



**Akunga v Obwoge & 3 others (Environment and Land Appeal  
E048 of 2024) [2025] KEELC 7650 (KLR) (4 November 2025) (Judgment)**

Neutral citation: [2025] KEELC 7650 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT AND LAND APPEAL E048 OF 2024**

**M SILA, J**

**NOVEMBER 4, 2025**

**BETWEEN**

**PATRICIA KERUBO AKUNGA ..... APPELLANT**

**AND**

**JAMES MOKAYA OBWOGE ..... 1<sup>ST</sup> RESPONDENT**

**CHARLES ONDIEKI BOSIRE ..... 2<sup>ND</sup> RESPONDENT**

**ALRED OCHWANGI OBONYO ..... 3<sup>RD</sup> RESPONDENT**

**DANIEL OIKO OMBUNA ..... 4<sup>TH</sup> RESPONDENT**

*(Being an appeal against the decision of Hon. C.A Ocharo, Chief Magistrate,  
delivered on 29 October 2024 in the suit Kisii MCELC No.12 of 2019)*

**JUDGMENT**

1. The suit giving rise to this appeal was commenced by the appellant, through a plaint filed on 29 January 2019 in the Chief Magistrates' Court at Kisii. The appellant pleaded to be the registered proprietor of the land parcel West Kitutu/Mwamonari/38 (parcel No. 38) holding in trust for John Barongo Nyabaro and William Siro Nyabaro (her brothers). She claimed that the respondents had trespassed into her land and that one of them, the 2<sup>nd</sup> respondent, had promised to move out but had failed to do so. In the plaint she asked for the following orders :
  - a. An eviction order be issued against the defendants from the plaintiff's land parcel West Kitutu/Mwamonari/38.
  - b. Costs of the suit be provided.
2. The 2<sup>nd</sup> respondent filed a defence and counterclaim through M/s Moracha & Company Advocates. In the counterclaim, he sued John Barongo Nyabaro and William Siro Nyabaro (brothers to the



plaintiff). His case was that on 28 February 2008, the two sold to him a portion measuring 0.2 Ha of their father's land in the land parcel West Kitutu/Mwamonari/38 for Kshs. 150,000/=. He came to be registered as proprietor of this portion which was registered as West Kitutu/Mwamonari/2455. He took possession and did substantial developments. He pleaded that on unknown dates the defendants in the counterclaim and the appellant conspired to transfer the land parcel West Kitutu/Mwamonari/38 to the appellant. In his counterclaim, he asked for the following orders :

