



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MILIMANI**

**ELC CASE NO. 361 OF 2017**

**JOY JENIPHER ADERO ACHOLA & EVERLYN ODETE ACHOLA**  
*(Suing as the Legal Representatives of the estate of the*  
*late* **JECKONIA OLIVER ACHOLA NDINYA)**  
.....**PLAINTIFF**

**=VERSUS=**

**KIBAGENDI ROBERT OTACHI.....1ST**  
**DEFENDANT**

**FREDRICK KIMEMIA KIMANI .....2ND**  
**DEFENDANT**

**REGISTRAR OF TITLES,**  
**NAIROBI LAND REGISTRY.....3RD**  
**DEFENDANT**

**ADEN HUSSEIN MAHAD.....4TH**  
**DEFENDANT**

**JUDGMENT**

**Introduction**

1. Through this suit, the estate of the late **Jeckonia Oliver Achola Ndinya** (*the late Ndinya*) challenges the transfer of title number **Nairobi/Block 103/431** [*the suit property*] from the late Ndinya to **Kibagendi Robert Otachi** [*the 1st defendant*]. It also challenges the subsequent transfer of the suit property from the name of the 1st defendant to the name of **Fredrick Kimemia Kimani** [*the 2nd defendant*]. It further challenges the subsequent transfer of the suit property from the name of **Fredrick Kimemia Kimani** to the name of **Adan Hussein Mahad** [*the 4th defendant*]. The estate terms the above transfers as fraudulent and illegal. The suit property comprises of land and a residential house. It is located in **Mugoya Estate, South C, Nairobi**.
2. The following are the five key issues that fall for determination in the suit: (i) Whether the late Jeckonia Oliver Achola Ndinya sold and transferred the suit property to the 1st defendant; (ii) Whether the subsequent transfer of the suit property, alleged to have been effected by the 1st defendant, to the 2nd defendant and the subsequent transfer alleged to have been effected by the 2nd defendant to the 4th defendant were valid and conveyed valid titles; (iii) Whether the 3rd defendant acted lawfully in declining to register the preservative court order issued by this court on 2/6/2017 and in registering the transfer in favour of the 4th defendant after being presented with the court order barring such registration; (iv) Whether the estate of the late Ndinya (*the plaintiff*) is entitled to the substantive reliefs sought in the amended plaint; and (v) What order should be made with regard to

costs of this suit. Before I analyse and dispose the above issues, I will briefly outline the parties' respective cases and evidence.

### **Plaintiff's Case**

3. The plaintiff is the estate of the late Ndinya, represented by **Joy Jenipher Adero Achola** and **Everlyn Odete Achola**. The estate initiated the suit through a plaint dated 31/5/2017. The plaint was amended on 28/8/2017. Through the amended plaint, the plaintiff sought the following reliefs against the defendants:

***a) A declaration that the purported transfer of the suit property from the late Jeckonia Oliver Achola Ndinya to the 1st defendant and the subsequent transfers to the 2nd and 4th defendants were illegal null and void at law.***

***b) An injunction restraining the 1st, 2nd and 4th defendants, their servants or anybody claiming through them, from entering, remaining on, taking possession of or in any other manner, howsoever, interfering with the plaintiff's possession and quiet use of the property known as Title No. Nairobi/Block 103/431 situated in South C, Mugoya Estate in Nairobi.***

***c) An injunction restraining the defendants, their agents, servants or anybody claiming***

***through them from selling, transferring, disposing of, alienating, charging, leasing or in any other manner howsoever interfering with the property known as Title No. Nairobi/Block 103/431 situated in South C, Mugoya Estate in Nairobi.***

***d) An order for the rectification of the register by cancellation of entries transferring the property known as Title No. Nairobi/Block 103/431 situated in South C, Mugoya Estate in Nairobi to the 1st, 2nd and 4th defendants and the cancellation of the certificates of lease issued to the 1st, 2nd and 4th defendants.***

***e) An eviction order and/or vacant possession.***

***f) Damages and/or mesne profits at the monthly rate of Kshs 45,000 effective May 2017 until vacant possession is restored.***

***g) Costs of this suit and interest on (f) above.***

- 4.** In summary, the plaintiff's case is that the late Ndinya acquired the suit property from **M/s Realty Brokers Limited** in 1989 and the suit property was registered in his name on **11/7/1989**. The suit property was always rented by the late Ndinya for rental income. As at May 2017, the estate of the late Ndinya was deriving rental income of Kshs 45,000 per month from the tenant who had leased the suit property. In March 2017, the 2nd defendant claimed to

have purchased the suit property from the 1st defendant in January 2015. In reaction to the above claim by the 2nd defendant, the estate carried out investigations and obtained a certified copy of the green card which revealed existence of the following two fraudulent entries: (i) entry number 4 dated 10/10/2012, relating to registration of a transfer of lease dated 19/3/2009 transferring the suit property from the late Ndinya to the 1st defendant; and (ii) entry number 5 dated 10/10/2012 relating to issuance of a certificate of lease to the 1st defendant. At that point, entries relating to transfers to the 2nd and 4th defendants did not exist in the green card.

