



**Kuria v Boro & 2 others (Environment and Land Appeal 27 of 2023)  
[2025] KEELC 6154 (KLR) (23 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 6154 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT AND LAND APPEAL 27 OF 2023  
JM MUTUNGI, J  
SEPTEMBER 23, 2025**

**BETWEEN**

**MONICA THENYA KURIA ..... APPELLANT**

**AND**

**PETER MBANYA BORO ..... 1<sup>ST</sup> RESPONDENT**

**JECINTA NJIKI MBURIA ..... 2<sup>ND</sup> RESPONDENT**

**JAMES MBURIA KINYUA ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the judgment and subsequent decree of Hon. A. Lorot, Chief Magistrate in Wang'uru C.M.E.L.C No. 137 of 2017 and dated 17th March 2023)*

**JUDGMENT**

**Introduction and background**

1. The Appellant filed a suit through a plaint dated 7<sup>th</sup> September 2017, seeking several remedies, including the cancellation of the title registered in the joint names of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, an order compelling the 1<sup>st</sup> Respondent to facilitate the transfer of land parcel Mwea/Tebere/B/5259 (suit land) to her, or, in the event of default, for the Court's Executive Officer to execute the transfer. The Appellant additionally sought to be allowed to deposit the balance of the purchase price in Court upon execution and registration of the transfer in his favour and further prayed to be awarded the costs of the suit.
2. The Appellant contended that she entered into a sale agreement to purchase a portion of land measuring 0.375 hectares, from the 1<sup>st</sup> Respondent, which was to be excised from the larger land parcel Mwea/Tebere/B/5073. She made a down payment of the purchase price and took immediate possession of the property, which she has since developed extensively. However, she stated that the 1<sup>st</sup>



- Respondent refused and /or neglected to obtain the necessary consent to transfer her portion of the land to her, and instead sold and transferred the portion in the names of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
3. The 1<sup>st</sup> Respondent filed a Statement of Defence dated 21<sup>st</sup> September 2017 where he admitted entering into the sale agreement with the Appellant. However, he averred that the Appellant failed to pay the remaining balance of the purchase price, which rendered impractical to complete the agreement with the Appellant.
  4. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed a joint Statement of Defence and Counterclaim on 21<sup>st</sup> September 2017. They claimed to be bona fide purchasers for value, having bought the property in question from the 1<sup>st</sup> Respondent. The suit land was transferred to them, and a title deed was issued in their names on 15<sup>th</sup> August 2017.
  5. The Learned Trial Magistrate heard the case and declined a judgment on 17<sup>th</sup> March 2023. In his judgment, he observed the Appellant took unnecessarily too long to finalise the payment of the balance of the purchase price, particularly taking into account the fact that the 1<sup>st</sup> Respondent was selling the land to raise funds for treatment of his sick wife. The Learned Trial Magistrate invoked the principle that "equity aids the vigilant and not the indolent" and dismissed the Appellant's entire claim. Regarding the counterclaim, the Learned Trial Magistrate noted that the Appellant was occupying land owned by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, the land having been transferred to them. He accordingly allowed the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents Counterclaim.
  6. Aggrieved and dissatisfied by the decision of the Lower Court, the Appellant has appealed to this Court and by the Memorandum of Appeal dated 6<sup>th</sup> October 2023 has raised 8 grounds of Appeal as follows:-
    1. The Honourable Learned Magistrate erred in law and fact by having acknowledged that though the proceedings were in tatter and even the typed proceedings were not of help proceeded to write a Judgment.
    2. The Honourable Learned Magistrate erred in law and fact by not recognizing and appreciating that the Appellant had a binding agreement of sale with the 1<sup>st</sup> Respondent.
    3. The Honourable Learned Magistrate erred in law and fact by failing to appreciate that the balance of the purchase price was only payable upon the consent of the relevant boards being obtained.
    4. The Honourable Learned Magistrate erred in law and fact by granting eviction orders whereas the Appellant was put in vacant possession by the 1<sup>st</sup> Respondent upon the payment of the first installment.
    5. The Honourable Learned Magistrate erred in law and fact by holding that there was no fraud in dealings by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents against the weight of the evidence adduced.
    6. The Honourable Learned Magistrate erred in law and fact by failing to appreciate the fact that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents had purchased the same piece of land one year later after the Appellant had purchased and put in vacant possession.
    7. The Honourable Learned Magistrate erred in law and fact by not exercising its unfettered jurisdiction in this matter.
    8. The Honourable Learned Magistrate erred in law and fact by not properly considering the evidence on record and the submissions by the Appellant.



7. The Appellant prayed that the Judgment and decree of the Learned Magistrate be set aside and she be awarded the costs of the Appeal and of the Subordinate Court.

