Ouya & another v Oseko & 4 others (Civil Appeal E697 & E715 of 2021 (Consolidated)) [2025] KECA 1724 (KLR) (24 October 2025) (Judgment)

Neutral citation: [2025] KECA 1724 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E697 & E715 OF 2021 (CONSOLIDATED)

PO KIAGE, J MOHAMMED & GV ODUNGA, JJA

OCTOBER 24, 2025

BETWEEN

MARIA LILIAN ODONGO OUYA .... APPELLANT

AND

MATHEW O OSEKO .... 1ST RESPONDENT

JULIE O OSEKO .... 2ND RESPONDENT

DAVID AWORI .... 3RD RESPONDENT

JUDITH MHINA .... 4TH RESPONDENT

AS CONSOLIDATED WITH

CIVIL APPEAL E715 OF 2021

BETWEEN

DAVID AWORI .... APPELLANT

AND

MATHEW O OSEKO .... 1ST RESPONDENT

JULIE O OSEKO .... 2ND RESPONDENT

MARIA LILIAN ODONGO OUYA .... 3RD RESPONDENT

JUDITH MHINA .... 4TH RESPONDENT

(An appeal from the judgment of the Environment and Land Court at Nairobi (Okong'o, J.) dated 25th February, 2021 in ELC Suit No. 870 OF 2003)

JUDGMENT

1. At the heart of this protracted dispute that has been in the court corridors since the year 1993, are two parcels of land, namely, L.R No. 12219/3 and L.R No. 12219/4 (suit properties). In the year 1992, Mathew O. Oseko and Julie O. Oseko (the Osekos) entered into an agreement with Lero Luno Enterprises Limited (Lero Luno Ltd), a company that was represented by one Nicholas Wandia Raballa (Mr. Raballa), for the sale of the suit properties. The properties were part of a larger plot that measured 10 acres. Initially, the Osekos had chosen to purchase half an acre plot of a larger plot, then identified as “G”. They paid a deposit of Kshs.80,000 for it but towards the end of the year 1992, they were informed that the said plot “G” had been sold to another person. On confronting Mr. Raballa about it, he offered them the suit properties instead. The Osekos and Mr. Raballa then entered into fresh negotiations. For L.R No. 12219/3, they agreed on a price of Kshs.450,000 and for L.R No. 12219/4, Ksh.400,000. Mr. Raballa agreed to transfer the Ksh.80,000 that they had initially paid, towards the purchase price for the suit properties. He also gave them a discount of Ksh. 50,000 for the second plot for the reason that it had a river frontage and it would thus be difficult to develop it. In total, the purchase price summed up to Kshs.880,000. The Osekos paid an additional Kshs.300,000 and agreed with Mr. Raballa to take possession of the suit properties. It was also agreed that in the meantime, Mr. Raballa would obtain all necessary approvals from the (defunct) City Council of Nairobi and the Ministry of Lands including, subdivision consents and title deeds. In light of those conditions, the Osekos prepared an agreement for sale which they executed and sent to Mr. Raballa for his signature. Mr. Raballa however informed them that he was unable to sign the agreement as the suit properties were in the name of Lero Luno Ltd, a company where he was a director. He then proceeded to make alterations to the sale agreement in his own handwriting by changing the name of the vendor to Lero Luno Ltd. He also amended the purchase price. The agreement, however, remained in draft and was never signed nor witnessed.

2 Pursuant to the terms of the sale agreement, the Osekos took possession of the properties on or about 15th March 1993. They also gave Mr. Raballa a bank guarantee for the balance of the purchase price. Later, Mr. Raballa informed them that he needed assistance in complying with the conditions precedents to the subdivision of the suit properties and issuance of titles. One such condition was the construction of an access road to the properties. It was agreed that the Osekos would construct the road which would be valued and the cost deducted from the balance of the purchase price. After constructing the road, the Osekos informed Mr. Raballa the cost or value of the road amounted to Ksh.400,000. Mr. Raballa, however, disputed that cost. A disagreement ensued and he asked for the full purchase price of the suit properties, failing which, he would regain entry into the properties and eject the Osekos. True to the threat, on the 7th and 8th June, 1993, Mr. Raballa sent his workers or agents who pulled down the fence the Osekos had put up on the suit properties and, destroyed construction materials and developments that were made thereon. The Osekos were aggrieved and instituted a suit against him and Lero Luno Ltd, being HCCC No. 2905 of 1993.

3. In the suit they sought specific performance of the agreement for sale, damages for breach of contract and for trespass, and an order of injunction against Mr. Raballa and Lero Luno Ltd from interfering with their developments or occupation of the suit properties. As the suit was on-going, Mr. Raballa passed away on 9th June 1996. On 11th August 2003, one David Awori (Mr. Awori) went to the suit properties and informed the workers of the Osekos, who were living there, that he had purchased the property and he would start moving his construction materials on site. He thus asked them to inform the occupants to vacate. Mr. Oseko later met Mr. Awori at the suit properties and the latter claimed that he had purchased parcel no. L.R No. 12219/3 from one Judith Mhina (Ms. Mhina) who had

allegedly purchased it from Lero Luno Ltd. He also informed him that parcel no. L.R No. 12219/4 had been sold to Maria Lilian Odongo Ouya (Ms. Ouya), by the same Ms. Mhina.

4. The Osekos decided to conduct a search at the Land Registry where they discovered that on 26th March 1998, Lero Luno Ltd had transferred the suit properties to Ms. Mhina. On 16th August 2003, Mr. Awori went to the suit properties, accompanied by hired goons, and broke down the gate. They also destroyed two temporary houses that the Osekos had built for their workers. The Osekos soon thereafter filed ELC No. 870/2003 vide a plaint dated 20th August 2003, against Mr. Awori, Ms. Ouya and Ms. Mhina seeking;

   a. An injunction to restrain the 1st and 2nd defendants [Mr. Awori and Ms. Ouya] whether by themselves, their servants or agents or otherwise howsoever from entering the plaintiffs' properties L.R. No. 12219/3 and L.R. No. 12219/4 or interfering with the plaintiffs' possession and development of the said properties in any way whatsoever as to prevent the plaintiffs from their use and enjoyment.

   b. A declaration that the 1st and 2nd defendants are not entitled to enter, use and/or occupy the suit properties or move any materials into the said suit properties or at all.

   c. A declaration that transfer of Titles L.R No. 12219/3 and L.R No. 12219/4 from Lero Luno Enterprises Ltd to the 3rd defendant, Judith Mhina, and the subsequent transfer of Title L.R. No. 12219/3 by the 3rd defendant to the 2nd defendant, David Awori and Title L.R. No. 12219/4 to Maria Lilian Odongo Ouya, the 1st defendant, was illegal, fraudulent, null and void.

   d. Damages against the Defendants for trespass.

   e. Special damages.

   f. Costs

   g. Interest on (d) (e) and (f)

   h. Further or other relief.

5. Incidentally, Mr. Awori and Ms. Ouya on their part filed ELC No. 877 of 2003, vide a plaint dated the same 20th August 2003, against the Osekos praying for orders that;

   a. An injunction do issue restraining the defendants [Mathew O. Oseko and J. O. Oseko] jointly and severally, their servants and/or agents from entering, evicting, harassing and/or in any other way interfering with the quiet possession and occupation of the L.R. No. 12219/3 and L.R. No. 12219/4.

   b. Damages.

   c. An order declaring the 1st and 2nd plaintiffs the rightful registered proprietors of L.R. No. 12219/3 and L.R. No. 12219/4.

   d. Costs

   e. Interest on (b) above.

   f. Any other or further relief that the Honourable court may deem fit to grant.

