

REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND COURT LAND APPEAL NO.

E054 OF 2024

HEZEKIAH ADWAR

OWILI.....APPELLANT

VERSUS

SALOME ATIENO

ODERO.....RESPONDENT

*(Being an appeal from the entire Judgment and Decree
of Honourable J. Orwa delivered on 17th October 2024 in
Homa-Bay CMELC 027 of 2022.*

JUDGEMENT

- 1.** By way of a Plaint dated 18th May 2022, the Respondent herein sought the following orders in the Trial court;
 - a) Declaration that entry into Land parcel no. Kochia/Kamenya/4675 or any portion of it before obtaining a grant of letters of administration in the estate of Alfred Odhiambo Agalo is null and void and amount to an act trespass.**
 - b) An order of eviction do issue against the defendants, employees, workers, servants or agents forcing them out of the suit land.**
 - c) General damages for trespass to land together with interest therein @12 p.a from the date of judgement until payment in full.**
 - d) Costs of the suit together with interest at the court rate.**

e) Such further or alternative relief as this Honourable Court shall deem fit to grant

2. She pleaded that she is the administratrix of the estate of Alfred Odhiambo Agalo who is a registered proprietor of Land Parcel No.Kochia/Kamenya/4675 jointly with his son Thomas Odhiambo, now deceased. That she has been in possession of the said and sometime in the year 2018 the defendants unlawfully and without any reasonable cause entered into a portion of the said land, ploughed the same and deposited thereon building materials without the plaintiff's permission or consent on allegations that the plaintiff's paternal uncle named Joanes Obiero had sold the said portion to them.
3. She urged that the registered proprietor of the suit Land Parcel No. Kochia/Kamenya/4675 is deceased and the said Joanes Obiero has never been the administrator of the deceased's estate. Further, that the said Joanes Obiero intermeddled with the estate of a deceased person contrary to Section 45 of The Law of Succession Act (cap160) and the subsequent contract with the defendants is null and void ab initio.
4. She urged that the estate of the deceased has been trespassed upon by the defendants and the defendants continue to trespass thereon with impunity. Despite several demands having been made to the defendants to vacate the said land and they have ignored the same.

5. The defendants filed a statement of defence dated 12/07/2022. They denied the allegations in the plaint and urged the court to dismiss the plaint with costs.
6. The matter then proceeded to hearing with the plaintiff calling two witnesses whereas the defendants failed to call any witness.
7. **PW1** was **Salome Odero Atieno** who adopted her witness statement dated 18/05/2022 as evidence in chief. She also produced a bundle of documents and had the same admitted as her exhibits. In her statement, she stated that the late Alfred Odhiambo Agalo only gave birth to two daughters and she was appointed the legal administrator ad litem of the estate of her father. She stated that she was born in the year 1950 and found her parent's homestead established in the land now registered in his name as Land Parcel No, Kochia/Kamenya/4675. The remaining portion which did not host the homestead was used for grazing cows and cultivating crops such as maize, cotton, groundnut, millet, sorghum, beans, pineapple and groundnuts.
8. She stated that in 1968 the deceased requested his younger brother named Simeo Mwai Agola to help him with one of his sons as he was afraid that since he had no son of his own he would remain lonely in his home without anyone to help him with his livestock when we are finally married. Simeo Mwai Agola agreed and gave out his son named Joseph Agola Mwai who her father took in to live with as if he was his own. She soon thereafter got married and her younger sister also got married. In the year 1977 her mother died and left her father

living in his house situate in the suit land where he was now living with Joseph Agola Mwai.

9. In the year 1980, Joseph Agola Mwai got married and built a house in her father's homestead where he stayed with his wife for a while before travelling to Macalder where he began working to earn his. In the year 1990, the house where her father was living collapsed and Joseph Agola Mwai travelled home and reconstructed a better house where her father lived until his death in the year 1992. Joseph Agola Mwai continued working in Macalder but continued cultivating portions of the suit land which they allowed.
10. She stated that in the year 2018, Hezekiah Adwar Owili without the consent of those in possession thereof instructed the 2nd defendant who erected a temporary structure on a portion thereof. That the defendant continues being thereon and have intensified their act of trespass by felling down trees planted thereof and depositing building materials with an intention of constructing a more permanent structure. Upon the intrusion of the defendants, Joseph Agola Mwai reported the incident at the office the area chief who summoned the 2nd defendant and his mother Salome Adhiambo and in which meeting they attended and it was resolved that the defendants do vacate the land and remove any illegal structure put thereon. The defendants have however continued trespassing thereon and she stated that it would be fair that an order be issued evicting them.
11. **PW2** was **Joseph Agola Mwai** who was the nephew to the deceased. He adopted his witness statement dated