- a. Refund of Kshs. 150,000/= plus interest from 28 February 2008 to the date of judgment.
  - b. Costs of the counterclaim.
3. The 4<sup>th</sup> respondent filed a defence through M/s J.M Nyagwencha & Company Advocates. He put the appellant to proof on how she came to be registered without succession being done and pleaded that the land parcel West Kitutu/Mwamonari/38 should be in the name of Nyabaro Nyatenga. He asked for the suit to be dismissed.
  4. The 1<sup>st</sup> and 3<sup>rd</sup> respondents appointed M/s Bosire Gichana & Company Advocates but they filed separate defences. The defence of the 1<sup>st</sup> respondent was fairly brief. He pleaded that he purchased a portion of the land parcel No. West Kitutu/Mwamonari/ 2454 from William Nyabaro and John Nyabaro on 5 September 2011 at a consideration of Kshs. 55,000/=.
  5. The 3<sup>rd</sup> respondent filed defence and counterclaim. He also pleaded to have bought a portion of land parcels No. West Kitutu/Mwamonari/3760 and 2758 from William and John Nyabaro at a consideration of Kshs. 170,000/= and became registered owner on 28 August 2014. He pleaded that they conspired with the Land Registrar to have his title to the parcel No. 3760 cancelled. He further pleaded that the 4<sup>th</sup> respondent forcefully entered his land and took possession. In the counterclaim, he asked for the following orders :
    - a. A declaration that the cancellation of title No. West Kitutu/Mwamonari/3760 was unlawful and unprocedurally done.
    - b. A permanent injunction restraining the plaintiff, 1<sup>st</sup>, 2<sup>nd</sup>, and 4<sup>th</sup> defendants from the land parcel West Kitutu/Mwamonari/3760.
    - c. In the alternative the appellant be ordered to compensate him the value of the land.
    - d. Damages including general damages for trespass, exemplary and aggravated damages.
    - e. Costs of the suit.
  6. Before the hearing commenced, it was mentioned in court, on 29 August 2023, that the 4<sup>th</sup> defendant/ respondent is deceased. No application for substitution was made and I presume that the case against him abated.
  7. Hearing commenced on 6 December 2023 when Julius Onchware Akunga testified as PW-1. He is a son of the plaintiff. He adopted a witness statement as his evidence. In it, he described himself as a newspaper vendor in Kisii Town. He stated that the appellant was his mother and thus Morris Nyabaro Nyatenga was his maternal grandfather. He died in 1983. His grandmother had earlier died in 1971. He stated that they left five sons and two daughters but only two uncles (John and William Nyabaro) and his mother are surviving. He stated that the suit land was registered in the name of his grandfather during adjudication in 1976. He stated that none of his uncles have put up any structures and that it was the 2<sup>nd</sup> respondent who had developed on the land. He stated that the suit land was subdivided in 2008 to three parcels, being No. 2454 in name of William Nyabaro, No 2455 in name of Charles Ondieki (2<sup>nd</sup> respondent) and parcel No. 2456 in name of William Nyabaro. He stated that he was



- certain that no succession had been done prior to this subdivision. He produced documents relating to a succession matter filed by his mother in the year 2016 and copies of the green cards.
8. Cross-examined, he stated that his mother got registered as proprietor of the suit land pursuant to the succession cause that she filed in 2016. He acknowledged that his uncles do not live on the land. He did not know where his uncles were and did not know if they sold the land. He stated that it was the respondents living on the land and that his mother does not live on the land.
  9. PW – 2 was the appellant. She also had a pre-recorded witness statement which she adopted as her evidence. In it she reiterated what was stated by PW-1, that her late father died in 1983 while registered as proprietor of the land parcel No. 38. She stated that she had 6 brothers and a sister and that she is married. She mentioned that four of her brothers are dead and those surviving are William Nyabaro and John Nyabaro who are twins. She mentioned that none of the two was married. She testified that she came to visit her father's land and her brothers, only to find that the 2<sup>nd</sup> respondent had built a house on the land. He inquired from him and he told her that he had bought the land from her two brothers. He however did not produce any document to show the purchase, nor did he say when and for how much he bought the land. She thereafter reported the matter at Rioma police station and the District Officer's office but no action was taken. She went to the Land Registry and found that the land parcel No. 38 had been subdivided in 2008 into the parcels No. 2454, 2455 and 2456 in names of John Nyabaro, William Nyabaro, and Charles Ondieki (2<sup>nd</sup> respondent). She mentioned that there were further subdivisions on the parcel No. 2454 on 18 July 2014 to produce the parcels No. 2757 and 2758; parcel No. 2456 was subdivided to produce a parcel No. 2759. She believed that the 2<sup>nd</sup> respondent forged the succession transmission form which could not be traced.
  10. Cross-examined she testified that she does not know where her siblings are though she involved them in the succession matter. She stated that she does not know if they are alive. She filed the succession matter as daughter of her late father. She was not aware that the cancellation of the titles earlier issued did not follow procedure but acknowledged that the respondents were not called to the Lands office. She is married and has her own land. She stated that she is yet to distribute the suit land (No.38) to her two siblings though they are entitled to a portion. She stated that she started following up on the land in 2015.
  11. With that evidence the appellant closed her case.
  12. DW-1 was Charles Ondieki Bosire, the 2<sup>nd</sup> respondent. His evidence was that he purchased the suit land from William Nyabaro and John Nyabaro on 28 February 2008. He produced the sale agreement and acknowledgement of payments. He got title to the land parcel No. West Kitutu/Mwamonari/2455. He testified that this is where he lives with his family and calls home. He stated that he has had no issue with the persons who sold to him the land. He testified that in 2010, the appellant came and complained that her brothers had sold the land without her consent. He claimed that they had a sitting at Rioma Police station and it was agreed that he could continue living on the land. In 2018 issues arose when he realized that the appellant had obtained a grant. He claimed that the persons who sold to him the land are now being hidden.
  13. Cross-examined, he stated that they appeared before the Land Control Board (LCB) and the land was subdivided. His title was however later cancelled by the Land Registrar without him being summoned. He came to know of the cancellation when he was charged with the offence of Forcible Detainer. He claimed that there was succession matter and the land came directly to him after that process. He testified that when the appellant's brothers sold the land to him, the title was in their name (William and John) who got registered as owners on 10 April 2008. He acknowledged that he did not produce the LCB consent or the transfer documents to himself nor any stamp duty receipt. He did not seek