6 On 28th August 2003, parties agreed by consent to have ELC No. 870 of 2003 and ELC No. 877 of 2003 consolidated with ELC No. 870 of 2003 being the lead file. Subsequently, on 29th September 2003, the two were further consolidated with HCCC No. 2905 of 1993 with ELC No. 870 of 2003

remaining the lead file. What followed thereafter were multiple adjournments and applications till 24th October 2019, when the trial proper commenced with Dr. Julie Oseko (Mrs. Oseko) testifying as PW1. Her evidence was primarily as outlined in the foregoing paragraphs. The Oseko's case closed on 22nd January 2020 and on the same day David Kenneth Awori (DW1) gave his evidence as defendant in ELC No. 870 of 2003 and as plaintiff in ELC No. 877 of 2003. He averred that he held an absolute and indefeasible title as the registered owner of L.R. No. 12219/3, measuring half an acre. Mr. Awori testified that before purchasing the property, due diligence was conducted and it confirmed that the parcel of land belonged to one Ms. Mhina. He visited the property which is situated next to the Bomas of Kenya and found it vacant at the time. On 12th August 2002, he executed a sale agreement between himself and Ms. Mhina for the aforesaid property and on 28th October 2002, he obtained the certificate of title after paying Ksh.1.5 Million. Mr. Awori testified that when he bought the property, he intended to build a residential house but when he began the construction, he met the Osekos who laid claim on the same property. He explained that since then he had not taken possession of the suit property because an injunction was issued against him. Further, when he filed ELC No. 877 of 2003, he was not aware that the Osekos had filed ELC No. 870 of 2003. Mr. Awori complained that he paid rates for the property even though he did not live there. He confirmed that the property was since developed and occupied by PW1.

7. Next to testify was Maria Lilian Odongo Ouya (DW2). Her evidence was that she was shown L.R. No. 12219/4 by Simon Munika, an agent and a son of Mr. Munika, the advocate who acted for the vendor of the property. She obtained a copy of the title deed of the property and conducted a search, after which she entered into an agreement of sale with the owner, Ms. Mhina. Ms. Ouya then borrowed a loan which she used to purchase the property and she was issued with title. She testified that she visited the property several times in the year 2002 and at the time, it was vacant. It was also not encumbered. She stated that she witnessed the sale agreement in respect of the property that was purchased by Mr. Awori. Ms. Ouya claimed that she was not aware that the suit properties were the subject of a court case and, when she filed ELC No. 877 of 2003, she had not been served with summons in ELC No. 870 of 2003.

8. After parties had filed written submissions, the learned Judge (S. Okong'o) rendered the impugned judgment on 25th February 2021 and decreed as follows;

    1. That Lero Luno Enterprises Limited, the 1st Defendant in ELCC No. 2905 of 1993 shall transfer to Julie Oseko, the 2nd Plaintiff in ELCC No. 2905 of 1993 and ELCC No. 870 of 2003 who is also the 2nd Defendant in ELCC No. 877 of 2003 all those parcels of land known as L.R. No. 12219/3 and L.R. No. 12219/4 within 90 days from the date hereof.

    2. That Julie Oseko, the 2nd Plaintiff in ELCC No. 2905 of 1993 and ELCC No. 870 of 2003 who is also the 2nd Defendant in ELCC No. 877 of 2003 shall pay to Lero Luno Enterprises Limited the balance of the purchase price in the sum of Ksh.470,000 within 60 days from the date hereof prior to the transfer aforesaid.

    3. That Julie Oseko, the 2nd Plaintiff in ELCC No. 2905 of 1993 and ELCC No. 870 of 2003 who is also the 2nd Defendant in ELCC No. 877 of 2003

       shall pay all statutory fees and charges on the transfer and any consent that may be required for the transfer to be effected.

    4. That it is declared that the transfer of L.R. No. 12219/3 and L.R. No. 12219/4 by Lero Luno Enterprises Limited, the 1st Defendant in ELCC No. 2905 of 1993 to Judith Mhina the 3rd Defendant in ELCC No. 870 of 2003 was illegal, null and void and the same is cancelled.

5. That it is declared that the transfer of L.R No. 12219/3 and L.R. No. 12219/4 by Judith Mhina the 3rd Defendant in ELCC No. 870 of 2003 to David Awori and Maria Lilian Odongo Ouya the 1st and 2nd Defendants in ELCC No. 870 of 2003 and the Plaintiffs in ELCC No. 877 of 2003 was illegal, null and void and the same is cancelled.

6. That Lero Luno Enterprises Limited, the 1st Defendant in ELCC No. 2905 of 1993 and David Awori and Maria Lilian Odongo Ouya the 1st and 2nd Defendants in ELCC No. 870 of 2003 who are also the Plaintiffs in ELCC No. 877 of 2003 are restrained by themselves or through their employees or agents from damaging and/or interfering with developments on and occupation of

   L.R. No. 12219/3 and L.R. No. 12219/4 by Julie Oseko, the 2nd Plaintiff in ELCC No. 2905 of 1993 and ELCC No. 870 of 2003 who is also the 2nd Defendant in ELCC No. 877 of 2003 in any way whatsoever.

7. That ELCC No. 877 of 2003 is dismissed.

8. That Julie Oseko, the 2nd Plaintiff in ELCC No. 2905 of 1993 and ELCC No. 870 of 2003 who is also the 2nd Defendant in ELCC No. 877 of 2003 shall have the costs of the consolidated suits to be paid by Lero Luno Enterprises Limited, the 1st Defendant in ELCC No. 2905 of 1993.

9. That decision aggrieved the appellants now before us namely, Ms. Ouya and Mr. Awori and they lodged an appeal through Notices of Appeal dated 3rd March 2021 and 2nd March 2021, respectively. In the two memoranda of appeal, lodged on behalf of the appellants, it is complained, in summary, that the learned Judge erred in law and fact by;

   1. Failing to find and hold that the appellants were the lawful registered owners of the suit property.

   2. Failing to hold that the appellants as innocent purchasers for value, their rights and interests to the suit land were protected under section 53 of the Indian Transfer of Property Act, 1882 (now repealed).

   3. Failing to find and hold that the appellants' title to the suit property was sacrosanct, valid and indefeasible under the Registration of Titles Act Cap 282 (now repealed) and *the Constitution*.

   4. Holding that there was an agreement for the sale of a parcel of land between the Osekos and Mr. Raballa and Lero Luno Ltd.

   5. Misapprehending and misapplying the law on agreements and/or contracts for disposition of interest in land.

   6. Failing to appreciate that the alleged agreement for sale was unenforceable.

   7. Failing to appreciate that the High Court on 29th November 1993 dismissed the Osekos' application for injunction.

   8. Holding that the Osekos were in possession of the suit property at the time it was transferred to Ms. Mhina and the appellants.

   9. Applying the common law doctrine of lis pendens.

   10. Failing to find and hold that HCCC No. 2905 of 1993 abated and could not be the basis of the application of the doctrine of lis pendens.

11. Failing to ascertain service of hearing notice to the Lero Luno Enterprises Limited in HCCC No. 2905 of 1993.

12. Granting reliefs sought by the Osekos in HCCC No. 2905 of 1993 which reliefs were ungrantable and unenforceable.

13. Granting reliefs against a non-existent party that did not participate in the proceedings giving rise to the reliefs.

14. Failing to find that ELC No. 870 of 2003 was sub judice HCCC No. 2905 of 1993 which was dealing with the same subject matter.

15. Arbitrarily abrogating and vitiating the appellant's property rights and enriching the Osekos.

16. Failing to consider the appellants' documentary and oral evidence.

17. Finding that Ms. Mhina did not have capacity to sell the suit property to the appellants.

18. Finding that the appellants were neither entitled to the suit property nor to the full purchase price plus interest thereon.

19. Finding that the suit property belonged to Mrs. Oseko.

20. Failing to appreciate that the agreement between Lero Luno Ltd and Mr. Rabala and, the Osekos, had not been completed.

21. Finding that the appellants were not entitled to the costs of the suit.

22. Dismissing ELC No. 877 of 2003 in its entirety.

23. Disregarding the authorities relied on by the appellants.

24. Failing to give due and proper consideration to the appellants' submissions.

10. The appellants prayed that the appeal be allowed, the judgement and decree of the court below be set aside and in its place an order be issued dismissing the 1st and 2nd respondents' suits with costs and, the appellants' suit be allowed with costs.

11. The parties filed written submissions together with digests and bundles of authorities. At the plenary hearing of the appeal, learned counsel appearing were Messrs Wekesa and Wesonga for Ms. Ouya, Ms. Ochogo for Mr. Awori and Ms. Ouma for Mrs. Oseko. There was no appearance for Ms. Mhina and Lero Luno Ltd despite having been served. Mr. Wekesa informed us that the two appeals, namely, Civil Appeal No. E697 of 2021 and Civil Appeal No. E715 of 2021 were consolidated on 16th July 2024, in Civil Application No. E100 of 2021, which was an application for an order of stay of execution. We proceeded to make Civil Appeal No. E697 of 2021 the lead file since it was filed first.

