a deceased person. On the other hand, the 1<sup>st</sup> Appellant purchased the suit property from the 2<sup>nd</sup> Defendant as the duly authorized beneficiary thereof as per the certificate of confirmation of grant dated 22<sup>nd</sup> September, 2009.

35. On the basis of the foregoing, the Respondent’s suit was a non-starter. The Respondent did not propound her claim in the trial court on a balance of probabilities and it is therefore the finding of this court that the trial magistrate erred in fact and in law and ultimately arrived at the wrong findings.

36. The upshot of the foregoing is that the Appellants have demonstrated merit in the instant appeal. The appropriate orders are as follows: -

1. The judgment and decree of the trial court dated 1<sup>st</sup> December, 2021 is hereby set aside.
2. An order is hereby issued dismissing the Plaintiff’s suit with no orders as to costs.
3. The Appellants shall have the cost of this appeal and the suit in the lower court.



.....

**HON. E. O. OBAGA**

**JUDGE**

**JUDGMENT SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 15<sup>TH</sup> DAY OF MAY, 2025.**

In The Presence Of:

Mr. Kamanda for Appellant.

Court assistant – Steve Musyoki