- the consent of the appellant before purchasing the land though the sellers told him that they had two sisters.
14. With that evidence the 2<sup>nd</sup> defendant closed his case.
  15. DW -2 was James Mokaya Obwoye, the 1<sup>st</sup> defendant. His evidence was that sometime in 2010 he purchased a portion of the land from William and John Nyabaro measuring 20 x 40 metres which he cultivates. He however has no title. Cross-examined he acknowledged that his sale agreement is undated. He was aware that the subdivision titles were cancelled. He has never gone to the Land Control Board.
  16. DW -3 was Alfred Ochwangi Obonyo, the 3<sup>rd</sup> respondent. His evidence also was that in 2014 he bought a portion of the land from William and John Nyabaro and he got titles reading West Kitutu/Mwamonari/2758 and 2760. He elaborated that the title No. 2758 came from the parcel No. 2454 and the title No. 2760 came from the parcel No. 2456. He took possession but later the 4<sup>th</sup> defendant (now deceased) forcefully entered the land. He followed up and discovered that his titles have been cancelled. He claimed to have filed the suit Kisii ELC No 157 of 2018 which is yet to be determined. He testified that when he bought the land the title to the parcel No. 38 had been closed and he was convinced of the genuineness of the sale. He is now not on the land having been evicted in 2018. Cross-examined, he testified that he did not know that the sellers had other siblings when he bought the land. The last time he spoke to them was in 2017. He stated that he did a search before the purchase but he did not have it. He did not inquire whether succession was done as the sellers had titles. He acknowledged that he had not produced any LCB consent, the transfer documents, nor the stamp duty receipts. He also had not produced payment to obtain the title and the sale agreement.
  17. With that evidence, the defence closed their case. Counsel were invited to file submissions and the judgment was subsequently delivered.
  18. In her judgment the trial court dismissed the counterclaims of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents for want of service. Regarding the case of the appellant, she was of opinion that the appellant was aware of the occupation of the land by the respondents, and was aware that her brothers had disposed their interest to the respondents. She held that the appellant could not simply file suit for eviction and ignore the fact that at the time of her registration there were persons on the land who had established homes and in possession. She held that prior to filing the succession proceedings, she ought to have made inquiries since the respondents were in possession. She was of opinion that the appellant was not acting in good faith and held that she failed to meet the maxims of equity, that he who seeks equity must do equity, and he who comes to equity must come with clean hands. She held that the appellant is not a truthful person and that she has approached court with unclean hands. She was not convinced that she did not know of her brothers' whereabouts. She held that the manner that the appellant obtained registration was clouded with non-disclosure of material facts. She found that the appellant does not reside on the suit property and the balance of convenience would not favour her and neither would she suffer loss if the orders she has sought are not granted unlike the respondents. She closed her judgment expressing frustration that the parties were sent to mediation but failed to agree. She dismissed the appellants' case with costs to the respondents.
  19. Aggrieved by the judgment, the appellant has preferred this appeal on the following grounds :
    - i. That the learned trial Magistrate erred in law and fact by holding that the plaintiff was the registered owner of the land parcel West Kitutu/Mwamonari/38 but strangely proceeded to dismiss the appellant's suit with costs in spite of the clear and undisputed evidence on how she acquired title to the suit property.