12. Highlighting written submissions lodged on behalf of Ms. Ouya, Mr. Wekesa indicated that the grounds in the memorandum of appeal had been condensed into two broad areas. The first was whether the trial court had jurisdiction to hear and determine ELC No. 2905 of 1993 (formerly, HCCC No. 2905 of 1993). Counsel submitted that the trial court did not have jurisdiction to hear and determine the suit which, to him, was non-existent. To illustrate this argument, he contended that when ELC No. 2905 of 1993 was filed on 15th June 1993, together with chamber summons for interlocutory injunction, the pleadings were served without summons to enter appearance. The firm of Shapley Barret & Company Advocates filed a Notice of Appointment of Advocates dated 2nd July 1993, to act for Lero Luno Ltd and Mr. Raballa with respect to the interlocutory application. The

application for injunction was subsequently dismissed on 29th November 1993, and no further action was taken by the Osekos in the suit. Mr. Wekesa submitted that absent summons to enter appearance, ELC No. 2905 of 1993 remained non-existent. To buttress this argument, he cited section 20 of the *Civil Procedure Act*, 1985 as well as section 19 of the *Civil Procedure Act* 2009, which provided that, 'where a suit has been duly instituted the defendant shall be served in the manner prescribed to enter an appearance and answer the claim.' Counsel further placed reliance on the holding in Karandeep Singh Dhilon & Another Vs. Nteppes Enterprises Ltd & Another [2010] eKLR. Mr. Wekesa contended that Order IV, Rule 1(7) of the Civil Procedure Rules 1985, which was applicable at the material time, made it mandatory to take out summons and serve upon the defendants and, absent summons to enter appearance, the suit stood dismissed 24 months after its filing. Alternatively, the suit stood dismissed after the ruling of Nambuye J. (as she then was) dated 4th May 2007. On that basis, counsel asserted that the trial court did not have jurisdiction to hear and determine ELC No. 2905 of 1993. He cited the Supreme Court decision in GEO CHEM Middle East Vs. Kenya Bureau Of Standards [2020] eKLR for the proposition that jurisdiction is everything and without it a court acts in vain.

13. It was submitted that ELC No. 870 of 2003 was incapable of adjudicating claims of illegality and fraud that were pleaded therein, for the reason that critical parties like Lero Luno Ltd, the Registrar of Titles and the Registrar of Companies were not made parties to the suit. For this argument, counsel relied on the holding in Muriithi (suing as the Legal Representative of the Estate of Mwangi Stephen Muriithi) Vs. Janmohamed SC, (Suing as the Executrix of the Estate of Hon. Daniel Toroitich Arap Moi) & another [2023] KESC 61 (KLR). Mr. Wekesa contended that there was no suit pending capable of underpinning the doctrine of lis pendens. Further, the trial court failed to consider the tenor, meaning and import of section 52 of the Indian Transfer of Property Act (ITPA), 1882 (repealed), which provided for the conditions precedent in application of the common law doctrine of lis pendens. Counsel submitted that a bar to transfer of property during pendency of a suit under section 52 of the ITPA is not automatic. There must be active prosecution of the case and a prohibition order. On reliance of the decision in Barclays Bank Of Kenya Limited Vs. Henry Ndungu Kinuthia & Another [2018] eKLR, it was urged that the prohibition order must be accompanied with an injunction. Counsel contended that in the instant case, there was no such prohibition order and injunction, the Osekos application for injunction having been dismissed for want of merit, on 29th November 1993. Thus, in counsel's view, there was nothing barring Lero Luno Ltd from transferring the suit properties as it did to Ms. Mhina in 1997. The trial court was faulted for failing to apply the proviso to sections 53 and 53A of the ITPA which, to counsel, protected the rights of Ms. Ouya as a purchaser in good faith for value without notice.

14. The second issue that Mr. Wekesa raised was whether Ms. Ouya had quality indefeasible title to the suit property which had not been impeached by the Osekos. He asserted that Ms. Ouya was the registered owner of the suit property and her title to the property was indefeasible and of good quality. She purchased the property at a market consideration of Kshs.1,500,000 from Ms. Mhina and a transfer was executed by the parties. Ms. Ouya also secured from Barclays Bank of Kenya a mortgage loan of Kshs.2,100,000 on the property. Counsel faulted the trial court for holding that there was a sale agreement between the Osekos and Mr. Raballa and Lero Luno Ltd. He referred us to Mr. Raballa's affidavits of 23rd July 1993 and 28th October 1993, where Mr. Raballa deposed that there was no sale agreement between him and the Osekos. He had offered as purchase price Ksh.450,000 per plot which the Osekos never accepted and instead forcefully took possession of the suit properties. On reliance of the decisions in Fidelity Commercial Bank Ltd Vs. Kenya Grange Vehicle Industries Ltd [2017] eKLR, and Michira Vs. Gesima Power Mills Ltd [2004] eKLR, counsel submitted that there was no meeting of the minds and the said negotiations could not bind the parties. He contended that there was no executed instrument produced by the Osekos crystallising the agreement and there was equally no oral

agreement. Citing National Bank Of Kenya Vs. Pipelastic Samkolit (k) Ltd & Another [2001] eKLR for the proposition that a court cannot write a contract for parties, it was urged that the trial court exceeded its jurisdiction by creating a non-existent agreement between the Osekos and Lero Luno Ltd. Moreover, a transaction involving a company needed a company resolution and none was produced by the Osekos.

15. Predicated on the principle in Salmon Vs. Salmon & CO. [1895 -9] ALL ER 33, that a company is a separate entity from its owners, Mr. Wekesa faulted the trial court for failing to link Lero Luno Ltd to any agreement or part payments, and taking Mr. Raballa to be the same as Lero Luno Ltd. He contested the Osekos reliance on a draft sale agreement submitting that the same was not dated and was not signed by Lero Luno Ltd or Mr. Raballa. Equally, the 'amended sale agreement' with handwritten 'amendments' that is similar to the draft, is not dated or signed by any of the alleged vendors nor witnessed by anyone. Counsel asserted that the existence of several drafts of the sale agreement, where parties were still offering and counter-offering, and making amendments, was a clear testament that the Osekos and Mr. Raballa had not reached an agreement. It was submitted that for a party to rely on the then section 3(3) of the *Law of Contract Act* (before the 1990 amendments), there must first be an agreement, whether in form of contract, oral or otherwise, and possession. It was urged that in this case, possession of the suit properties was not lawful and the learned Judge's holding that there was overwhelming evidence on record to show that the Osekos were in possession of the suit properties in 1993, several years before Awori and Ouya came into the picture, was not borne out of any evidence and misapprehended the ruling of the court of 29th November 1993. The decision in Peter Mbiri Michuki Vs. Samuel Mugo Michuki [2014] eKLR was cited for the proposition that possession needed to be lawful, open, uninterrupted and continuous. On reliance of Savings & Loan (k) Limited Vs. Kanyenje Karangaita Gakombe & Another [2015] eKLR, it was deposed that the oral agreement between the Osekos and Mr. Rabala could not impose any liability or obligation or benefit to Lero Luno Ltd, which was not a party to it.

16. Mr. Wekesa castigated the Osekos for failing to lead evidence in support of the argument that Lero Luno Ltd could not transfer the suit properties when Mr. Raballa, one of the directors had passed away. He contended that the argument failed on 'indoor management' rule otherwise known as 'Turquand's rule' as was stated in STANDARD CHARTERED BANK OF KENYA LTD Vs. HABIBA MOHAMED AL-AMIN & 9 OTHERS, Civil Appeal No. E029 of 2021. Further that, without substituting Mr. Raballa, who was at the centre of the alleged transactions by the Osekos in ELC No. 2905 of 1993, there could be no tenable cause of action against Lero Luno Ltd. On reliance of the Supreme Court's holding in DINA MANAGEMENT LIMITED Vs. COUNTY GOVERNMENT OF MOMBASA & 5 OTHERS (Petition 8 (E010 of 2021) [2023] KESC 30 (KLR), that a party claiming infringement of his property rights has to prove his entitlement warranting the constitutional protection, counsel asserted that the Osekos had no property rights of any colour in law over the appellants' certificates of title. In conclusion, we were urged to hold that Ms. Ouya had quality indefeasible title which had not been impeached and thus it was protected under Article 40 of *the Constitution*, section 23 of the Registration of Titles Act, Chapters 286 of the Laws of Kenya (repealed) and its successor section 26 of the *Land Registration Act*, 2012.