- 5.** The plaintiff termed the above entries as fraudulent, pointing out that: (i) the late Ndinya never sold nor transferred the suit property to anybody during his lifetime; (ii) the estate held the original lease dated 4/2/1988, adding that a transfer to the 1st defendant could not have been effected without surrender of the original lease; (iii) the signature on the purported instrument of transfer was not that of the late Ndinya; (iv) the two entries had not been endorsed by the Land Registrar; (v) there was no explanation as to why the 1st defendant never sought to take possession of the suit property in March 2009 - the month and year he allegedly acquired the suit property from the late Ndinya; and (vi) there was no explanation as to why the 1st defendant never sought to take possession of the suit property in December 2010 - the month and year the late Ndinya died, if indeed he had purchased the suit

property from the late Ndinya in 2009. The plaintiff itemized various particulars of fraud.

6. The plaintiff averred that although they moved swiftly and locked up the suit premises after their tenant had been forced out by the defendants, the defendants were in the process of taking over possession of the suit property at the time the suit was initiated. The plaintiff added that upon filing this suit, they obtained from this court and presented to the Land Registrar (*the 3rd defendant*) a court order barring registration of any instrument disposing any interest in the suit property. The 3rd defendant, while seized of the court order, went ahead and registered a transfer vesting the suit property in the name of the 4th defendant on 14/6/2017.

### **Plaintiff's Evidence**

7. The plaintiff called a total of 4 witnesses. **Richard Ochieng Bonyo** testified as **PW1**. He worked as a policy and resource mobilization advisor in the Office of the Governor, Homabay County Government. He was a brother to the late advocate, **Peter Onyango Bonyo** (*the late Bonyo*), who died on 15/5/2012 of schizophrenia (chronic brain disorder). He stated that in 2009, the late Bonyo was seriously sick and could not have attested to the transfer dated 19/3/2009, adding that the late Bonyo was mad at the time and had been suspended from practising as an advocate. He further testified that on 19/3/2009, the late Bonyo was admitted at **Kisii Level 5 Hospital** and could not have attested to the transfer conveying the suit property to the

1st defendant. Shown the sale agreement dated 24/2/2009, he stated that the late Bonyo never had an office at Utalii House, adding that the late Bonyo worked at **C N Kihara & Co Advocates** at Salama House. Lastly, he stated that the signatures on the transfer were not those of the late Bonyo.

**8. Emmanuel Karisa Kenga** testified as **PW2**. He was a trained and practising forensic documents examiner with experience of more than 27 years. He retired from the National Police Service in 2015. On 9/10/2017, he received the following documents from the plaintiff's advocates, bearing questioned signatures attributed to the late Ndinya: (i) Sale agreement dated 24/2/2009; (ii) Letter dated 23/7/2009; (iii) Letter dated 15/10/2009; (iv) Letter dated 27/10/2009; (v) Addendum dated 6/1/2010; (vi) Letter dated 20/1/2010; (vii) Letter dated 26/3/2010; and (viii) Transfer dated 19/3/2009. He also received the following three documents which had the known signatures of the late Ndinya: (i) Letter dated 27/11/1999; Letter dated 7/10/2005; and KRA Land Rent pay-in-slip. His brief was to examine and compare the questioned signatures with the known signatures of the late Ndinya. The questioned signatures were marked **A1** to **A8** while the known signatures were marked **B1** to **B3**. On examination, he established that the questioned signatures were authored/written by a different author from the author of the three known signatures. He produced his report as an exhibit.

**9. Fredrick Richard Owiti** testified as **PW3**. He was a practising psychiatrist, having practiced as a doctor since

1978. Upon qualifying as a doctor, he studied psychiatry at the London Institute of Psychiatry and qualified as a member of the Royal College of Psychiatrists in 1985. He practised at Chiromo Medical Centre where he was a director. He was the late Bonyo's psychiatrist. He produced a medical report which he authored on the late Bonyo.

- 10. Joy Jenipher Adero Achola** testified as **PW4**. She was one of the administratrices of the estate of the late Ndinya. She adopted the contents of her written witness statement dated 19/3/2018. She produced 33 documents out of the 36 documents that were contained in the plaintiff's list and bundle of trial documents. Among the 33 documents she produced was a confirmed Grant relating to the estate of the late Ndinya. The other 3 documents were produced by different witnesses. She reiterated the estate's case as summarized above.
- 11. PW4** testified that in October 2013, they were attacked by thugs in their Karen family home and their late father's safe which had some documents was stolen. The incident was reported at Karen Police Station. No recovery was made of the lost items.
- 12. PW4** added that they enjoyed possession of the suit property up to May 2017. In May 2017, she received a phone call from a neighbour at Mugoya, South C and learnt that their tenant was moving out. She went to the premises to enquire why the tenant had not given notice. She met uniformed private security guards at the premises. They told her they had been positioned there by the owner of the

suit property. She went to Akila Police Station and reported that strangers were evicting the estate's tenant. She bought padlocks and locked the premises.