18/05/2013 as evidence in chief. In it, he stated that he was the son of Simeon Mwai, now deceased who is a younger brother to Allred Odhiambo. Agalo, the registered proprietor of the suit land. He stated that sometime in the year 1968 or thereabout when he was still a young boy, his father allowed him to live with his uncle as he had no son of his own. That in 1978, his uncle was blessed with a son named Thomas Odhiambo while he was living with him and his cousins had already been married. Sometime in the year 1980 he got married and built a house in his uncle's homestead in the suit land where he stayed with his wife for a while before travelling to Macalder for work.

- 12.** In the year 1990, the house where his uncle was living collapsed and he came home and reconstructed a better house for him where he lived until his death in the year 1992. Sometime in the year 1988 or thereabout adjudication commenced in Kamenya Adjudication Section and his uncle was jointly recorded with his son as proprietors of the suit land. In the year 1992 his uncle died and he continued living with his cousin in his uncle's home erected on the suit land.
- 13.** He stated that in the year 2018, Hezekiah Adwar Owili without his consent instructed the 2nd defendant, who erected a temporary structure on a portion thereof. The defendant continues being thereon and have intensified their act of trespass by felling down trees planted thereon and depositing building materials with an intention of constructing a more permanent structure. Upon the intrusion of the defendants, he reported the incident at the office of

the area chief who summoned the 2nd defendant and his mother Salome Adhiambo and it was concluded in the said meeting that the defendant should desist from interfering with the suit land.

14. PW3 was the adjudication officer **Kipruto Toromto**. He testified that he had been the land adjudication officer, Homabay sub-county since the year 2006. that Land parcel No.4675 as per the demarcation book is in the name of Alfred Odhiambo Agalo and Thomas Odhiambo. He produced the same as exhibit-PE-1. He stated that the objector in objection No.911 is Hezekiah Adwar Owili and the defendants were Thomas Odhiambo and Alfred Odhiambo (deceased). Objections when being heard and determined representatives of deceased are allowed to represent the deceased persons as per the land adjudication Act. For a person to become a representative of deceased person, should be a relative of deceased e.g. wife of deceased, brother of deceased or children of deceased. He stated that ideally they should be relatives of deceased.

15. He stated that Hezekiah Owili stated that he bought the entire land from deceased defendants Joanes Obiero - representative of 1st defendant and 2nd defendants stated that 1st defendant was his brother and 2nd defendants' father. The judgment was entered in favour of the objector. As per the sale agreement dated 15/4/2008, the person selling the land was Joanes Obiero Agalo. The purchaser was Hezekiah Adwar Owili.

- 16.** During cross examination he stated that during objection proceedings, succession proceedings can be used when objection proceedings are conducted and dissatisfied. The parties can appeal and go to court. In regard to the disputed parcel of land, there was no appeal and at close of adjudication process, the person registered as the adjudicated owner of land has the absolute rights over the land.
- 17.** The plaintiff closed her case and the defendant called 1 witness in support of his case.
- 18. DW1** was the 1st defendant who adopted his witness statement dated 23/1/2024 as evidence in chief.
- 19.** During cross examination, he stated that his land was Kochia/Kamenya/4675 and that he had the title deed. That the first registration was done on the 29/6/2018 and he is the first registered owner. He further stated that Joanes Obiero Agalo sold the land to him. He stated that Parcel No.4675 was adjudicated to Alfred Odhiambo Agalo who was deceased in 2008. He additionally stated that technically you cannot buy land from a deceased person. Joanes was managing the estate of deceased by that time but he did not know whether he had a grant of letters of administration of Estate of Deceased as at 2008.
- 20.** The court considered the evidence of the witnesses and the evidence tendered in court. Vide the judgement delivered on 17th October, 2024, the trial court entered judgement in favour of the respondent as follows;