17. Next to highlight her submissions in support of the appeal was Ms. Ochogo for Mr. Awori, who contended that there was no agreement between Lero Luno Ltd and Mr. Raballa on one hand, and the Osekos on the other hand, regarding the suit properties, but mere negotiations about an unspecified parcel of land, which negotiations were never completed, nor a contract signed. Counsel referred us to Mr. Raballa's affidavit of 23rd July 1993, and another dated 28th October 1993, where Mr. Raballa denied there being a meeting of minds between parties, to enable them to execute the sale agreements. She drew our attention to the averments in those affidavits, specifically, that even though Mr. Raballa

was to draw the agreement for sale as vendor in the transactions, the Osekos asked him to allow them to draw the agreement concerning plot 'G' so as to cut down on costs, and he acceded to their request. Mr. Raballa further averred that he made amendments to the draft agreement, which he drew on the agreement and on a separate piece of paper and asked Mr. Oseko to include the same in the final agreement before he could approve it and sign. It was urged that the amendments were major to the extent that they included changes on; the purchase price, the deposit to be paid, the issue of possession and the vendor's name. Mr. Raballa went on to state that he was shocked when the Osekos forcefully took possession of the suit properties and began making developments on them, without presenting the final draft agreement for signing by him. Just like her colleague, Ms. Ochogo argued that the lack of presentation of the final draft agreement for approval and signing by Mr. Raballa, demonstrated that there was lack of mutuality of intentions.

18. Ms. Ochogo highlighted the decision of Bosire, J. (as he then was) of 29th November 1993 in HCCC No. 2905 of 1993, dismissing the Osekos' interim application for an injunction against Lero Luno Ltd and Mr. Raballa, regarding the suit property, on the basis that there was no executed written contract between the parties and thus no prima facie case with the probability of succeeding. Counsel pointed out Mrs. Oseko's testimony to the effect that Mr. Raballa made amendments to the draft agreement and the agreement was never signed and neither was it witnessed by other parties. He contended that this was an illustration of lack of meeting of minds between parties hence lack of an enforceable contract. Counsel went on to cite section 3(3) of the *Law of Contract Act*, Cap 23 of the Laws of Kenya, the decisions in Kukal Properties Development Ltd Vs. Tafazzal H. Maloo & 3 Others, Nairobi CA No. 155 of 1992 and LEO Investment Ltd Vs. Estuarine Estate Ltd Nairobi ELC No. 2067 of 2007, all which affirm essentials of a contract for the disposition of an interest in land.

19. Referring to section 26(1) of the *Land Registration Act*, 2012 and the holding in Njenga & 3 Others Vs. Ndua & Another (Civil Appeal 187 of 2017) [2021] KECA 253, Ms. Ochogo contended that Mr. Awori was a bona fide purchaser for value. She submitted that HCCC No. 2905 of 1993 abated one year after Mr. Raballa died on 9th June 1996 and there was no substitution that was done. Therefore, the court erred in law by allowing a suit that had abated to proceed. To anchor this argument, Ms. Ochogo relied on Order 24 rule 4(1)(2)(3) of the Civil Procedure Rules, 2010, and the decision in Muriithi Ngwenya Vs. Gikonyo Macharia Mwangi Murang'a, ELC No. 221 of 2017. Counsel argued that a suit that has abated cannot be subject to the doctrine of lis-pendens, under sections 52 and 53 of the ITPA, 1882 (now repealed). Moreover, the Osekos did not pay the full agreed purchase price. Ms. Ochogo concluded her submissions by urging us to allow the appeal with costs and set aside the impugned judgment.

20. We inquired from Ms. Ochogo whether Mr. Raballa did acknowledge receiving Ksh. 300,000 of the purchase price from the Osekos. Counsel responded in the affirmative, upon which we sought to know how then it was possible that there was no agreement between the parties. Her answer was that the initial deposit that was paid by the Osekos was in respect to the original draft agreement which Mr. Raballa later amended and changed the purchase price. We quizzed Ms. Ochogo why she was the one advancing the argument that there was no contract between parties, an argument that should have been made by or on behalf of Mr. Raballa and his company, Lero Luno Ltd. In reply, counsel initially intimated that the reason was because Mr. Raballa and his company were never served with hearing notices and pleadings, however, upon further probing by the court, she agreed that the two, through their representatives, had been made aware of the appeal.

21. We sought to know from Ms. Ochogo, the kind of due diligence that her client had carried out, considering that from the record, it seemed that the Osekos had always been in possession of the suit properties. Counsel reiterated that her client had visited the suit property and found it vacant.

However, when he took possession, he was kicked out. We further inquired whether Ms. Ochogo's client ever developed the property. Counsel indicated that her client never developed the land because of the injunction that was issued.

22. In opposition to the appeal, Ms. Ouma for the Osekos began by responding to whether the High Court had jurisdiction to determine HCCC No. 2905 of 1993. She invoked Article 159(2)(d) of *the Constitution* which enjoins courts to administer justice without undue regard to procedural technicalities. Counsel also cited James Kanyiita Nderitu & Another Vs. Marios Philotas Ghikas & Another [2016] KECA 470 (KLR), where the Court was of the view that a consent judgment or order can only be set aside on the same grounds as would justify the setting aside of a contract, for instance on grounds of fraud, mistake or misrepresentation. She contended that the appellants consented to the consolidation of the suits. They had opportunity to but did not raise the question of jurisdiction having perused all the pleadings in the three suits. Further, the issue of failure to serve summons to enter appearance was never raised as a preliminary objection and neither was it canvassed during the hearing of the suit. On reliance of the holding in Galaxy Paints Company Ltd Vs. Falcon Guards Ltd [2000] Eklr And Gurdev Singh Birdi & Narinder Singh Ghatora As Trustees Of Ramgharia Institute Of Mombasa Vs. Abubakar Madhbuti [1997] eKLR, counsel submitted that the trial court could only pronounce itself on issues arising from the pleadings or such issues as the parties had framed for the court's determination. It was thus asserted that the appellants were estopped from raising the issue at the appellate stage. Ms. Ouma submitted that Lero Luno Ltd and Mr. Raballa were represented by the law firm of Sharpley Barret Advocates, who prepared Grounds of Opposition dated 21st July 1993, in response to the Oseko's application for an injunction, dated 15th June 1993. Consequently, the appellants could not allege that because there was no service of summons to enter appearance, then the suit was impotent.

23. On whether there existed a legally binding contract between the Osekos and Lero Luno Ltd and Mr. Raballa, Ms. Ouma cited Peter Mbiri Michuki Vs. Samuel Mugo Michuki (supra) where the Court in reference to the former section 3(3) of the *Law of Contract Act*, held that even though the subject sale agreement which was made in 1964, was not in writing, the plaintiff/respondent only had to satisfy the trial court that he either took possession of the suit property in part performance of the said oral contract, or that being already in possession of the suit property, he continued in possession in part performance of the oral contract. Counsel contended that Mr. Raballa was aware of the Osekos' possession of the suit properties because he had filed a suit against them for vacant possession, being HCCC No. 3367 of 1994, which was dismissed for want of prosecution. Further, the appellants' advocate, who represented them in the sale with Ms. Mhina, and who also acted for the sole director of Lero Luno Ltd, was aware of the Osekos' possession by virtue of a letter dated 11th November 1996, whereby he inquired on the status of the pending balance of the purchase price. Williams, The Statute of Frauds: Section IV (1932) 256, page 2 and the decision in Gurdev Singh Birdi & Narinder Singh Ghatora As Trustees Of Ramgharia Institute Of Mombasa Vs. Abubakar Madhbuti [1997] eKLR as referred to in ANdrew Murugu Maina & Another Vs. Johnson Ngarari Mwaura [2019] eKLR, were cited for the proposition that a party seeking specific performance must demonstrate that he has performed or is willing to perform all the terms of the agreement. In that respect, Ms. Ouma submitted that the Osekos had given Mr. Raballa a bank guarantee from the National Bank of Kenya for the balance of the purchase price, upon Mr. Raballa releasing the title deeds of the suit properties to the Bank. Accordingly, she argued that it was Lero Luno Ltd and Mr. Raballa who failed to complete the transaction by failing to obtain all necessary approvals from the Nairobi County Council.

