



**Achayo v Oyugi & 3 others (Environment and Land Appeal
E033 of 2024) [2025] KEELC 6633 (KLR) (2 October 2025) (Judgment)**

Neutral citation: [2025] KEELC 6633 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL E033 OF 2024**

AE DENA, J

OCTOBER 2, 2025

BETWEEN

ROSE ACHIENG ACHAYO APPELLANT

AND

FRANKLINE JENES ODHIAMBO OYUGI 1ST RESPONDENT

EMMA AKUMU 2ND RESPONDENT

LAND REGISTRAR SIAYA 3RD RESPONDENT

HON ATTORNEY GENERAL 4TH RESPONDENT

JUDGMENT

1. The Appellant Rose Achieng Achayo being aggrieved by the judgment of Honourable Benjamin Limo P.M delivered in Siaya MCELC E055/2023 has appealed against the same and seeks the following reliefs:
 - a. That the appeal be allowed.
 - b. The orders of the trial court issued on 17th September 2024 be set aside.
 - c. The orders sought in the primary suit be allowed as per the plaint dated 12th July 2023.
 - d. The costs of the appeal and the lower court proceedings be borne by the Respondents.
 - e. Such other reliefs as may appear just to the Honourable court.
2. The grounds of appeal are as follows; -
 - a. That the learned Magistrate erred in law and fact by declaring that the title deed held by the 1st and 2nd respondents was not impeachable under Section 26 of the [Land Registration Act](#) while there was sufficient evidence to the contrary.



- b. That the learned Magistrate erred in law and fact by upholding the title deed in the name of the 1st and 2nd Respondent to be valid yet the same was not acquired legally and procedurally.
 - c. That the learned Magistrate erred in law and fact in holding that the 1st Respondent was an innocent purchaser while the 1st Respondent was well aware at the time of purchase that the late Josephine Oneyo had not conducted succession of the late Lucas Ndoya Odialo and that is the reason why they entered into a sale agreement.
 - d. That the trial court erred in law and in fact by coming to the finding that the Appellant had not proved any element of misrepresentation yet the appellant had proved the same.
3. Upon admission of the Appeal, the court directed the Appeal to proceed by way of written submissions, both parties complied. The submissions are summarized as follows; -

Appellants Submissions.

4. The Appellant framed three issues for determination in submissions dated 3/03/2025 filed through his Advocates, Ooro Awana & Co. Advocates as follows; -
 1. Whether Josephine Oneya Ndoya acquired the suit parcel legally and whether she had a good title to pass to the 1st & 2nd Respondent.
 2. Whether the sale agreement between Josephine Oneya Ndoya and the 1st & 2nd Respondents was null & void.
 3. Whether the 1st and 2nd Respondent is a bona fide purchaser for the suit parcel
5. On the issue number 1, the Appellant submits that the suit property namely North Gem/Malanga/700 was registered in the Appellant's father's name Ndoya Odila, who passed on 30/06/1997, yet the property was allegedly transferred in the year 2004 without succession rendering the transition a nullity as no transfer by transmission could have been lawfully made hence no valid title could pass to the 1st & 2nd Respondents.
7. On issue No. 2, the Appellants submit that the 1st and 2nd Respondents had purchased the suit property in August 2001 and another agreement on 14th April 2004. The Appellant submits that the Agreements entered between the Respondents and Josephine Oneya were a nullity as the said Josephine lacked capacity. To buttress the point the appellant placed reliance on the decision in the case of Re-Estate of Barasa Kanenje Many (deceased) Succession cause No. 263 of 2002) (2020) on the proposition that a grant of letters of administration intestate did not relate back to the date of death so as to authenticate any of the acts of the administrator done between the date of death and the appointment.
8. On issue number 3, the Appellant submit that the 1st & 2nd Respondents were not bonafide purchasers for value since they were required to undertake due diligence of the property which they did not adequately undertake. Reliance was placed on the decision in the case of Esther Ndegi Njiru Vs. Leonard Gatei, as quoted in the case of Said vs Shume & 2 Others (Civil Appeal E50 of 2023) (2024) KECA 866 (KLR) on the expanded scope of due diligence beyond the official searches and Dina Management Limited Vs County Government of Mombasa & 5 Others (Petition 8 (E010) of 2021 (2023) KESC 30 KLR.
9. On the last issue, the Appellant submits that the title in the name of the 1st & 2nd Respondent was impeachable even though the 1st and 2nd Respondent did not participate in any fraud and/or illegality in support of this proposition. The Appellant cites the decision in the case of Alice Chemutai Too



Vs Nickson Kipkurui Korir & 2 Others (2015) eKLR which referred to the case of Elijah Makeri Nyangwara vs Stephen Mungi Njuguna & Anther Eldoret ELC case No. 609 B of 2012 thus

“It needs to be appreciated that for section 26 (i) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted herein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors....”.