- 13. PW4** further testified that on carrying out investigations, she established that there was a purported transfer of the suit property by her father, the late Ndinya, to the 1st defendant. The signature on the transfer was not that of the late Ndinya. The transfer was purported to have been presented and registered on 10/10/2012, about two years after the death of the late Ndinya. The transfer had been backdated to indicate that it was executed on 19/3/2009. The transfer bore a stamp duty franking stamp of October 2012.
- 14. PW4** added that when she made enquiries at the Law Society of Kenya about Peter Onyango Bonyo, she established that he had been suspended in January 2008 and was not allowed to practise law in the year 2009. She stated that she served on the 1st defendant a notice to produce proof of payment of purchase price to the late Ndinya and none was tendered by the 1st defendant.
- 15. PW4** testified that the two transfers dated 19/3/2009 and 12/1/2015 were expressed as drawn by **Ongegu & Associates**. She made enquiries at the said law firm and the proprietor of the law firm wrote a letter to the estate disowning the two transfers and terming them as fraudulent. She showed the court the entries in the green card and testified that only entries 1, 2 and 3 relating to registration of the suit land in the name of Realty Brokers

Ltd; transfer to the late Ndinya; and issuance of title to the late Ndinya had been endorsed by the Land Registrar as at the time of certification of the green card by the Land Registrar on 25/5/2017. The entries relating to registration of the transfer to the 1st defendant and issuance of title to the 1st defendant had not been endorsed by the Land Registrar. At that point (25/5/2017) the entries relating to the transfer to the 2nd defendant and the transfer to the 4th defendant were not in the green card.

- 16. PW4** added that the suit property had been distributed by the succession court as part of the late Ndinya's estate. She showed the court the late Ndinya's bank statements and testified that the purported purchase price had not been paid through any of the accounts.
- 17. PW4** further stated that upon obtaining an order barring registration of instruments against the land register relating to the suit property, she presented the court order to the Land Registrar on 9/6/2017 for registration but the court order was not registered by the Land Registrar until 16/6/2017, adding that the court order was registered after the Land Registrar had registered a transfer by the 2nd defendant transferring the suit property to the 4th defendant on 14/6/2017. She added that the 1st defendant had been involved in other land fraud cases. She urged the court to grant the estate the reliefs sought in the amended plaint.

### **1st Defendant's Case**

- 18. *M/s Mwangi Mwangi Associates Advocates*** filed a joint notice of appointment dated 27/6/2017 on behalf of the 1st and 2nd defendants. The said firm subsequently filed a joint statement of defence dated 15/2/2018 on behalf of the 1st and 2nd defendants. Trial commenced and the plaintiff testified and closed their case. In the course of defence hearing, the 1st defendant brought a notice of motion dated 24/2/2023 seeking an order striking out the pleadings that had been filed on his behalf by ***M/s Mwangi Mwangi Associates Advocates***. He further sought leave to file his pleadings and trial documents. He deposed in his supporting affidavit that he never instructed the firm of ***Mwangi Mwangi Associates Advocates*** and that he was not privy to the notice of appointment; to the pleadings; and to the trial documents filed by the said firm on his behalf.
- 19.** On 17/2/2023, the court directed service of the said application on ***M/s Mwangi Mwangi Associates Advocates***. The said firm did not file any response to the serious allegations of forgery which the 1st defendant had made against them. None of the parties to the suit presented evidence to demonstrate that the 1st defendant instructed the said firm. Consequently, vide a ruling dated 6/12/2023, the court granted the 1st defendant leave to file pleadings and trial bundle in the suit.
- 20.** On or about 6/1/2024, the 1st defendant filed a statement of defence dated 2/11/2022 (sic) through ***M/s K Moseti &***

**Co Advocates** in which he averred that he was not privy to the statement of defence filed by **M/s Mwangi Mwangi Associates Advocates**, dated 15/2/2019, adding that the witness statement attached to the said defence was a forgery and emphasized that he never signed it. He also disowned the trial documents filed by **M/s Mwangi Mwangi Associates Advocates**. The 1st defendant denied ever purchasing, acquiring or owning the suit property, adding that he was going to take the matter to the Directorate of Criminal Investigations to establish how the purported transfers were registered in his name without his knowledge. He denied purchasing the suit property from the late Ndinya. He averred that he had never made any claim of ownership of the suit property.

21. The 1st defendant averred that, having perused the documents relating to purchase, sale and transfer of the suit property his case was that: (i) the signatures appearing on the said conveyance documents were forgeries; (ii) he had never signed any of the said documents/instruments; (iii) he had never appeared before any of the purported witnessing advocates; and (iv) the passport photographs appearing on the transfers had been obtained and used fraudulently. He denied ever going to the suit property to evict the estate's tenant. He contended that he was an unnecessary party to the suit and urged the court to dismiss the suit against him with costs.

### **1st Defendant's Evidence**

- 22.** The 1st defendant testified as **DW4**. He adopted his written witness statement dated 2/11/2022 (sic). He produced the newspaper extract of the notice published in the newspaper, inviting him to attend court for the hearing of the case. In summary, his evidence was that, he was a clinical psychologist. He came to know about this case when a friend shared the newspaper notice. He attended court on the appointed day and informed the court that he was not aware of the case. He asked the court to grant him time to peruse the court file and file a defence. On perusing the court file, he realized that his name had featured in a land transaction that culminated in the case, adding that it had been alleged in the case that he had acquired the suit property, title number Nairobi/Block 103/431, located in Mugoya Estate, South C, Nairobi.
- 23.** The 1st defendant stated that he filed a defence dated 2/11/2022 and a witness statement in which he clarified that he had never instructed **M/s Mwangi Mwangi Associates Advocates**. He testified that he never purchased nor acquired the suit property from the late Ndinya and he never sold nor transferred the suit property to the 2nd defendant. He denied entering into a sale agreement with **Mr. Fredrick Kimemia Kimani** [*the 2nd defendant*]. He denied dealing with the 2nd defendant over the suit property. He stated that he first met the 2nd defendant in court when he attended the hearing of this suit.