24. It was contended that while the appellants alleged that Lero Luno Ltd was not a party to the oral agreement, they failed to inform the court that Mr. Raballa was one of the directors and the quorum for conducting business as per the Articles of Association of the Company, was one director. Counsel

asserted that the trial court did not err in holding that there existed a legally binding and enforceable agreement between the Osekos and Lero Luno Ltd, as the Osekos had demonstrated that they had negotiations and agreed on the purchase price, a deposit of Ksh.380,000 was paid, possession was handed over as per the contract, and an undertaking for the balance of the purchase price was given to Lero Luno Ltd and Mr. Raballa, upon the handover of the titles to the bank.

25. Next, Ms. Ouma affirmed the trial court's finding that the sale and transfer of the suit properties to Ms. Mhina was unlawful. Counsel referred to the definition of the term 'lis pendens' as described in Black's Law Dictionary, 9th Edition, that is, 'the jurisdictional, power or control acquired by a court over property while a legal action is pending.' She also cited Naftali Ruthi Kinyua Vs. Patrick Thuita Gachure & Another [2015] KECA 911 (KLR) where the Court held that the doctrine of lis pendens 'overrides section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other.' She urged us to take cognisance that Mr. Munikah, the advocate who acted for Lero Luno Ltd and Ms. Mhina, was aware that the Osekos had an interest in the land and they had sued Lero Luno Ltd for specific performance of the contract, hence he should have advised Ms. Ouya and Mr. Awori accordingly.

26. Ms. Ouma asserted that the dismissal of the application for injunction in ELC No. 2905 of 1993 did not mean that the entire suit was dismissed; the doctrine of lis pendens was active up until the judgment was delivered. To buttress this argument, she cited Marete Vs. Ndegwa & 2 Others (Civil Appeal E042 of 2021) KECA 545 (KLR) where the Court opined that the doctrine runs with the suit and where a person relying on it succeeds in the suit, the doctrine may come to its aid in setting aside a transaction that might have been entered between a party to the suit and a third party. Based on section 107 of the *Evidence Act*, and the Supreme Court decision in GWER & 5 Others Vs. Kenya Medical Research Institute & 3 Others [2020] KESC 66 (KLR), counsel contended that it was incumbent on the appellants to provide evidence showing that they were bona fide purchasers for value without notice. Further, counsel pointed out that court's holding on what it means to be a bona fide purchaser for value, as elucidated in Dina Management Ltd Vs. County Government Of Mombasa & 5 Others (supra). In that case the Apex Court held that, to establish whether one is a bona fide purchaser for value, the court must first go to the root of the title. Ms. Ouma drew our attention to the fact that both Mr. Awori and Ms. Ouya never met Ms. Mhina, the vendor who sold to them the suit properties. They also did not adduce any evidence of payment of the purchase price before the trial court, and neither did they produce any land control board consents or rates clearance certificates.

27. Counsel contested the appellants' assertion that when they viewed the suit properties, they were vacant. She reminded the Court that in ELC No. 877 of 2003, the appellants had stated that they never managed to take possession of the properties because they were chased away by the Osekos. Moreover, the fact that the Osekos were in possession was constructive notice that there was an issue with the properties. Citing this Court's decision in Tenai Vs. Sidhu & 5 Others [2025] KECA 105 (KLR), counsel submitted that if the Court was to go back in history to assess the process by which Ms. Ouya and Mr. Awori acquired their titles, various irregularities would be revealed as follows; Lero Luno Ltd lacked capacity to transfer any of its assets or shares since according to its memorandum and articles of association, it required two directors to do so. Further, there could not have been a surrender of title from Lero Luno Ltd to Ms. Mhina on 2nd February 1998, as the only remaining director, Mr. Towett, had already passed on. Ms. Ouma went on to state that, Mr. Asinuli, the advocate who supposedly represented Ms. Mhina in ELC No. 870 of 2003, stated that he was aware that the Osekos had possession of the suit properties and he knew of the existence of ELC No. 2905 of 1993, as he was employed in the law firm of Munikah Advocates. It was argued that Ms. Ouya and Mr. Awori were trying to convince the court that they had title to the suit properties, which title should not be questioned, yet that acquisition was tainted with illegalities and fraud.

28. Reference was made to the decision in Mwanzia Vs. Kimea & 4 Others [2025] KEELC 517 (KLR) where the court reasoned that because the 3rd respondent's activities pointed to collusion between him and the other respondents, he had not demonstrated that he was an innocent purchaser for value without notice. Ms. Ouma quizzed why the Court should believe that Ms. Mhina exists, when she had never taken part in the proceedings and, when the advocate who was representing her, Mr. Asinuli, admitted that he had never met her. In conclusion, Ms. Ouma submitted that the trial court properly directed itself to the issues at hand by carefully analysing the facts and applying the law accordingly. She urged us to dismiss the appeal with costs.

29. In reply to submissions by counsel for the Osekos, Mr. Wesonga termed as misguided and untenable, the argument that since the issue of non-service of summons was never raised as a preliminary objection, the appellants were estopped from raising it on appeal. Counsel contended that the issue was raised by Nambuye, J. (as she then was) in her ruling of 4th July 2007, whereupon she ordered that the Osekos regularise the issue. Subsequently, an application for review of that ruling was dismissed by Okong'o, J. on 15th September 2017. In counsel's view, therefore, the issue of non-service of summons in ELC No. 2905 of 1993 remained alive. Moreover, it was a jurisdictional question that can be raised at any time and at any stage. Mr. Wesonga contended that the assertion that the appellants were estopped from raising the issue of non-service of summons was without merit as no estoppel can issue against a statute. To support this argument, he cited the holding of the court in Niazsons (k) Limited Vs. China Road & Bridge Corporation (kenya) [2000] eKLR. It was argued that the court could not by consolidation of the suits cure the irregularity, considering that the defendants in the matter were not in court so that they could consent to the consolidation. Counsel went on to state that parties could not consent to confer jurisdiction to the Court in ELC No. 2905 of 1993 when it did not have it by virtue of non-service of summons. To buttress the proposition that jurisdiction cannot be conferred by consent of parties, he cited the Supreme Court decision in Rawal & 2 Others Vs. Judicial Service Commission & 2 Others; Okoiti (interested Party); International Commission Of Jurists & 2 Others (Amicus Curiae) [2016] KESC 1 (KLR) and this Court's holding in Samuel Maina Njoroge Vs. Land Dispute Tribunal Ruiru & 2 Others [2019] KECA 949 (KLR). It was further submitted that the notice of appointment lodged by Sharpley Barret Advocates was only meant to protect the interests of the defendants in the matter, in so far as the application for injunction and the plaint was concerned.

30. Next, Mr. Wesonga reiterated that the mere filing of ELC No. 2905 of 1993 did not bring into application the doctrine of lis pendens as it depended on the active prosecution of the suit. To reinforce this submission, he cited this Court's decision in CO- Operative Bank Of Kenya Limited Vs. Patrick Kangethe Njuguna & 5 Others [2017] eKLR. On reliance of the holding of Madan J. in Baber A. Mawji Vs. United States International University & Another [1976] eKLR, counsel insisted that there must be a prohibition order by the court under section 52 of the ITPA, 1882 (repealed), for the doctrine of lis pendens to apply. He continued that, since the Osekos did not obtain a prohibitory order and neither did they appeal against the ruling of 29th November 1993, when their application for injunction was dismissed, then the suit properties were free and available for any dealing, and the issue of lis pendens became res judicata. We inquired from Mr. Wesonga whether the appellants ever appealed against the order for consolidation of the three suits, to which he gave a negative response.

31. Ms. Ochogo also made a brief reply to the submissions made on behalf of the Osekos. She urged that the appellants could not rely on the doctrine of part performance because it was not in tandem with the oral agreement that they relied on. She reiterated that the appellants were the only indefeasible title holders of the suit properties.

32. We have given due and careful consideration to the submissions made and have perused the entire record before us in a full and exhaustive manner re-evaluating and re-appraising all the evidence that

was before the trial court so as to draw our inferences of fact, and to arrive at our own independent conclusions on the appeal before us. This is our duty as a first appellate court which proceeds by way of a retrial, but alive to the fact that we have not had the advantage, enjoyed by the trial court, of hearing and observing the witnesses as they testified, for which we make due allowance. See Rule 31(1)(a) of the Court of Appeal Rules; Peters -vs- Sunday Post Limited [1958] EA 424 and Selle & Another -vs- Associated Motor Boat Company Limited & Others [1968] EA 123.