- 1) A Declaration that the entry into land parcel number Kochia/Kamenya/4675 belonging to the late Alfred Odhiambo Agalo (Deceased) is illegal null and void amount to trespass.
 - 2) The Defendants and their agents or proxies to vacate parcel number Kochia/Kamenya/4675
 - 3) Within 90 days from the date of judgement failure of which the Defendants be evicted out of the suit land as provided for in law.
 - 4) The Plaintiff is awarded Kshs 300,000/= as general damages for trespass.
 - 5) The Suit land Kochia/Kamenya/4675 reverts to the estate of Deceased (Alfred Odhiambo Agalo & Thomas Odhiambo) forthwith.
 - 6) The Plaintiff is awarded costs of the suit.
 - 7) Interest on General Damages and costs at court rates from date of Judgement till payment in full.
- 21.** Being aggrieved with the entire judgement of the trial court, the appellant instituted the present appeal vide a memorandum of appeal dated 6th November 024 premised on the following grounds;
- 1) The Honourable Learned Trial Magistrate erred in law and fact by entering judgement in favour of the Plaintiff herein without any justifiable reasons whatsoever. The Judgement herein is contrary to the evidence tendered in Court and the law.**
 - 2) The Honourable Learned Trial Magistrate erred in law and fact by failing to understudy the evidence**

adduced by the Plaintiff which was deficient in terms of its contents and therefore she arrived at a biased and slanted Judgement.

- 3) The Honourable Learned Trial Magistrate erred in law and fact by failing to make a determination that there was no appeal filed against the objection proceedings which could overturn the decision of the Land Adjudication and Settlement Officer.**
- 4) The Honourable Learned Trial Magistrate erred in law and fact by failing to take cognizance of the express provisions of Section 13(5) of the Land Adjudication Act.**
- 5) The Honourable Learned Trial Magistrate erred in law and fact by failing to take cognizance of the express provisions of Section 24, 25 and 26 of the Land Registration Act No.3 of 2012.**
- 6) The Honourable Learned Trial Magistrate erred in law and fact in failing to make a determination that the Appellant is in occupation of Land Parcel No. Kochia/Kamenya/4675 a fact that was confirmed by the Respondent.**
- 7) The Honourable Learned Trial Magistrate erred in law and fact in granting an order of permanent injunction against the Appellant in absence of any factual and/or legal basis to warrant such an order being made against the Appellant whatsoever.**

- 8) The Honourable Learned Trial Magistrate erred in law and fact by awarding No. Kochia/Kamenya/4675 to the Respondent which constitutes rectification of the register in respect of a first registration. Consequently, the judgement sought to be impeached contravenes express provisions of the Land Registration Act No. 3 of 2012.**
- 9) The Honourable Learned Trial Magistrate erred in law and fact by making an order that the title deed issued to the Appellant be nullified and/or cancelled without taking into consideration that the Respondent has never been registered over No. Kochia/Kamenya/4675.**
- 10) The judgement and/or decision of the Learned Trial Magistrate is contradictory and self-defeating. Consequently, the judgement herein has occasioned a miscarriage of justice and thus ought to be set-aside ex-debito.**
- 11) The Honourable Trial Magistrate erred in fact and in law in failing to properly or at all analyse, evaluate and consider the totality of evidence adduced by the Appellant and witness. Consequently, the Trial Magistrate arrived at a passionate and biased conclusion contrary to the evidence on record.**
- 12) The Honourable Trial Magistrate failed to properly evaluate and/or analyse the tenor of the**

submissions tendered by the Respondent. Consequently, the Learned Trial Magistrate misapprehended the crux of the legal issues attendant to the matter before the Court.

22. The parties were directed to file submissions on the appeal.

Appellants' submissions

23. On whether the adjudication officer acted lawfully by allowing persons not administrators of the estates of the deceased parties to conduct the objection, counsel urged that the Respondent had complained that the Objection was heard in contravention of the Law of Succession Act as none of the parties that appeared before the Adjudication Officer was a legal representative of the estate of Alfred Odhiambo Agalo of the original parties to the dispute. On his part, the appellant stated that the said Joanes Obiero was biological brother to the Deceased who was the legal owner of the suit land. The question therefore is whether, the said Johannes Obiero Agola was competent to conduct or file an objection before the adjudication officer.

24. Counsel cited Section 13 (5) of the Land Adjudication Act and urged that the position therein was affirmed in the case of Patrick Kaviu Kithusi -Vs- Deputy County Commissioner Kitui West & Others (2022) eKLR where the Court of Appeal stated as follows:

It is therefore clear from Section 13 (5) of the Land Adjudication Act that the Act recognizes successors and not necessarily administrators of the estate of the deceased persons as defined under the Law of Succession

Act. In so far as the Land Adjudication Act and the process of adjudication is concerned, the applicable law is the customary law applicable within the adjudication section and not necessarily Order 24 of the Civil Procedure Act and Section 82 of the Law of Succession Act.