10. On the strength of the above submissions the Appellant seeks that the appeal be allowed.

Respondents Submissions

11. In their submissions dated 2/5/2025 filed by their Advocates Messrs Nyawaro & Co. Advocates, framed and submitted on two issues for determination to wit; -
 1. Whether the appellant has established a case for fraud in the transfer of the subject property?
 2. Whether the 1st respondent’s mother was an innocent purchaser for value?
12. On issue 1, the Respondents submit that the Appellant has not established a case for fraud in the transfer of the subject matter, on account of not proving the fraud as required under the provisions of section 107 of the *Evidence Act*. The Respondents submit that allegations of fraud must be specifically pleaded and proved. Reliance was placed on the decision in Kinyanjui Kamau vs George Kamau (2015) eKLR. The case of Embakasi Properties Limited & Another Vs. Commissioner of Lands & Ano (2019) eKLR on belief that the title issued to the Appellants mother was prima facie evidence that being the person named therein was the absolute and indefeasible owner.
13. The Respondents further submit that the 1st Respondents mother acquired a good title to the suit property which had been transferred after succession and an agreement dated 4th June 2004 was made, hence all due diligence had been conducted before the purchase and transfer.
14. On the second issue, the Respondent submit that 1st Respondent is an innocent purchaser for value, who had done due diligence to determine the lawful owner from whom they acquired a legitimate title. The court is referred to the case of Arthi Highway Developers Limited Vs. West End Butchery Limited & 6 Others (2015) eKLR and Dina Management Limited (supra),
15. On the strength of the above the Respondent submits that the Appeal be dismissed.

Analysis And Determination

16. Having perused the Record of Appeal, the undisputed facts are that the 1st Respondent is the registered owner of North Gem/Malanga/700 which parcel of land was firstly registered in the name of Lucas Ndoya Odila. It is also undisputed that the Appellant is the Administrator of the Estate of Lucas Ndoya Odola also known as Lucas Ndoya Odiola.
17. Following my analysis of the Record of Appeal, the rival submissions of the parties, and the law the following issues commend determination; -
 - i. Whether or not the Appeal is merited. In considering this issue the court shall also consider (a) Whether or not the 1st Respondent holds good title over North Gem/Malanga/700 (b) whether the estate of Lucas Ndoya (deceased) has a legitimate claim over North Gem/Malanga/700.
 - ii. What reliefs ought to issue
 - iii. Who bears the costs of this Appeal



Analysis And Determination.

18. This is a first appeal. The court will be guided by the case of *Selle Vs. Associated Motor Boat Co.* (EA.123) to reconsider the evidence, evaluate it itself and draw its own conclusions though bearing in mind to make due allowance in the fact that the court neither saw nor heard the witnesses.
19. It is the Appellants contention that the original owner of the suit property was her father Lucas Ndiya Odila for whose Estate she has filed the suit. This position is confirmed by the copy of the register/ green card appearing at page 52 of the Record of Appeal. Indeed, Lucas Ndoya Ondika appears at entry No.1 as the original owner having been registered thereof on 16/5/1977. The grant of letters of Administration Ad Litem appearing at page 32 of the Record of Appeal as well as copy of the certificate of death of Lucas Ndoya Ondila both state the date of death as having occurred on 30/06/1997.
20. Therefore at the time of his demise the late Lucas Ndoya Ondila was still the registered owner of the suit property. For the suit property to have been transferred to a 3rd party after the demise of the registered owner the same ought to have been done by way of succession and transmission.
21. There was no evidence of succession having been undertaken by Josephine Oneya Ndoya the wife of Lucas Oneya in 2004 to enable her become the registered owner adlitem Administrator of his estate. Consequently, in my view the registration of the suit property to Josephine Oneya and subsequently transfer to the 1st respondents' mother Penina Ogada was done in contravention of Section 45,79 and 82 of the [Law of Succession Act](#) which stipulate; -
22. Section 45 of the [Law of Succession Act](#) provides that:
 - “(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.
 - (2) Any person who contravenes the provisions of this section shall-
 - a. be guilty of an offence and liable to a fine not exceeding ten thousand shillings or a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
 - b. be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”
23. Section 79 of the [Law of Succession Act](#) provides; -