- ii. That the trial Magistrate erred both in fact and law by ignoring that the respondents' right over the various titles they purported to hold are not recognizable in law and if they wanted any remedy they could have pursued it in a different fora and on different persons other than in dismissing the appellant's suit.
  - iii. That the trial Magistrate erred in law and fact by failing to consider the uncontroverted and corroborated testimony tendered by the appellant which clearly showed that the appellant was the registered owner of the land and the only inescapable conclusion to be arrived at was to allow the appellant's suit with costs.
  - iv. That the trial Magistrate erred in failing to consider the appellant's testimony, evidence and submissions, and arrived at an unjustified decision.
20. The appellant seeks that the judgment be substituted with one allowing the appellant's suit as prayed.
  21. The appeal was argued through written submissions and I have taken note of the submissions filed by Mr. Godia, learned counsel for the appellant, Mr. Moracha, learned counsel for the 2<sup>nd</sup> respondent, and Ms. Bosire, learned counsel for the 1<sup>st</sup> and 3<sup>rd</sup> respondent. I am of the following view.
  22. The case of the appellant was one of eviction. She asserted to have title to the land parcel West Kitutu/ Mwamonari/ 38 and she contended that the respondents were in illegal occupation, thus the prayer for their eviction. The respondents' case was that they purchased the suit land from the brothers of the appellant and took occupation. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents averred that they in fact got titles to what they purchased. It will be recalled that the 2<sup>nd</sup> respondent had a counterclaim against William Nyabaro and John Nyabaro seeking refund for the amount of Kshs. 150,000/= that he claimed to have paid in 2008. The other counterclaim was filed by the 3<sup>rd</sup> defendant who claimed to own the parcels No. 3760 and 2758 (though I observe in her judgment that the trial Magistrate stated that he corrected this to read the parcel No. 2760). He wished to have a declaration that the cancellation of his title to the parcel No. 3760 was unprocedurally done, a permanent injunction and general damages. I would imagine that the 2<sup>nd</sup> respondent's counterclaim was being made in the event that he lost the suit lodged by the appellant against him so that he can secure damages against William and John Nyabaro. He had no pleadings to contest the manner in which his title to the land parcel No. 2455 was cancelled and no pleadings for its reinstatement. For the 3<sup>rd</sup> respondent the striking out of his counterclaim means that there are no pleadings to interrogate the manner in which his title was cancelled and no contestation about the cancellation of the same.
  23. The case therefore proceeds on the basis that the title to the land is that held by the appellant which is the title West Kitutu/Mwamonari/38, and there is no other title. Indeed, that is the position of the matter. The only title that can be said to be present is the title to the land parcel West Kitutu/ Mwamonari/38. The alleged titles to the subdivisions of this parcel No. 38 do not exist in the Lands Registry.
  24. The case of the appellant was that the respondents had no entitlement to the land given that they purported to purchase and occupy the land before succession of the estate of her late father was first undertaken. She pressed the point that without succession being done, the land parcel No. 38 could not be subdivided and titles to those subdivisions could not issue to her two brothers or to any purchaser. She urges that her brothers could not have had capacity to sell any portion of the suit land.
  25. None of the respondents availed any evidence to show that there had been any succession of the estate of the late Nyabaro Nyatenga, filed by William and John Nyabaro. Indeed, it is a mystery as to how this land parcel No. 38 was purportedly subdivided to bring forth the parcels West Kitutu/



Mwamonari/2454, 2455 and 2456. It is also a mystery as to how the 2<sup>nd</sup> defendant got himself registered as owner of the land parcel No. 2455. Save for the alleged sale agreement between him and the brothers of the appellant, he did not provide any consent from the Land Control Board, no transfer instrument, no payment of stamp duty, and no evidence of payment of any registration fees. So too the 3<sup>rd</sup> respondent. The record shows that all these titles were reversed so as to return the parcel to the No. 38 in name of Nyabaro Nyatenga, and as I have mentioned, I have no pleadings to interrogate the manner of cancellation of these titles.