**Submissions by the parties.**

8. The Appellant filed her written submissions on 4<sup>th</sup> July 2024, where she asserted that a valid contract existed between her and the 1<sup>st</sup> Respondent which the 1<sup>st</sup> Respondent breached. She argued that she had paid a total of Kshs 519,000/-, which the 1<sup>st</sup> Respondent acknowledged, and that the remaining sum of Kshs 131,000/- was to be paid after the issuance of the consent of the Land Board. The Appellant contended she was purchasing 0.375 hectares out of a total of 0.425 hectares, and therefore, the suit land needed to be subdivided prior to obtaining the consent for transfer. She contended her attendance was not required to get the subdivision's initial consent.
9. The Appellant argued that it was the responsibility of the 1<sup>st</sup> Respondent to seek consent for the subdivision. Once that was obtained, the Appellant would join the 1<sup>st</sup> Respondent at the land office for the normal transfer process. Instead, the 1<sup>st</sup> Respondent, the Appellant argued, illegally entered into another agreement with the 3<sup>rd</sup> Respondent. The Appellant argued that her registration of a caution on the land, followed by the transfer of the land to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents the very next day, demonstrated clear evidence of fraud. The Appellant submitted that as the 1<sup>st</sup> Respondent breached the terms of the contract, she was entitled to damages for breach. Additionally, the Appellant argued that if the 3<sup>rd</sup> Respondent intended to purchase the suit parcel, he ought to have inspected the land and would have noted the developments made by the Appellant on the land.
10. The 1<sup>st</sup> Respondent filed his written submissions dated 20<sup>th</sup> March 2024, where he asserted his title to land parcel Mwea/Tebere/5259 was protected under Sections 24, 25, and 26 of the [Land Registration Act](#) 2012. He submitted that the Appellant did not specify the grounds on which she intended to have the aforementioned title canceled, as she never pleaded any fraud or illegality or furnish any particulars to support any alleged fraud.
11. The 1<sup>st</sup> Respondent further submitted the Appellant was not intent on the Land Control Board consent being obtained as he was not ready to complete the transaction which prompted the 1<sup>st</sup> Respondent to opt out of the transaction and make a refund of the money he had been paid towards the purchase price by the Appellant.
12. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed their written submissions dated 21<sup>st</sup> June 2024, where they argued the 1<sup>st</sup> Respondent, having refunded the purchase price to the Appellant, was free to engage with other potential buyers for the suit land. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents contended that the 1<sup>st</sup> Respondent sold the property Mwea/Tebere/5259 to them and they were bonafide purchasers for value. They contended they were not parties to the agreement between the 1<sup>st</sup> Respondent and the Appellant and that their agreement with the 1<sup>st</sup> Respondent was separate and distinct and did not involve the Appellant.
13. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent further submitted that the contract between the Appellant and the 1<sup>st</sup> Respondent was rescinded, and the 1<sup>st</sup> Respondent made a refund of the consideration paid by the Appellant to him. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents asserted that the Appellant did not raise any claims of fraud in her pleadings in the trial Court, and thus, was bound by her pleadings. They maintained that the Appellant failed to prove her case in the trial Court on a balance of probabilities, and the finding and holding by the Subordinate Court was justified.



## Analysis and Determination

14. I have considered the Memorandum of Appeal, the record of appeal, the evidence in the Lower Court and the parties' written submissions. The key issue for determination in this Appeal is whether the Learned Trial Magistrate erred in dismissing the Appellant's case and upholding the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' Counterclaim.
15. This being a first-instance appeal, the Court is duty-bound to appraise and re-evaluate the evidence in accordance with the principle enunciated in the Court of Appeal Case of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123.

## Whether the Learned Trial Magistrate erred in dismissing the Appellant's Case

16. The Appellant in the suit before the Lower Court sought to have the title registered in the joint names of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents cancelled and the 1<sup>st</sup> Respondent to be ordered to provide the consent to transfer and to execute all necessary documents in respect of land parcel Mwea/Teber/B/5259 to the Appellant. In other words, the Appellant was seeking specific performance of her contract with the 1<sup>st</sup> Respondent by her pleadings.
17. The Appellant in essence was challenging the title that had been issued to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. Under Section 26(1) of the *Land Registration Act*, 2012 the title of a registered proprietor may only be challenged on the grounds of fraud or misrepresentation and/or if the title was obtained unlawfully or illegally or through a corrupt scheme Section 26(1) of the Act provides as follows:-
  - 26 (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
    - a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
    - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
18. In the case of *Alice Chemutai Too v Nickson Kipkurui Korir & 2 others* (2015) eKLR the Court held that: -

“It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. I do not see how a person with a perfectly good title should be deprived of his title by activities of fraudsters. It is in fact time to put down our feet and affirm that no fraudster, nor any beneficiary of fraudulent activities, stands to gain for his fraud, and no title holder will ever be deprived of his good title by the tricks of con artists.”