“The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative”
24. Section 82 of [Law of Succession Act](#), states:

Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers – (b) to sell or otherwise turn to account, so far as seems necessary or



desirable in the execution of their duties, all or any part of the assets vested in them, as they think best: Provided that— (ii) no immovable property shall be sold before confirmation of the grant;

25. It follows therefore that both Josephine Oreya and Penina Ogada were illegally and irregularly registered as proprietors of the suit property.

26. In arriving at the above finding the court is guided by the decision in *James Muhu Kanai v Caroline Njeri Ngotho & 2 others* [2015] eKLR where the court stated:

‘By virtue of Section 79 of the *Law of Succession Act*, the said property had not vested in the widow as administrator and therefore she was not at the material time a personal representative of the deceased and had no capacity whatsoever to exercise any of the powers set out in Section 82 of the Act, in particular the power to sell estate property. In any event, the property in question was immovable property, which, by virtue of proviso (ii) to Section 82(b), could not be sold before the grant had been confirmed. The provisions of Sections 45 and 82 of the *Law of Succession Act* are in mandatory terms. The effect of this then is that the acts of intermeddling cannot be sanitized by acts meant to regularize the unauthorized dealings. These unlawful acts cannot be cured.’

27. In the Matter of the estate of Veronica Njoki Wakagoto (Deceased) [2013] eKLR the court stated:

‘The effect of this is that the property of a dead person cannot be lawfully dealt with by anybody unless such person is authorized to do so by the law. Such authority emanates from a grant of representation, and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence. In this matter the respondent sold property belonging to a dead person without authority as letters of administration had not yet been made to him. The fact of having petitioned for the letters did not clothe him with any authority. He and Felix Kinuthia intermeddled with the estate, and they no doubt committed an offence under section 45(2) (a) of the Act. It is unfortunate that the prosecutorial authorities do not focus on offences of this kind as prosecutions are hardly ever mounted over them. This explains why property of dead persons is routinely intermeddled with.’

28. The 1st Respondent is claiming title from an impeached process and since the process of acquisition was a nullity. It remained null and void.

29. The 1st Respondent is thus not an innocent purchaser for value since the process of acquisition of the property was a nullity in any event. In the case of *Dina Management Ltd (supra)* the Supreme Court of Kenya pronounced thus; -

(111) 111] Article 40 of *the Constitution* entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired. Having found that the 1st registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under Article 40 of *the Constitution*.’

.....It is not enough for a party to state that they have a lease or title to property. In the case of *Funzi Development Ltd & Others Vs. County Council of Kwale, Msa Civil Appeal No. 252 of 2005* (2014) eKLR the Court Appeal which decision this court affirmed stated that; -



‘... A registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot on the basis of indefeasibility of title sanction an illegality or give its seal of approval to an illegal or irregularly obtained title.’
Emphasis is mine.

30. In answer to sub issue number 1 (a) the court finds that 1st Respondent did not hold a good title.
31. Having found that the transaction of the sale transfer to Josephine was irregular and that Josephine lacked capacity to enter into an agreement with Penina and that there was no good title passed to Penina and the 1st Respondent, it follows that the property must revert to the Estate of Lucas Oreyo for distribution to the said Estate.
32. In answer to sub issue number 2 the Estate of Lucas Oreyo has a legitimate interest in the suit property.
33. For the reasons advanced, the Court finds that the Appeal has merits and the property was fraudulently and/or irregularly transferred to Josephine Oreyo who transferred it to Penina Ogada and eventually transmitted it to 1st Respondent.
34. On the reliefs, to issue, having found that the Appeal is merited, the orders of the trial court issued on 17th September 2024 be and are hereby set aside.
35. The appeal is allowed in terms of the plaint dated 12th July 2023, with costs to the Appellant.

DATED AT SIAYA THIS 2ND DAY OF OCTOBER 2025

HON. LADY JUSTICE A.E. DENA

JUDGE

02.10.2025

Judgement delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Ooro F for appellant

Mr. Otieno Holding Brief for Mr. Nyamwaro for 1st and 2nd Respondent

Court Assistant: Ishmael Orwa