- 25.** He urged that this position was reiterated Dominic Musei Ikombo vs. Kyule Makau [2019] eKLR and submitted that the Respondent and the said Joseph Mwai had a right to file an objection or appeal the decision by the Land adjudication and settlement officer as required under section 29 Of the land adjudication Act. They decided to sit on that right. Counsel posited that due to the foregoing it is clear that adjudication processes does not require parties to obtain letters of administration to protect their interest in land in question.
- 26.** On who was the *bona fide* owner of the suit property, counsel cited section 26 of the Land Registration Act which states that certificate of title will be held as conclusive evidence of proprietorship. He cited the case of Dr Joseph Arap Ngok Vs Justice Moiyo Ole Keiwa & 5 Others Civil Appeal No. CA 60 of 1997 in support of this submission.
- 27.** Counsel urged that the appellant stated that they entered into an agreement between him and Joanes Obiero in the year 2008 where both Joseph Mwai Agalo, Salome Atieno Odero & Simeo Juma Agalo were witness to the said agreement but never raised any objection during the said transaction or adjudication. That he further stated that he paid the full purchased price and during adjudication he filed

an objection and the suit land was registered in his name as the absolute registered owner of the suit property. The appellant has been in possession on the suit land from 2008 up to date with no interference from any one. He urged that it is also prudent for Court to note that the Respondent during hearing adopted his statement as her evidence in chief. In her statement she appreciated the fact the land previously recorded in the name of deceased father Alfred Odhiambo but it was later given to Joseph Ogola Mwai as a gift. She further stated that during cross examination that she no longer interested in the land but in this court to fight for the right of Joseph Agola Mwai. The respondent is only fighting for the rights of Joseph Agalo Mwai after the death of his father & the said Joanes Obiero.

- 28.** Counsel submitted that the said Joseph Ogola Mwai also testified that he the rightful owner of the above mentioned property that he was given as a gift by the father of the Plaintiff herein but never produced any document showing that the said property was issued to him as a gift and Joanes Obiero sold the suit property illegally without their consent. The respondent did not produce any document or Certificate of a search or green card or adjudication records confirming that the said parcel of land was previously registered in the name of the deceased Alfred Odhiambo Ogalo and the appellant fraudulently transferred into his name. Further, that the respondent did not produce evidence challenging the title of the appellant to the suit land parcel neither on the grounds of fraud or misrepresentation.

29. He cited Section 107(1) of the Evidence Act on burden of proof and urged that the respondent filed the suit prematurely for the reason that the respondent had not exhausted all the available avenues before instituting it. Counsel urged that the appellant had met the threshold for the decision of the trial court to be set aside and prayed the court allow the appeal.

Respondents' submissions

30. Learned counsel for the respondent began by addressing grounds number 1, 2, 10, 11 and 12. He urged that the respondent testified that she is the eldest daughter of Alfred Odhiambo Agalo now deceased. In cross examination the appellant admitted that Alfred Odhiambo Agalo had one son and daughters but did not know their names since they were older than him. In re-examination the appellant testified that Salome Otieno Odero, the respondent herein is the niece to Joanes Obiero Agalo who allegedly sold Land Parcel No. 4675 to him. The plaintiff / respondent produced a copy of a limited grant of letters of administration ad litem issued to her on 10th November 2020 giving her locus standi to sue on behalf of the deceased's estate.

31. Counsel submitted that originally Land Parcel No. 4675 was adjudicated and recorded in the names of Alfred Odhiambo Agalo and his son Thomas Odhiambo who are both now deceased. Mr. Toromo, the Land adjudication Officer testified as PW3 and produced a copy of a sketch map from Land Adjudication office confirming ownership of Land Parcel No. 4675. He also produced a copy of adjudication proceedings

confirming that Hezekiah Adwar Owili filed the said objection against deceased persons who were allegedly represented by Joanes Obiero Agalo. Pw3 Mr. Kipruto, the Land Adjudication officer, testified that during adjudication process a deceased person would be represented by close next of kin like a spouse, children, and step children... in order of priority. The 1st defendant also produced a copy of objection proceedings and a copy of sale agreement between Alfred Odhiambo Agalo and Joanes Obiero Agalo as the vendors and he himself as the purchaser. In cross examination, the appellant testified that the daughters of Alfred Odhiambo who ranked high in priority to their uncle, Joanes Obiero Agalo did not want the suit parcel however he did not produce any document showing that the respondent and her sister had renounced their inheritance rights with regard to Land Parcel No. 4675 which was still under adjudication by then.