- 24.** Shown the sale agreement dated 24/2/2009, he stated that he never signed it and he was not privy to it. He denied appearing before any advocate to sign documents relating to the suit property. He termed the sale agreement a forgery.
- 25.** Shown the agreement dated 12/1/2010, expressed to be between him and the 2nd defendant, he denied being privy to it and stated that the signature on it was a forgery. He denied appearing before advocate **Bosire Daniel Kirera** nor knowing him. Shown the addendum dated 2/2/2012, he stated that he was not privy to it, adding that the signature on it was a forgery. He denied appearing before advocate Bosire Daniel Kirera.
- 26.** Shown the transfer dated 19/3/2009 purporting to convey the suit property from the late Ndinya to him, he testified that he never executed the said transfer, adding that he was not privy to it. He denied purchasing the suit property from the late Ndinya. He testified that what was on the transfer as his signature was a forgery.
- 27.** Shown the transfer dated 12/1/2015, purporting to convey the suit property from him to Fredrick Kimemia Kimani, he said the signature on the said transfer was a forgery, adding that he never transferred the suit property to the 2nd defendant. He stated that he never appeared before advocate Bosire Daniel Kirera. He testified that the photographs used on the transfers were his campaign poster photos.

**28.** In a nutshell, the 1st defendant's evidence was that he neither purchased nor acquired the suit property from the late Ndinya. He emphasized that he had never owned the suit property. He further emphasized that he neither sold nor transferred the suit property to the 2nd defendant.

### **2nd Defendant's Case**

**29.** The 2nd defendant relied on the joint defence dated 15/2/2018. His case was that, at all material times, the suit property belonged to the late Jeckonia Oliver Achola Ndinya. In 2009, the late Ndinya sold and transferred the suit property to the 1st defendant. The transfer from the late Ndinya to the 1st defendant was effected vide a transfer dated 19/3/2009, drawn by one **Kirera Daniel Bosire** and was witnessed by one **Peter Onyango Bonyo**. The transfer was registered on 10/10/2012. The 1st defendant completed payment of the consideration in early 2010 when, on behalf of the 1st defendant, he (the 2nd defendant) paid the outstanding balance of Kshs 3,000,000 in cash to the late Ndinya and to the late Ndinya's son (*the late Dr. James Achola*) on the instructions of the late Ndinya. All the payments were acknowledged.

**30.** The 2nd defendant added that upon completing the transaction, the 1st defendant took possession of the suit property as the beneficial owner and inherited the late Ndinya's tenant who later vacated the suit property when the 1st defendant threatened to distress for rent. In October 2012, the 1st defendant's advocate procedurally

transferred the suit property into his name [the 1st defendant's name].

- 31.** The 2nd defendant denied fraud. He added that he expressed interest in the suit property in 2009 and he thereafter entered into a sale agreement dated 12/1/2010 for purchase of the suit property from the 1st defendant at a consideration of Kshs 10,000,000. He was unable to meet the timelines. He renegotiated the purchase price to Kshs 13,000,000. He completed paying the purchase price in 2015 and took possession of the suit property.
- 32.** The 2nd defendant stated that on 24/5/2017, he sold the suit property to the 4th defendant. The suit property was subsequently transferred to the 4th defendant on 14/6/2017. He added that he gave possession of the suit property to the 4th defendant after the 4th defendant paid him purchase price.

### **2nd Defendant's Evidence**

- 33.** The 2nd defendant testified as **DW1**. He stated that he was a hotelier owning several hotels in Nairobi and in the Masai Mara. He adopted his witness statement dated 15/2/2018 which mirrored his case as summarized above. He produced the documents itemized as number 15 to number 19 in the list and bundle of documents dated 15/2/2018. The documents itemized as number 1 - 14 were not produced.

- 34. DW1** stated that he purchased the suit property from the 1st defendant after the 1st defendant failed to complete the transaction between himself and the late Ndinya. His engagement with the 1st defendant started in September 2009. He dealt directly with the late Ndinya (**Prof Achola**) and his late son, Dr. James Achola. He stated that he paid them Kshs 3,000,000 in cash. He finished paying the purchase price which the 1st defendant owed the late Ndinya in 2010. He subsequently ran into financial problems and was unable to complete the transaction between him and the 1st defendant. The initial purchase price in the transaction between him and the 1st defendant was Kshs 10,000,000 but he ended up paying Kshs 13,000,000. He finished paying purchase price to the 1st defendant in 2015. He was unable to take immediate possession in 2015 because he fell sick and he was immobilized. He took possession in May 2017.
- 35.** It was the evidence of the 2nd defendant that the original certificate of lease which the late Ndinya showed him is not the one copy of which the estate was relying on, insisting that the one which he was shown by the late Ndinya was dated 7/6/2004.
- 36.** In his testimony during cross-examination, he admitted that there were various discrepancies between exhibits 15, 16, 17 and 18 as contained in the list and bundle that he filed in court and those that he tendered during trial as originals of the four exhibits. He confirmed that none of the four documents was a true copy of what he was presenting as

their corresponding originals. Asked about cash money as the alleged mode of paying purchase price, he said that cash money is what the seller wanted. Asked to show the source of the cash money that he allegedly paid, he stated that he had closed the bank account. He added that he dealt with the late Dr. James Achola, a son to the late Ndinya. Asked to show evidence of stamp duty relating to the transfer from the 1st defendant to himself, he stated that he paid stamp duty but the stamp duty documents got lost. He could not remember the amount paid. Asked to show the day book number (the presentation number assigned to the application for registration of the transfer of lease) relating to the transfer from the 1st defendant to himself, he said he did not have it.