26. The evidence provided demonstrates that it is the appellant who filed succession for the estate of her late father in 2016 vide the suit Kisii CMSuccession Cause No. 359 of 2016. She obtained a grant to represent the estate and the same was confirmed on 22 March 2018. The confirmation of grant shows that the suit land is to be registered in name of the appellant in trust for her two brothers.

27. I do not see any law that would protect the respondents. They could not purchase land from the brothers of the appellant as they were not registered as proprietors and did not hold any grant of letters of administration. That purported act of purchase of land was an act of intermeddling in the estate of a deceased person which is outlawed by Section 45 of the *Law of Succession Act*, Cap 160, Laws of Kenya, which is drawn as follows :

45. No intermeddling with property of deceased person

(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 to 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.

28. The above law is clear. It is inescapable that the respondents could not purport to have acquired any interest in the suit land by virtue of any legitimate purchase from William and John Nyabaro as they had no capacity or indeed any right to sell. The respondents thus had no right to take possession or occupation of the suit land. In her judgment, the trial Magistrate held that the appellant knew of their occupation ; of course she came to know of their occupation and that is why she sued them. But it cannot by any stretch be claimed that she was complicit to the purported sale of the land to the respondents. She was certainly not a party to any of the alleged sale agreements. In fact, no evidence whatsoever was led to support those sale agreements save for the sole evidence of the respondents themselves. The purported sellers never testified and nobody was called as a witness to confirm any such sales. However, what is critical, which I have already elaborated above, is that the respondents could not obtain any interest in the land without proper succession first being undertaken.

29. I see that in her judgment the trial Magistrate was very sympathetic to the respondents. There was no place for such sympathy. The respondents took occupation of land that was in name of a deceased person without succession and they should have known better.



30. Within this appeal, it was urged that they are innocent purchasers for value. They cannot be. They cannot be said to be innocent purchasers for value when they have no consent from the Land Control Board, no proof of any transfer instrument, no proof of having paid any stamp duty nor registration fees. They do not meet the test of an innocent purchaser for value and they cannot be protected.
31. There was no basis for dismissing the case of the appellant. In fact if you critically analyse the judgment, you will see the absurd result of dismissing the case of the appellant. This is because despite dismissing the case of the appellant, the trial court made no orders to affect the title of the appellant. It still remained in her name in trust for her two brothers. There was no order made to cancel or nullify this title. Neither was there any order made to reinstate the titles held by the 2<sup>nd</sup> and 3<sup>rd</sup> respondent, or any order made for transfer to the 1<sup>st</sup> respondent of the portion that he alleged to have purchased. So where would the judgment leave the parties? Despite the judgment, the respondents would still be floating, with no title, and the appellant would also be left floating, with a title but no right to the land.
32. There was truly no basis for dismissing the case of the appellant. You do not base a judgment on sympathy but on law and facts. The law and the facts of this case were against the respondents and in favour of the appellant. Painful as it may be to the respondents, it was the appellant who had demonstrated good title to the suit land. She deserved the order of eviction.
33. For the reasons above I allow this appeal. I proceed to set aside the judgment of the trial court. I substitute it with an order that the case of the appellant before the trial court succeeds as prayed. I give the respondents 90 days to give vacant possession or they be evicted. The appellant will also have the costs of the case before the lower court and the costs of this appeal.
34. Judgment accordingly.

**DATED AND DELIVERED THIS 4<sup>TH</sup> DAY OF NOVEMBER 2025**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT KISII**

Delivered in the presence of :

Mr. Godia for the appellant

Ms. Bosire for the 1<sup>st</sup> & 3<sup>rd</sup> respondents

Mr. Moracha for the 2<sup>nd</sup> respondent

Court Assistant – Michael Oyuko