- 32.** Counsel cited William Kabogo Gitau vs. George Thuo & 2 Others (2010) eKLR on what amounts to a balance of probabilities and urged that the respondent satisfactorily discharged her legal burden and grounds number 1, 2, 7, 10, 11 and 12 should fail for the aforesaid reasons.
- 33.** On ground No. 3, counsel submitted that failure to lodge an appeal does not in any way make right the appellants' averments justifiable. The alleged proceedings were and remain illegal by virtue of having been conducted after the death of the proprietors of the suit land and without notification to the lawful legal administrators whatsoever.

The Provisions of Section 45(1) of the Law of Succession Act do not exempt land which is still under the Land Adjudication from the description of the free property of a deceased person.

34. On ground No. 4, counsel urged that section 13(5) of the Land Adjudication Act allegedly being relied on by the Appellant is ill conceived. Pw3 testified that during adjudication process a deceased person would be represented by close next of kin like a spouse, children, and step children... in order of priority. He reiterated that the appellant produced a copy of objection proceedings and a copy of sale agreement between Alfred Odhiambo Agalo and Joanes Obiero Agalo as the vendors and he himself as the purchaser. That the appellant testified that the daughters of Alfred Odhiambo who ranked high in priority to their uncle, Joanes Obiero Agalo did not want the suit parcel however he did not produce any document showing that the respondent and her sister had renounced their inheritance rights with regard to Land Parcel No. 4675 which was still under adjudication by then. He cited the case of *In Re Estate of John Gakunga Njoroge (Deceased) (2015) eKLR* in support of this submission.

35. Counsel submitted that in this instant case, the said Joanes Obiero Agalo had no powers to dispose of the deceased's property before he was appointed as the administrator of his estate. In the premises, resolution of the alleged objection to the adjudication register leading to the registration of the 1st defendant as the sole registered proprietor of Land

Proprietor of Land Parcel No. 4675 is not binding on the estate of the deceased, Alfred Odhiambo Agalo.

36. On ground 5 as set out in the memorandum of appeal counsel cited Section 26 of the Land Registration Act and the holding of Hon. Justice Munyao Sila in the case of **Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & Another (2013) eKLR** where he considered the applicability of section 26(1) (b). He urged that a historical search for Land Parcel No. 4675 shows that the said land parcel was adjudicated and recorded in the names of Alfred Odhiambo Agalo and Thomas Odhiambo who was the son to Alfred Odhiambo Ogalo now deceased. Land Adjudication Officer Mr. Toromo produced copies of the sketch map for Kamenya Kochia Adjudication section and objection proceedings which was filed by the 1st defendant in the year 2009. He urged that the appellant testified in cross examination that Land Parcel No. Kochia/Kamenya/4675 measuring 0.73 of a hectare is registered in his name as the sole registered proprietor and pointed out that although the 1st respondent is the registered proprietor of Land Parcel No. Kochia/Kamenya/4675, he does not have a good title pursuant to Section 26 (i) (b) of the Land Registration Act, 2012.

37. On ground No. 6 counsel urged that the alleged occupation by the appellant whilst it is not disputed, it is as a result of a trespass and cannot be allowed to stand. Proof of occupation does not in any way negate the claim brought about by the respondent and or disapprove the fact that the appellant's

title and occupation altogether are fraudulent. He further urged that on grounds No. 8 and 9, the honourable learned trial magistrate categorically directed that the suit parcel in contention being Land Parcel No. Kochia/Kamenya/4675 does revert to the respondent's deceased father one Alfred Odhiambo Agalo who was the first registered proprietor. The said order was due to the fact that the title passed to the appellant was proved to be an instrument of illegality which in law cannot stand. It is clear that at no point did the trial learned magistrate direct that the suit parcel be registered in the names of the respondent herein and as such allegations to that effect remain mere averments with no iota of evidence. The order of having the suit land revert to the names of the deceased rightly amounts to rectification of the register. The appellant is equally not clear on what specific provisions of the land act were breached if any and as such this grounds must fail. Counsel urged that the respondent proved her case to the required standard and prayed that the appeal be dismissed.