- 37.** In re-examination, he stated that the original exhibits were different from their supposed corresponding copies because he edited the original documents after the photocopies had been made.

### **3rd Defendant's Case**

- 38.** The 3rd defendant filed a statement of defence dated 9/10/2018. Its case was that the register relating to the suit property was opened on 1/2/1988 and the suit property was registered in the name of Realty Brokers Limited as leasehold proprietors. On 11/7/1989, a transfer of the leasehold interest was registered in favour of Jeckoniah Ndinya Achola. Vide a letter dated 6/5/2004, Jeckoniah Ndinya Achola wrote to the District Land Registry in Nairobi seeking issuance of a title. A certificate of lease was

subsequently issued to Jeckoniah Ndinya Achola on 7/6/2004. On 10/10/2012 a transfer of lease between Jeckoniah Ndinya Achola and Kibagendi Robert Otachi was registered. On 6/3/2015, a transfer of lease between Kibagendi Robert Otachi and Fredrick Kimemia Kimani was registered. On 14/6/2017, a transfer between Fredrick Kimani and Aden Hussein Mahad was registered.

- 39.** The 3rd defendant contended that at all material times, officers of the 3rd defendant acted in good faith, adding that all transactions relating to the suit land were processed pursuant to the statutory duties and obligations of the 3rd defendant's office, which included receiving and registering documents. The 3rd defendant averred that actions of the 3rd defendant were a result of documents that were presented as duly executed by the 1st, 2nd and 4th defendants and their agents. The 3rd defendant denied collusion or involvement in fraud and prayed that the claim against him be dismissed with costs.

### **3rd Defendant's Evidence**

- 40.** The 3rd defendant led evidence by **Gildine Karani** who testified as **DW3**. She was a Land Registrar working in the Chief Land Registrar's Office. She adopted the contents of her witness statement dated 20/12/2021. She produced the parcel file relating to the suit property. Her testimony was that the Land Registry was not involved in fraud and that the Land Registry registered the documents because they met the requisite procedural threshold.

- 41.** She stated that the parcel file which she had did not have the following documents: (i) the cancelled original certificate of lease in the name of the 1st defendant; (ii) stamp duty documents relating to the transfer to the 1st defendant; and (iii) booking form relating to the transfer to the 1st defendant.
- 42. DW3** testified that the court order preserving the land register relating to the suit property was not registered because the Land Registrar wanted a copy of the grant issued by the succession court before the court order could be registered. She was not able to identify the Land Registrar or the Officer who endorsed the rejection notes on the court order.
- 43.** During cross-examination, she stated that the parcel file did not have any application for registration of the transfer of lease in favour of the 1st defendant. The parcel file did not also have any application for valuation of the suit property. Thirdly, the parcel file did not have proof of payment of stamp duty by the 1st defendant. She added that the value declared in the transfer was Kshs 8,000,000 while the figure captured in the white card was Kshs 6,000,000.
- 44. DW3** confirmed that according to the certified copy of the green card which the Land Registrar issued on 25/5/2017, entry numbers 4 and 5 had not been endorsed but the green card which she had produced bore an endorsement (single endorsement) for the two entries, dated 10/10/2012. She added that the parcel file did not have a cancelled certificate in the name of the 1st defendant. She confirmed

that the court order was presented to the Land Registrar for registration on 9/6/2017.

- 45.** Shown the instrument of transfer in favour of the 1st defendant, she testified that the said transfer did not bear the following particulars: (i) the date when it was received for registration; (ii) the presentation book number; (iii) the registration fees paid to the Government; and (iv) the receipt number issued.

#### **4th Defendant's Case**

- 46.** The 4th defendant filed a statement of defence dated 13/2/2017 through **M/s Were & Oonge Advocates**. His case was that he purchased the suit property from the 2nd defendant vide a sale agreement dated 24/5/2017 after conducting due diligence. He paid the purchase price in full and the suit property was registered in his name. Due process was followed in registering the suit property into his name. He spent Kshs 2,000,000 to renovate the suit property. The 4th defendant denied any illegality and put the plaintiff to strict proof of the allegations made in the amended plaint. He added that he was an innocent purchaser for value.

#### **4th Defendant's Evidence**

- 47.** The 4th defendant testified as **DW2**. At the time of testifying, he was doing mining in Logoria. He was also involved in real property business. He adopted his written statement dated 15/2/2018. He produced 9 exhibits. In

summary, his evidence was that he purchased the suit property from the 2nd defendant vide an agreement dated 24/5/2017 after conducting due diligence and after inspecting it. He engaged **M/s Were & Oonge Advocates** to represent him in the transaction between him and the 2nd defendant. He paid the agreed purchase price of Kshs.14,000,000 in cash instalments and adhered to all due processes. He took possession of the suit property on 29/5/2017 and undertook renovations costing Kshs 2,000,000.