33. In a first appeal, therefore, the standard of review has to be a deferential one, giving a measure of respect to the findings of the trial court. That is not to say, however, that in appropriate cases a first appellate court will not disagree and depart from such findings. In Sumaria & Another -vs- Allied Industries Limited [2007] KLR 1, this Court spoke to this when it held as follows (at p.2);

"

" 1. Being a first appeal, the court was obliged to reconsider the evidence, re-evaluate it and make its own conclusions. A Court of Appeal would not normally interfere with a finding of fact by the trial court unless;

a. It was based on no evidence or

b. It was based on a misapprehension of the evidence or

c. The Judge was shown demonstrably to have acted on wrong principle in reaching the finding he did."

See also Mwangi & Another -vs- Wambugu [1984] KLR 453; [1982-88] 1 KAR 278.

34. Bearing those principles in mind, and having ourselves considered and re-evaluated the evidence, and the submissions made, we think that the central issues for our determination are;

1. Whether the trial court had jurisdiction to hear and determine ELC No. 2905 of 1993 (formerly, HCCC No. 2905 of 1993).

2. Whether there was a legally enforceable agreement for sale of the suit properties between the Osekos and Mr. Raballa and Lero Luno Ltd.

3. Whether the doctrine of lis pendens was applicable.

4. Whether the appellants were bona fide purchasers for value without notice.

35. Beginning with the issue of jurisdiction, the appellant's contention is hinged on Order IV, Rule 1(7) of the Civil Procedure Rules, 1985, now, Order 5, rule 1(1) and rule 2(7) of the Civil Procedure Rules, Legal Notice 151 of 2010. The rules require a defendant in a suit to be served with summons to enter appearance within a specified time. Where a summons has not been served on a defendant and an application has not been made to court to extend the validity of those summons, the court may dismiss the suit at the expiry of 24 months from the date of issuance of the original summons. The appellants argue that parties could not confer jurisdiction in ELC No. 2905 of 1993 by consenting to consolidate the matters especially because the defendants were not present in court when the consolidation was done. On the strength of the Supreme Court decision in Rawal & 2 Others Vs. Judicial Service Commission & 2 Others; Okoiti (interested Party); International Commission Of Jurists & 2 Others (Amicus Curiae) (supra) and this Court's holding in Samuel Maina Njoroge Vs. Land Dispute Tribunal Ruiru & 2 Others (supra) it is contended that jurisdiction cannot be conferred on a court through party consent. Further that, the question of jurisdiction can be raised at any stage. That argument was countered by Mrs. Oseko, the 2nd respondent, who asserted that the appellants

consented to the consolidation of the suits and thus they had an opportunity to raise the issue of jurisdiction once their advocates had perused pleadings in the three suits but did not do so.

36. A review of the record at page 615 shows that on 29th September 2003, when the three suits were consolidated, counsel for the appellants, one Mr. Kimathi, was present. The court made the following order;

> "By Consent these cases be consolidated with HCCC No. 2905/93. Application be heard on 9/10/2003 before any Judge. Orders extended."

37. There is no evidence in the proceedings that followed thereafter whether the appellants' counsel sought a review of or contested that decision in any way. As correctly submitted by the 2nd respondent, this Court and the High Court have in a litany of cases authoritatively stated that a consent judgment or order can only be set aside on the same grounds as would justify the setting aside a contract, such as fraud, mistake or misrepresentation. That was the reasoning of this Court in James Kanyiita Nderitu & Another Vs. Marios Philotas Ghikas & Another (supra) where the Court observed;

> We do not think there is any merit in the complaints by the appellants that the learned judge erred by joining Athman to the suit and by entertaining his application, which was filed out of time. Athman was joined into the suit on 18th December 2012 by the consent of the parties, including the appellants. The appellants took no action or steps to challenge the consent order joining Athman to the suit, if indeed they were aggrieved by it. They waited to raise the issue of joinder in their submissions in the applications to set aside the orders of Mbito, J. It is trite law that a consent judgment or order can only be set aside on the same grounds as would justify the setting aside a contract, for example on grounds of fraud, mistake or misrepresentation."

3. The Court was also of a similar view in Board Of Trustees National Social Security Fund Vs. Micheal Mwalo [2015] KECA 782 (KLR) where it stated;

> "29. The judgment arose from a consent of the parties to the suit. The law pertaining to setting aside of consent judgments or consent orders has been clearly stated. A Court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court." See also Flora N. Wasike Vs. Destimo Wamboko [1985] KECA 149 (KLR); S M N Vs. Z M S & 3 others [2017] KECA 506 (KLR).

39. The 2nd respondent submits that since the issue of summons was not raised in the form of a preliminary objection and neither was it canvassed during the hearing of the suit, then the appellants were estopped from raising the issue at the appellate stage. In response, the appellants cited the decision in Niazsons (k) Limited Vs. China Road & Bridge Corporation (Kenya) (supra) for the argument that there can be no estoppel against a statute. We think, respectively, that the appellants having failed to canvass the issue of non- service of summons during trial, the court could not possibly make any determination on it. We affirm the holding of this Court in Gurdev Singh Birdi & Narinder Singh Ghatora as Trustees of Ramgharia Institute Of Mombasa Vs. Abubakar Madhbuti (supra), which re- stated the well-established standard, that it is not open for this Court to inquire, for the first time, into issues which were not pleaded or canvassed and on which the Court has not benefit of the opinion of the learned Judge. In our view, once suits are consolidated, they are treated as one suit and the court cannot,

in its decision purport to uphold one suit while dismissing the other suit. The suits either stand or fall together. Further, we find it rather puzzling that the appellants, who were not party to ELC No. 2905 of 1993, are making representations on behalf of parties in that case.

40. Our foregoing observation notwithstanding, on our perusal of the record, at page 335, we sighted a 'Notice of Appointment of Advocates' dated 21st July 1993, by the law firm of Shapley Barret & Co. Advocates. At page 336, is a document titled, 'Additional Grounds of Objection and/or Notice of a Preliminary Point of Objection' of equal date, filed by the same law firm. The appellants argue that the notice of appointment was only meant to protect the interests of the defendants, in so far as the application for injunction and the plaint was concerned. We think, while the law is explicit that a defendant ought to be served with summons to enter appearance, we do not think that a party can selectively choose to participate in part of the proceedings, and later seek refuge in the argument that the court did not have jurisdiction because there was no service of summons. We are of the view that, Lero Luno Ltd and Mr. Raballa having submitted themselves to the jurisdiction of the court, were estopped from claiming that the same court lacked jurisdiction to hear and determine the suit. Whether or not summons issued, the parties did appear before the Court where they fully participated. The objective of taking our summons to enter appearance is to alert the defendant of the existence of the suit so that the defendant may come on record. Thereafter, the defendant may decide whether or not to defend the suit by filing the defence. We agree with the decision of this Court in Girado Othieno Mahaja Vs. Khafulu Khatwala & Another [1983] KLR 553 that the object of all service is to give notice to the party on whom it is made, so that he may be aware of and may be able to resist that which is sought against him; and when that has been substantially done, so that the court may feel perfectly confident that service has reached him, everything has been done that is required.

41. It is further contended that ELC No. 2905 of 1993 abated when Mr. Raballa passed on and was not substituted, and that consequently, the court erred when it allowed the suit to proceed. The appellants rely on Order 24 Rule 4(1)(2)(3) of the Civil Procedure Rules, 2010 for that argument. The said provisions are couched thus;

    1 Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

    2. Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

    3. Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant."

42. While the above provisions allow as of right for a deceased party to a suit to be substituted with his or her legal representative, we are also cognisant that pursuant to Order 24 rule 1, a suit does not abate by the mere death of a party, if the cause of action continues. In this matter, it is evident that when Mr. Raballa passed away on 9th June 1996, the suit was still on- going. The suit continued as against Lero Luno Ltd, who was the 1st defendant in the case. In our view, therefore, ELC No. 2905 of 1993 did not abate by virtue of Mr. Raballa's demise. Consequently, we are not convinced that the court lacked jurisdiction to determine ELC No. 2905 of 1993.