Analysis and Determination

38. This being an appellate court, I must first set out the duty of the court. In **Williamson Diamonds Ltd and another v Brown** [1970] EA 1, the court held that:

“The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion.”

39. Further, in **PIL Kenya Limited v Oppong** [2009] KLR 442, it was held that:

“It is the duty...of a first appellate court to analyse and evaluate the evidence on record afresh and to reach its own independent decision, but always bearing in mind that the trial court had the advantage of hearing and seeing the witnesses and their demeanour and giving allowance for that”.

40. Similarly, in **Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates** [2013] e KLR, the Court of Appeal stated;

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”

41. The issue that arises for determination are;

- 1) **Whether the trial court erred in finding that Joanes Obiero Agalo had no capacity to transfer the suit land**
- 2) **Whether the trial court erred in finding that the appellant had trespassed onto the land.**

Whether the trial court erred in finding that Joanes Obiero Agalo had no capacity to transfer the suit land

42. There are some undisputed facts that emerge from the proceedings in the trial court to wit; that the late Alfred

Odhiambo Agalo died on 10/05/1992; and that the suit land was registered in his name at the time of his death. It is also not disputed that the land was sold to the 1st defendant by Joanes Obiero Agalo and that the suit land was the property of a deceased person. Additionally, from the evidence on record, the 1st defendant, PW1 and PW3 were aware that the suit land belonged to the deceased when it was sold.

43. In order for a person to be able to deal in the property of a deceased person, he must first be appointed an administrator and exercise the powers of the representative pursuant to section 82 of the Law of Succession Act, or he must be an executor the will of the deceased. The Appellant, on her part, proved that she was a daughter to the deceased and obtained a grant of letters of administration. Joannes Obiero is the uncle to the respondent and the brother to the deceased. It is on record that the 1st defendant purchased the suit land from Joanes Obiero and was well aware that the land belonged to a deceased person. All through the transactions, all the parties were aware that the property belonged to a deceased person.

44. In order to deal in the estate of a deceased person, one is required to take out a grant of letters of administration. If a person sells part of the estate of the deceased person before taking out a grant of letters of administration, the same is a criminal offence Section 45 of the Succession Act states;

(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for

any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall-

a. be guilty of an offence and liable to a fine not exceeding ten thousand shillings or a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

b. be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

45. Section 79 of the Law of Succession Act provides; -

The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative

46. Section 82 of Law of Succession Act, states:

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

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

47. It follows therefore that the appellants were illegally and irregularly registered as proprietors of the suit property, pursuant the sale that took place.

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

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

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

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

50. In the case of **Funzi Development Ltd & Others Vs. County Council of Kwale, Msa Civil Appeal No. 252 of 2005 (2014) eKLR** the Court Appeal which decision this court affirmed stated that;

‘.... A registered proprietor acquires an absolute and indefeasible title if and only if the allocation

was legal, proper and regular. A court of law cannot on the basis of indefeasibility of title sanction an illegality or give its seal of approval to an illegal or irregularly obtained title.’ Emphasis is mine.

51. The upshot of the foregoing is that Joanes Obiero, in selling the suit land to the Appellants, intermeddled with the estate of the deceased. As he was not an administrator of the estate, nor was he an executor of the will he had no capacity to transfer the suit land to the appellants. I am in agreement with the findings of the trial court that the seller intermeddled with the suit land when he sold the same without authority to do so.

Whether the trial court erred in finding that the appellant had trespassed

52. Having found that the Joanes Obiero had no capacity to transfer the suit land to the 1st defendant, it follows that the sale agreement that was tendered as evidence of the sale and the title issued as a result are null and void. Consequently, any titles issued under the pretext of the sale are also null and void as one of the parties did not have good title to transfer to the purchaser. Whereas the appellant complied with the provisions of section 3(3) of the contract act with regard to contracts for the sale of land, the same is a nullity as the vendor did not have the capacity or the title to transact in the suit land.

53. I am in agreement with the trial court that without a proper title for Joanes Obiero had no good title to pass on to the 1st

appellant and as a result his occupation of the suit land was trespass. I find no reason to interfere with the same.

54. I therefore find that the appeal lacks merit and the same is dismissed with costs to the respondent.

Ruling dated, signed and delivered virtually via the Teams Platform this 16th day of December 2025

HON. DR. IUR NYAGAKA

JUDGE

From 2:42 PM, in the presence

Ms. McOgot Advocate for the appellant

Ms. Oyala Advocate for the Respondent