- 48. DW2** added that after he took possession of the suit property, a lady went to the suit property accompanied by Police Officers from Langata Police Station. The Police Officers asked him to record a statement. That was the first time he was informed about the court proceedings in this suit. He contended that he was a stranger to the plaintiff's claim, adding that he was a purchaser for value without notice of any dispute.
- 49.** He denied fraud, adding that the sale and transfer of the suit property between him and the 2nd defendant was above board and within the law. He contended that he conformed with all legal requirements. He urged the court to reject the plaintiff's claim because the reliefs sought would dispossess him of the suit property in disregard of his rights as a bonafide purchaser for value without notice

### **Analysis and Determination**

**50.** I have considered the parties' pleadings and evidence. I have also considered the submissions that were tendered in the case. As pointed out in the introduction part of this judgment, the following are the issues that fall for determination in the suit: (i) Whether the late Jeckonia Oliver Achola Ndinya sold and transferred the suit property to the 1st defendant; (ii) Whether the subsequent transfer of the suit property, alleged to have been effected by the 1st defendant to the 2nd defendant, and the subsequent transfer alleged to have been effected by the 2nd defendant to the 4th defendant, were valid and conveyed valid titles; (iii) Whether the 3rd defendant acted lawfully in declining to register the preservatory court order issued by this court on 2/6/2017 and in registering the transfer in favour of the 4th defendant after being presented with the court order barring such registration; (iv) Whether the estate of the late Ndinya (*the plaintiff*) is entitled to the substantive reliefs sought in the amended plaint; and (v) What order should be made with regard to costs of this suit. I will sequentially analyse and dispose the five issues in the above order.

**51.** Did the late Jeckonia Oliver Achola Ndinya sell and transfer the suit property to the 1st defendant? First, from the evidence on record, the late Ndinya died intestate on 1/12/2010 at Mater Hospital. The grant of letters of administration relating to his estate was issued to Everlyn Odete Achola and Joy Jenipher Adero Achola on 23/8/2013. The grant was confirmed on 17/3/2016. The transfer conveying the suit property into the name of the 1st

defendant was presented for registration on 10/10/2012. It was registered on 10/10/2012. The presentation and registration were done about two years after Ndinya had died. It was not done by his personal representatives.

- 52.** The framework in **Sections 45 and 79 - 83** of the **Law of Succession Act** applied to the suit property from the day the late Ndinya died. Any unrepresented instrument of transfer purported to have been executed by him prior to his death became ineffective and required to be replaced with a proper instrument of transfer duly executed by his duly appointed personal representatives.
- 53.** Secondly, in the present case, the 1st defendant tendered pleadings and evidence to the effect that: (i) he never purchased the suit property from the late Ndinya; (ii) the late Ndinya never sold the suit property to him; (iii) he has never owned the suit property; (iv) he never executed the sale agreement and the transfer instrument relating to the alleged sale and the alleged transfer of the suit property to him by the late Ndinya; and (v) he was not privy to the registration of the suit property in his name.
- 54.** The defence and evidence of the 1st defendant is that the late Ndinya neither sold nor transferred the suit property to him. Given the above evidence and the above defence by the 1st defendant, the court makes a finding that the late Ndinya did not sell and did not transfer the suit property to the 1st defendant. The transfer of the suit property from the name of Jeckoniah Ndinya Achola to the name of Kibagendi Robert Otachi was procured fraudulently and illegally.

- 55.** Were the two subsequent transfers valid? Did the two subsequent transfers convey valid titles to the recipients? After the suit land was allegedly registered in the name of the 1st defendant on 10/10/2012, it was subsequently registered in the name of the 2nd defendant on 12/1/2015. In his evidence during trial, the 1st defendant denied selling the suit property to the 2nd defendant. He denied transferring the suit property to the 2nd defendant. He termed as forgeries all documents linking him to the two sales and to the two transfers, emphasizing that all the documents relating to the two transfers were forgeries.
- 56.** On his part, the 2nd defendant relied on four (4) exhibits which appear as item numbers 15 to 18 in the list and bundle of documents dated 15/2/2018. The four documents were alleged to be written acknowledgments of receipt of cash by one Dr James Ndinya, a son to the late Ndinya. It emerged during cross-examination that what the 2nd defendant presented as originals of the four documents had fundamental variances with their supposed originals and could not be described as true copies of what the 2nd defendant presented as originals of his trial documents. The 2nd defendant admitted that there were variances to the alleged original acknowledgments. This lends credence to the view that the documents which the 2nd defendant was waving were forgeries.
- 57.** Besides the foregoing, an examination of the alleged acknowledgements reveals that they relate to cash money allegedly paid to one Dr James Achola by the 2nd

defendant. The late James Achola never owned the suit property. The suit property was owned by the late Ndinya. Effectively, the 2nd defendant was not able to prove acquisition of the suit property through purchase. He was not able to prove payment of the alleged purchase price amounting to Kshs 13,000,000.

- 58.** The 2nd defendant was, similarly, unable to demonstrate that he lawfully procured the registration of the suit property into his name. He was unable to show the source of the large amounts he alleged to have paid to the late Ndinya's deceased son on behalf of the 1st defendant. He was unable to produce the day book number (*the application for registration of the transfer of lease*). He was also unable to prove payment of the stamp duty on the transfer. He could not tell the amount paid as stamp duty.
- 59.** The totality of the foregoing is that what the 2nd defendant purportedly acquired from the name of the 1st defendant was fake. The alleged transferor (*the 1st defendant*) has disowned it and termed it a forgery.
- 60.** Besides the 2nd defendant purporting to pass to the 4th defendant what he knew to be fake, the evidence on record reveals that the registration of the 4th defendant as proprietor of the suit property was done in blatant violation and contempt of a court order issued and presented to the Land Registrar. The court order barred the registration of any disposal instrument in the relevant land register relating to the suit property. For the above reasons, like the two preceding registrations, the registration of the suit

property in the name of the 4th defendant was a fraud, an illegality and a nullity.

- 61.** Our courts have stated in numerous decisions that a title acquired fraudulently is a fake that does not divest the legitimate proprietor of his interest. The Supreme Court of Kenya in ***Dina Management Limited v County Government of Mombasa & 5 others (Petition 8 (E010) of 2021 (2023) KESC 30(KLR)*** emphasized this principle as follows:

***“Article 40 of the Constitution entitles every person to the right to property, subject to the limitations set out therein. Article 50 (6) limits the right as not extending them to any property that has been found to have been unlawfully acquired. Having found that the 1st registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under Article 40 of the Constitution. The root of the title having been challenged, as we already noted above the appellant could not benefit from the doctrine of bona fide purchaser.*”**

- 62.** In ***Sehmi & another v Tarabana Company Limited & 5 others (Petition E033 of 2023) (2025) KESC 21 (KLR)*** the Supreme Court of Kenya outlined the prevailing principle as follows:

***“In view of this Court’s pronouncement in Dina Management Limited (supra), the answer as to whether the doctrine of innocent purchaser for value without notice protects a purchaser of an illegally or irregularly allocated title to public land lies squarely in the negative. We hasten to add that such a transaction cannot attract the protection of equity because “the latter follows the law”. In this regard, two critical elements of the doctrine would be missing because, first, the purchaser must have purchased “a legal estate”, and secondly, such purchase must have been without “notice”. Since the holder of an illegally allocated title cannot confer a valid title upon a third party, there would be no “legal estate” to be purchased in the first place. Similarly, the absence of “notice” is in reference to the existence of “an equitable interest” in the land and not “the incidence of illegality or irregularity of the title” in question. Therefore, there can be no protectable “purchaser of an illegal title without notice of such illegality”. In other words, a purchaser will only be regarded as bona fide if he buys property in good faith without notice of any defect or claims against the title. So that if the title in question is illegal or obtained through unlawful means,***

***the purchaser cannot claim protection even if he was not aware of the illegality.”***

- 63.** In ***Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR***, the **Court of Appeal** outlined the following principle:

***“It is our finding that as between West End and Arthi, no valid title passed and the one exhibited by Arthi before the trial court was an irredeemable fake. It follows that Arthi had no title to pass to subsequent purchasers, and therefore KMAH, Yamin and Gachoni cannot purport to have purchased the disputed land or portions thereof.”***

- 64.** Consequently, it is the finding of this court that the registration of the suit property in the name of the 2nd defendant and the subsequent registration of the suit property in the name of the 4th defendant were fraudulent and illegal. It is the further finding of this court that the said registrations did not convey valid titles to the 2nd and the 4th defendants respectively.
- 65.** Did the 3rd defendant act lawfully in declining to register the preservative court order issued on 2/6/2017 and in registering the transfer in favour of the 4th defendant while seized of the preservative court order? When the plaintiff presented an application under a certificate of urgency and made serious allegations of fraud, the court considered the application and issued an interim order on 2/6/2017. The

interim order barred registration of any instrument disposing an interest in the suit property. From the evidence on record, the order was presented to the 3rd defendant for registration on 9/6/2017. The 3rd defendant rejected the said court order on 14/6/2017 and proceeded to register a transfer in favour of the 4th defendant on the same day. The 3rd defendant subsequently registered the court order after registering the transfer in favour of the 4th defendant.

- 66.** Asked in cross-examination to explain why the 3rd defendant who at that time was a party to this case and had been served with court papers, declined to register the court order, **DW3** (the 3rd defendant's witness) stated as follows:

***“The order restrained the Land Registrar against registering an interest in the suit property. A transfer is one such instrument that was prohibited.***

***The order was served on 9/6/2017. Our investigation office confirmed that it was authentic. The Land Registrar did not register it because a copy of the grant was not attached. I agree that the issue relating to the question as to whether the plaintiffs were administrators or not was one that the court had to consider prior to issuing the order. The order required supporting documents for it to be registered.***

***The court order was rejected on 14/6/2017. On the same day, the Land Registrar proceeded to register a transfer to Aden Hussein Mahad. The court order was binding on the Land Registrar as a defendant in the suit. The Land Registrar should not have ignored the court order. It is not true that there was fraudulent facilitation in the disobedience of the court order.***

***The court order was presented as number 161/6 while the transfer in favour of Aden Hussein Mahad was presented as number 231/6. Both of them were acted upon on 14/6/2017 but by different Registrars."***

67. From the above excerpt of DW3's evidence, the 3rd defendant acknowledged that as a party to this case, the preservatory order was binding on him. Secondly, he acknowledged that the locus of the plaintiff was a factor which the court considered before issuing the order. Suffice it to add that, given the preservatory nature of the court order, and noting that the 3rd defendant had confirmed that what was before him was a duly issued preservatory court order, he had no legitimate basis for second-guessing the authority of the court to issue the preservatory order. His action was illegal and has exposed the Department of Lands to probable claim(s). Indeed, it has emerged from the evidence on record that the probable fraud which the court

order was intended to prevent materialized because of the illegal decision of the 3rd defendant.