19. Fraud, which the Appellant has brought up in this appeal, was neither pleaded with particularity nor proved at the trial; it cannot therefore be raised for the first time on appeal. In the case of *Daniel Otieno*



Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, A C Mrima emphasized that parties are bound by their pleadings. He held that:

“It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Anor. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

“.....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

20. The Appellant having not pleaded fraud with particularity before the subordinate Court cannot before this Court submit that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents obtained their title fraudulently. That needed to be pleaded and the particulars of the alleged fraud given so that the Respondents were made aware of the case they were facing and to enable them to respond to the allegations appropriately. The Appellant in my view did not adduce any evidence that proved the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents obtained title to land parcel Mwea/Tebere/B/5259 fraudulently and/unlawfully or unprocedurally.
21. The Green card (abstract of title) for land parcel Mwea/Tebere/B/5259 tendered in evidence before the Lower Court shows the 1<sup>st</sup> Respondent was registered as proprietor on 16<sup>th</sup> December 2016 and that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were registered as joint tenants on 15<sup>th</sup> August 2017. At the time of their registration there was no encumbrance noted against the title. The sale agreement between the Appellant and the 1<sup>st</sup> Respondent was entered into on 25<sup>th</sup> November, 2016. The transaction having been one that was subject to the provisions of the *Land Control Act*, Cap 302 Laws of Kenya, the same became void for all purposes under Section 6(1) of the Act as no consent was sought and obtained within the prescribed period of six(6) months from the date of the sale agreement. The contract/sale agreement was therefore unenforceable. The only remedy the Appellant had was refund of the purchase price paid, which the 1<sup>st</sup> Respondent duly offered.

#### **Whether the Learned Magistrate erred in upholding the 2<sup>nd</sup> And 3<sup>rd</sup> Respondents’ Counterclaim**

22. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents sought eviction and injunction orders, claiming they were the registered owners of the property, having purchased it as bona fide purchasers for value. The principles governing bona fide purchasers were reaffirmed by the Supreme Court in *Dina Management Ltd v County Government of Mombasa & 5 Others* (2023) KESC 30 (KLR), where the Supreme Court stated:

“...in order to be considered a bona fide purchaser for value, they must prove; that they acquired a valid and legal title, secondly, they carried out the necessary due diligence to



determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property ....”

23. This position was endorsed by the Supreme Court of Uganda in the case of *Lwanga v Mubiru and Others* (Civil Appeal 18 of 2022) (2024) UGSC 7 where the Court stated:-

“The principle of bona fide purchaser for value without notice is a general defence in any transaction of sale or purchase of any property particularly land. The definition of bona fide purchaser for value without notice is “that buyer who has paid a stated price for the property without knowledge of existing or prior claims or prior equitable interest. Bona fide is a Latin word meaning good faith, without fraud, sincere, genuine. See (Black’s Law Dictionary 9th Edn Page 199) A bona fide purchaser is a buyer who buys without constructive or actual notice of any defects or infirmities against the seller’s title. See (page 1355 Black’s Law Dictionary 9th Edn. It is trite law that a person who relies on the defence of bona fide purchaser for value without notice has the burden to prove that he or she acted in good faith. The purchaser must have given due consideration and purchased the land without notice of the fraud. Such notice cover both actual and constructive notice of fraud. In the case of *Jones v. Smith* [1841] 1 Hare 43, the Chancery Court held: “a purchaser has constructive notice of fraud if he had actual notice, that there was some encumbrance and a proper inquiry would have revealed what it was (but if) it abstained either deliberately, carelessly from making those inquiries which a prudent purchaser would have made...then the defence cannot be available to him or her.”

24. It was not in dispute that the 1<sup>st</sup> Respondent was the registered proprietor of the suit land at the time the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents purchased the land. The Green Card and the search certificate did not disclose there was any encumbrance or restriction registered against the title. It is evident the initial land parcel Mwea/Tebere/B/5073 was subdivided in December, 2016 when land parcel Mwea/Tebere/B/5259 was excised and registered in the 1<sup>st</sup> Respondent’s name on 16<sup>th</sup> December 2016. The 1<sup>st</sup> Respondent after the Appellant failed to raise the balance of the purchase price to enable them to attend before the Land Control Board for consent was entitled to rescind the contract and make a refund of the purchase price paid which he did.
25. Upon evaluation of the evidence adduced before the Lower Court, I am satisfied the Learned Magistrate did not err in his findings and decision and there is no basis to fault him. The Appeal lacks any merit and I dismiss the same with costs to the Respondents.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 23<sup>RD</sup> DAY OF SEPTEMBER 2025.**

**J. M. MUTUNGI**

**ELC JUDGE**