43. Turning to whether the Osekos had a legally binding and enforceable agreement for sale of the suit properties with Mr. Raballa and Lero Luno Ltd, we note that the learned Judge upon considering this

issue came to the conclusion that based on the evidence on record, and the provisions of the pre-2003 section 3(3) of the *Law of Contract Act*, the agreement between the Osekos and Lero Luno Ltd and Mr. Raballa was legally enforceable. Section 3(3) of the *Law of Contract Act* that was in force at the material time provided as follows;

> "(3) No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorised by him to sign it, provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract-
>
> i. Has in part performance of the contract taken possession of the property or any part thereof or
>
> ii. Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract."

44. Essentially, the provision permitted a suit to be instituted upon a contract for the disposition of an interest in land, even where the agreement is not in writing, so long as it could be shown that the intending purchaser had in part performance of the contract taken possession of the property or any part thereof, or being already in possession, he continued in possession in part performance of the oral contract. See Peter Mbiri Michuki Vs. Samuel Mugo Michuki(supra).

45. The appellants argue that there was no executed instrument produced by the Osekos crystallizing the agreement and there was equally no oral agreement. They rely on Mr. Raballa's affidavits of 23rd July 1993 and 28th October 1993, where he deposed that there was no sale agreement between him and the Osekos. It is urged that there was no meeting of minds and the negotiations between the parties could not bind them. To support that argument, the appellants cited various authorities including, Michira Vs. Gesima Power Mills Ltd [2004] KECA 61 (KLR), a case that is substantially similar to the instant one. The decision in that case is, however, distinguishable from this matter to the extent that the Court found that neither party actively endeavored to perform his obligations in order to bring the contract to fruition. In this case, by contrast evidence was led that following negotiations between Mr. Raballa and the Osekos, which were later reduced into a draft agreement for sale, although the contract remained in draft, the Osekos paid a deposit of the purchase price. They then took possession of the suit properties after giving Mr. Raballa a bank guarantee from the National Bank of Kenya, for the balance of the purchase price, upon his releasing the title deeds to the bank. A copy of the bank guarantee is at page 348 of the record. When there was breach of the agreement, the Osekos instituted a suit being ELC No. 2905 of 1993 seeking, among other remedies, specific performance of the agreement for sale. We are of the considered view that the Osekos made effort to perform their end of the bargain.

46. The appellants also relied on the decisions in Kukal Properties Development Ltd Vs. Tafazzal H. Maloo & 3 Others (supra) and Leo Investment Ltd Vs. Estuarine Estate Ltd (supra) for the proposition that the agreement between the Osekos and Mr. Raballa and Lero Luno Ltd, did not meet the essentials of a contract for the disposition of an interest in land as stipulated in section 3(3) of the *Law of Contract Act*. These authorities are, however, distinguishable from the present matter for the reason that the agreement of sale between the Osekos, Mr. Raballa and Lero Luno Ltd was made in 1992/1992 and was therefore regulated by the pre-2003 *Law of Contract Act*. The learned Judge recognised that fact as much. Section 3(3) of the pre-2003 *Law of Contract Act* recognised oral contracts for sale of land

while post-2003 it does not, and that is what is invoked in the above-stated authorities which have been relied on by the appellants.

47. The Osekos contend that following oral negotiations with Mr. Raballa, a director of Lero Luno Ltd, they agreed to purchase the suit properties and went ahead to pay an additional deposit of Ksh.300,000, in addition to the Ksh.80,000 which they had paid earlier for a different plot that was disposed of to another purchaser. They later expressed the agreement in writing and appended their signature. However, when they took the agreement to Mr. Raballa for approval and appendage of his signature, he made handwritten amendments to the contract and returned it to them to input those alterations. Those amendments are partly visible from the agreement which is found at pages 476 to 480 of the record. We further note that in an affidavit sworn by Mr. Raballa on 23rd July 1993, found at pages 340 to 346 of the record, Mr. Raballa acknowledged at paragraph seven (7) that discussions between the Osekos and himself concerning the purchase of part of his property began in the year 1991. At paragraphs 10 and 12, he acknowledged receiving Ksh.49,000 and Ksh.30,000, respectively, as deposit for the property. At paragraph 14, he averred that on 5th March 1993, he received a further Ksh.300,000 as part payment of the purchase price. At paragraph 19, Mr. Raballa deposed;

> "As stated above and is evident from exhibit 'M00-4' attached to the plaintiffs' application, the first plaintiff undertook to draw, engross and tender to me the Agreement for Sale for execution by the defendant company. I have been expecting to receive from the plaintiff the final draft Agreement for Sale for my approval before engrossment. To date the plaintiffs have failed to furnish me with the said final draft."

48. In our considered view, the terms of the amended sale agreement and the foregoing averments by Mr. Raballa, demonstrate that to a certain significant extent there was a meeting of minds between parties sufficient to be construed as an oral agreement, which had not yet been reduced into a written agreement.

49. On reliance of the decision in Peter Mbiri Michuki Vs. Samuel Mugo Michuki, (supra) the appellants contend that possession of the suit properties by the Osekos was not lawful, open and continuous and therefore did not meet the conditions prescribed under section 3(3) of the *Law of Contract Act*. In her testimony, however, Mrs. Oseko stated that when they paid a deposit of Ksh.300,000, some time in 1993, they agreed with Mr. Raballa to take possession of the suit properties. They then proceeded to occupy the properties by clearing them and depositing building materials for their residential house. Pictorial evidence of the same was provided during trial, as indicated at Pages 488 to 492 of the record. On the other hand, the appellants, who purchased the suit properties in October 2002, averred that the Osekos evicted their workers from the suit properties and they continue to be present there. We are in agreement with the learned Judge that the evidence on record overwhelmingly shows that the Osekos took possession of the property in 1993, so many years before the appellants came into the picture when they purchased the property in 2002. In so finding, we re-state this Court's sentiments in PETER MBIRI MICHUKI Vs. SAMUEL MUGO MICHUKI, (supra), a decision that has been relied on by both the appellants and the respondents;

> "25. [...] Having re-evaluated the evidence we concur with the finding of the learned judge that the plaintiff/respondent proved that he had actual and/ or constructive possession of the suit property since 1964 and the possession was open, uninterrupted and continuous till the filing of the Originating Summons by the Plaintiff in1991. It is our view that Section 3 (7) of the *Law of Contract Act* makes exception to oral contracts for sale of land coupled with part performance. We find that Section 3 (3) of the *Law of Contract Act*

came into effect in 2003 and does not apply to oral contracts for sale of land concluded before Section 3 (3) of the Act came into force. The proviso to Section 3 (3) of the *Law of Contract Act* applies in this case and we hold that the sale agreement between the appellant and the plaintiff did not violate or offend the provisions of the *Law of Contract Act*."

50. The appellants submit that if at all there existed an oral agreement between the Osekos and Mr. Raballa, the same could not confer any right or liability on Lero Luno Ltd which was not a party to the oral agreement. Citing the decision of this Court in Savings &loan(k)limitedvs.kanyenjekarangaita Gakombe & Another [2015] eKLR, it is urged that a contract affects only the parties to it. The 2nd respondent, however, posits that Mr. Raballa was one of the directors of Lero Luno Ltd and according to the Memorandum and Articles of Association of the company, the quorum for conducting business is one director. Indeed, paragraph 31 of the said Memorandum and Articles of Association of Lero Luno Ltd, found at page 461 of the record reads, 'The quorum of Directors for transacting business shall, unless otherwise fixed by the Directors be one.' We observe that while this Court in Savings & Loan (k) Limited Vs. Kanyenje Karangaita Gakombe & Another (supra) reasoned that a contract cannot confer rights or impose obligations to a person who is not a party to the contract, it also acknowledged that there are exceptions to the doctrine of privity of contract. The Court rendered itself as follows;

> "Over time some exceptions to the doctrine of privity of contract have been recognized and accepted. Among these exceptions is where a contract between two parties is accompanied by a collateral contract between one of them and a third party relating to the same subject matter. Thus in Shanklin Pier V Detel Products Ltd [1951] 2 KB 854, for example, the plaintiff owned a pier, which it wished to be repainted. After the defendant represented to the plaintiff that some particular paint was fit for purpose, the plaintiff directed its contractor to use that paint. The contractor purchased the paint from the defendant, which proved unfit for purpose. Upon a suit by the plaintiff against the defendant, the court found for the plaintiff notwithstanding the fact that there was no privity of contract between the plaintiff and the defendant, as far as the contract for the sale of the paint was concerned.
>
> While the proposition that a contract cannot impose liabilities on a non-party has been widely embraced and accepted as rational and well founded, the proposition that a contract cannot confer a benefit other than to a party to it has not been readily accepted and has in fact been the subject of much criticism. In DArlington Bourough Council V Witshire Northern Ltd [1995] 1 WLR 68 Lord Steyn eloquently demonstrated the flaw in the proposition in the following terms:
>
> 'The case for recognizing a contract for the benefit of a third party is simple and straightforward. The autonomy of the will of the parties should be respected. The law of contract should give effect to the reasonable expectations of contracting parties. Principle certainly requires that a burden should not be imposed on a third party without his consent. But there is no doctrinal, logical or policy reason why the law should deny effectiveness to a contract for the benefit of a third party where that is the expressed intention of the parties. Moreover, often the parties, and particularly third parties, organize their affairs on the faith of the contract. They rely on the contract. It is therefore unjust to deny effectiveness to such a contract.'"