- 68.** Based on the evidence summarized above, it is the finding of this court that the 3rd defendant acted unlawfully in declining to register the preservative court order and in registering the transfer in favour of the 4th defendant after being presented with a preservative court order barring such registration.
- 69.** Is the plaintiff entitled to the substantive reliefs sought in the amended plaint? The plaintiff prayed for 7 reliefs numbered (a) to (g). Prayers (a) to (e) relate to a declaration on ownership of the suit property; injunctive orders barring the defendants from dealing in or with the suit property; an order rectifying the land register; and an eviction order/order of vacant possession. The court having made findings to the effect that all the impugned transfers were fraudulent, illegal, null and void, it follows that the estate of the late Ndinya (*the plaintiff*) is entitled to the said reliefs.
- 70.** Prayer (f) relates to damages/mesne profits. Evidence was tendered by the plaintiff to the effect that their tenant was illegally evicted from the suit property in May 2017. At the time of the illegal seizure of the suit property, the tenant was paying a monthly rent of Kshs 45,000. The above evidence was not controverted by the defendant. It also emerged from the defence evidence that the people who seized the property in May 2017 were the 2nd and 4th defendants. Consequently, the court finds that the plaintiff

is entitled to mesne profits against the 2nd and 4th defendants at the rate of Kshs 45,000 per month from 1/6/2017 up to the day when the two defendants cede possession of the suit property to the plaintiff. The said mesne profits will attract interest at court rate from the date of this judgment.

- 71.** On costs, the 2nd and 4th defendants were responsible for the plaintiff's tribulations. They will bear the plaintiff's costs. They will also bear the 1st defendant's costs.
- 72.** Disturbing revelations emerged from the testimony of DW3. Apart from the decision rejecting to register a valid court order, it emerged that many key documents that are necessary in the registration process were missing from the parcel file. They include documents relating to booking, valuation and payment of stamp duty relating to the impugned transfers. It would appear the fraud materialized because the 3<sup>rd</sup> defendant closed his eyes to key requirements. For these reasons, the 3<sup>rd</sup> defendant will bear his costs of the suit.

### **Disposal Orders**

- 73.** In light of the above findings, the plaintiff's suit succeeds and is disposed as follows:

**(a) It is hereby declared that the  
purported transfer of title number  
Nairobi/Block 103/431 from the late**

**Jeckoniah Achola Ndinya to Kibagendi Robert Otachi is illegal, null and void.**

**(b) It is hereby declared that the purported subsequent transfer of title number Nairobi/Block 103/431 from Kibagendi Robert Otachi to Fredrick Kimemia Kimani is illegal, null and void.**

**(c) It is hereby declared that the subsequent transfer of title number Nairobi/Block 103/431 from Fredrick Kimemia Kimani to Adan Hussein Mahad is illegal, null and void.**

**(d) An order is hereby issued decreeing rectification of the land register relating to title number Nairobi/Block 103/431 by cancellation of all the entries relating to the above three transfers and cancellation of all the resultant titles.**

**(e) The defendants and their agents/servants and all those claiming through them are decreed to vacate land title number Nairobi/Block 103/431 within 10 days and in default, they are to be evicted without further notice.**

**(f) An injunction is hereby issued restraining the 2nd and 4th defendants together with their agents/servants and anybody claiming**

***through them from entering, remaining on, taking possession of or in any other manner, howsoever, interfering with the plaintiff's possession and quiet use of the suit property, title number Nairobi/Block 103/431, located in Mugoya Estate, South C, Nairobi.***

***(g) An injunction is hereby issued restraining the 2nd and 4th defendants, their agents, servants or anybody claiming through them from selling, transferring, disposing of, alienating, charging, leasing or in any other manner howsoever, interfering with the property known as title number Nairobi/Block 103/431 situated in Mugoya Estate, South C, Nairobi.***

***(h) The 2nd and 4th defendants are decreed to pay the plaintiff mesne profits at the rate of Kshs. 45,000 per month from 1/6/2017 till the date of ceding possession of the suit property together with interest at court rate from the date of this judgment.***

***(i) The 2nd and 4th defendants shall bear the plaintiff's costs of this suit and those of the 1st defendant.***

**DATED, SIGNED AND DELIVERED AT MERU THIS 17TH DAY**

**OF NOVEMBER, 2025.**

**B M EBOSO [MR]**

**ELC JUDGE**

**In the Presence of:**

Mr. Mungla for the Plaintiff

Ms. Ndundu for the 3rd Defendant

Court Assistant - Mr. Tupet