51. We are of the view that Mr. Raballa as director of Lero Luno Ltd was acting on behalf of the company when he engaged the Osekos in an oral agreement with respect to the suit properties. The Osekos then

proceeded to take possession of the properties on the faith of that contract. We think, with respect, though Lero Luno Ltd may not have been party to the oral contract, it was bound by its agent's actions. In conclusion therefore, we find that the Osekos had a legally binding and enforceable agreement for sale of the suit properties with Mr. Raballa and Lero Luno Ltd.

52. As to whether the doctrine of lis pendens was applicable, the appellants submit that there was no suit pending capable of underpinning the doctrine of lis pendens. It is argued that a bar to transfer property during pendency of a suit under section 52 of the ITPA is not automatic. There must be active prosecution of the case and a prohibition order that is accompanied by an injunction, which was not the case herein. The 2nd respondent rejects that argument while asserting that the fact that the injunction in ELC No. 2905 of 1993 was dismissed did not mean that the entire suit was dismissed; the doctrine of lis pendens was active up until the judgment was delivered. It is urged that Munikah & Company Advocates, the law firm that represented Lero Luno Ltd and Ms. Mhina in the transaction, was aware that the Osekos had possession of the land and should have accordingly advised the appellants. Section 52 of the ITPA, 1888 (repealed) delineates the doctrine of lis pendens as follows;

> "During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose."

53. This Court has had occasion to define the doctrine iN Naftali Ruthi Kinyuavs.patrickthuitagachure&another (supra), while citing with approval the holding of Turner L. J, in Bellamy Vs. Sabine [1857] 1 De J 566 as follows;

> Lis pendens is a common law principle that was enacted into statute by section 52 Indian Transfer of Property Act (ITPA)-now repealed. While addressing the purpose of the principle of lis pendens, Turner L. J, in Bellamy vs Sabine [1857] 1 De J 566 held as follows:-
>
> > 'It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendent lite were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendants alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same course of proceedings.'"

54. In Marete Vs. Ndegwa & 2 Others [2024] KECA 545 (KLR), the Court reasoned as follows;

> In our understanding, the doctrine of lis pendens runs with the suit so that its application depends on the outcome of the suit. Where the person relying on the doctrine succeeds in the suit, the doctrine may come to its aid in setting aside a transaction that might have been entered into between the other party to the suit and a third party without necessarily affecting the other party's liability to the third party. However, where the party who seeks to rely on the doctrine fails in the suit, he can no longer rely on the doctrine."

55. Similarly, in Carol Silcock Vs. Kassim Sharrif Mohamed [2013] KEELC 137 (KLR), Angote, J. observed thus;

33. Section 52 of the ITPA 1882 prohibits the transfer of a property to a third party during the pendence of a suit. The converse of this provision therefore is that where a party to a suit transfers the suit property to a third party, such a transfer shall be null and void for being contra statute. Such a transfer cannot affect the rights of a Decree holder.

34. As I stated in Malindi HCCC No. 63 of 2013,; Abdalla Omar Nabhan Vs. The Executor of the Estate of Saad Bin Abdalla Bin Abuod & Another, the purposes of the principle of lis pendens is to preserve the suit property until the suit is finally determined or until the court issues orders and gives terms on how the suit property should be dealt with. The doctrine of lis pendens is founded on public policy and equity.

[...]

37. The doctrine of lis pendens has also been discussed in the Treaties by Mulla & Gour on the Indian Transfer of Property Act. In Mulla, 5th Edition, page 245 and Gour, 7th edition, Vol.1, Page 579, the two authors state as follows:

> 'Every man is presumed to be attentive to what passes to the courts of justice of the state or sovereignty where he resides. Therefore, purchase made of property actually in litigation, pendete lite, for a valuable consideration, and without any express or implied notice in point of fact affects the purchase in the same manner as if he had such notice, and he will be accordingly be bound, by the judgment or decree in the suit.'"

56. We enclose the foregoing pronouncements on the doctrine in view of our finding above, that there was an oral legally enforceable sale agreement between the Osekos and Mr. Raballa and Lero Luno, it follows that the suit properties were not available for transfer to Ms. Mhina. Pursuant to the doctrine of lis pendens, which is a doctrine of general application, the suit properties ought to have been preserved during the pendency of ELC No. 2905 of 1993, until the suit was finally determined. We concur with the learned Judge that the doctrine of lis pendens was applicable and the transfer of the suit properties to the appellants was in breach of that doctrine.

57. On whether the appellants were bona fide purchasers for value without notice, the appellants place reliance on the apex court's decision in Dina Management Ltd Vs. County Government Of Mombasa & 5 Others (supra), for the submission that a party claiming infringement of his property rights has to prove his entitlement warranting the constitutional protection. They urge that they have quality indefeasible title which is protected under Article 40 of the Constitution, section 23 of the Registration of Titles Act, Cap 286 of the Laws of Kenya (repealed) and its successor section 26 of the *Land Registration Act*, 2012. The respondent also relies on the same Supreme Court decision for the argument that to establish whether one was a bona fide purchaser for value, it is imperative to go to the root of the title.

58. In its decision in Dinah (supra), the Supreme Court took into account this Court's holding in Munyu Maina Vs. Hiram Gathiha Maina [2013] KECA 94 (KLR) where the Court opined;

> 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 need not be noted on the register."

59. Our reading of the letter dated 11th November 1996, found at pages 241 and 242 of the record, reveals that both Lero Luno Ltd and Ms. Mhina, were aware of the Osekos' purchase and possession of the suit properties. In the letter, Mr. Munikah, the Advocate who acted for the remaining director of Lero Luno Ltd, in the transaction for the sale of the suit properties, inquires from the Osekos as to the status of the pending balance of the purchase price. Notably, the appellants confirmed in their testimony during trial that the said Mr. Munikah, was the advocate who acted for Ms. Mhina, the vendor who sold to them the suit properties, although they never met her. The letter which is authored by Munikah & Company Advocates and addressed to Mr. & Mrs. M. O. Oseko, is referenced, 'LR NO. 12219 AND LR NO. 12221 Karen; Langata Nairobi And Lero Luno Enterprises LTD'. It reads in part;

> 'Dr. Towett, without prejudice, is in principle willing to discuss through ourselves any commitment the late Raballa had negotiated with any third party effecting the Company and or the lands. Your name features vaguely on the Company's relevant titles as having held some interest in some portions of the said lands.
>
> Mr. S. M. Munikah has now been retained by Dr. Taaitta Arap Toweett to handle matters of the Company and the said lands. We shall be grateful if you will as a matter of urgency communicate with us stating inter alia;
>
> i. Your interest and consideration agreed and copies of supporting documents,
>
> ii. Performance (if any),
>
> iii. Outstanding performance (if any),
>
> iv. Any other relevant information.'

60. In light of our finding that the doctrine of lis pendens was applicable and the statements in the above letter, we are not persuaded that the appellants did all the necessary due diligence to ensure that the titles to the suit properties were free of any encumbrances. They therefore were not bona fide purchasers for value without notice. Accordingly, their titles to the suit properties are invalid and defeasible and the learned Judge had a sound basis in law and fact for so holding.

61. The upshot is that this appeal fails and is hereby dismissed.

We order that each party shall bear own costs of the appeal.

Order accordingly.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF OCTOBER, 2025.

O. KIAGE

....

JUDGE OF APPEAL

JAMILA MOHAMMED

....

JUDGE OF APPEAL

G. V. ODUNGA

....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR