

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELCLA NO. E005 OF 2025

RAHAB ATIENO OBANGE1ST APPELLANT
EVANS ABONDO2ND APPELLANT

- VS -

SUSAN ADHIAMBO MATOKARESPONDENT
(Being an appeal from the judgement of Hon. Amos Kiprop Makoross, SPM delivered on the 7th day of January, 2025, in Tamu MCELC NO. E013 OF 2023 between Susan Adhiambo Matoka vs Rahab Atieno Obange and Evans Abondo)

JUDGEMENT

Background

The record of appeal shows that the appellants were the defendants in TAMU MELC CASE NO. E013 OF 2023 (herein referred to as the suit) wherein they had been sued by the respondent vide the plaint dated 21st August 2023 over a parcel of land known as LR 4476/21/1 MUHORONI TOWNSHIP (the suit land).

The respondent's case in the suit was that she had entered into a land sale agreement in respect of the suit land vide which the 1st appellant sold to her the suit land but which transaction was never completed.

That the 1st appellant instead, sold the land to the 2nd appellant. The respondent therefore sought for orders of specific performance, permanent injunction and costs of the suit.

The record shows that in response to the respondent's claim, the appellants had filed their respective defences. The 1st appellant filed statement of defence dated 8th March, 2024 and similarly, the 2nd appellant filed 2nd defendant's statement of defence of even date.

The record shows that the suit was heard before the trial court which, vide the judgment dated 7th January, 2025, found that the remedy sought were merited and proceeded to enter judgement in favour of the respondent and against the appellants as prayed in the plaint.

The appeal

Dissatisfied with the judgement, the appellants preferred the present appeal vide the Memorandum of Appeal dated 22nd January, 2025 seeking for orders that the judgement of the trial court be set aside and costs of the appeal be awarded to them. The grounds of the appeal are that the trial Magistrate erred both in law and fact;

1. by actually purporting rewriting of the contract between the 1st appellant and the respondent through his judgment.
2. by proceeding to fetch and fish out unnecessary superfluous and irrelevant issues post his own determination and finding that the plaintiff had breached the agreement dated 17th day of September, 2024 in the first instance.
3. by failing to find that if indeed there was a sale agreement between the 1st appellant and the respondent, then the same had lapsed by virtue of effluxion of time.

4. by failing to give due consideration that the main issue was delay of payment of the purchase price a fact that the judgement failed to consider that the respondent failed to pay the same.
5. by failing to give the strict timelines in payment of the balance of the purchase price while issuing the order for specific performance.
6. in that he disregarded the Appellant's evidence, testimonies, submissions and judicial authorities on the subject matter with the resultant effect of miscarriage of justice to the appellants.
7. in finding that the respondent had proved her case on a balance of probabilities when there were several lacunae in her evidence.
8. when he issued prohibitory injunction against the appellants who have always been in possession and occupation of the suit property.
9. when he failed to render himself on the issue of the 2nd appellant being an innocent purchaser for value thus failing to address a key component in the case.

Submissions

The appeal was heard by way of written submissions. Written Submission dated 14th November, 2025 were filed by Okatch and Partners Advocates for the appellants. Counsel submitted that the dispute arises from a sale agreement dated 17th September, 2021 between the respondent and the 1st appellant in respect of LR. NO. 4476/21/1 MUHORONI TOWNSHIP.

That the agreement which was binding on the parties provided timelines in clauses 2 and 3 thereof on the payment of the purchase price. That the respondent failed to adhere to the timelines hence necessitating the rescission of the said sale agreement by 1st appellant and the subsequent sale of the suit property to the 2nd appellant through a sale agreement dated 29th June, 2023.

Counsel relied on the provisions of Section 3 (1) and (3) of the Law of Contract Act and the case of Kukal Properties Development Limited - vs - Tafazzal H. Maloo & 3 Others (1993) eKLR and Solomon Ndegwa Kuria vs Peter Nditu Gitau (2019) eKLR and submitted that where payment timelines are expressly provided, time is of the essence of the agreement. That the original contract expired by effluxion of time and was no longer enforceable against the vendor.

That the 2nd appellant conducted due diligence. That the respondent did not have any legal interest in the suit property. That the respondent is only entitled to refund of any sums paid on account of the purchase price less the forfeited 10% which relief was not sought. That the breach of the agreement arose from the respondent. Counsel relied on the provisions of section 80 of the Land Registration Act, 2012 and submitted that rectification of the appellants' title was statutorily barred.

Relying on the provisions of section 107 of the Evidence Act, Counsel submitted that the burden of proof rested with the respondent. Counsel submitted further that the respondent had not come to court with clean hands.

Relying on the provisions of Section 27 of the Civil Procedure Act and the case of Republic - vs - Rosemary Wairimu Munene Ex parte applicant - vs - Ihururu Dairy Farmers Co-operative Society Ltd, Counsel submitted that costs of the suit should be borne by the respondent. Counsel urged the court to allow the appeal with costs to the appellants on full indemnity basis.

Written Submissions dated 21st November, 2025 were filed by Bruce Odeny & Company Advocates for the respondent. Counsel submitted that the respondent came to realize that the 1st appellant had short changed her when the 2nd appellant began to put up structures on the suit land claiming that the land had been sold to him by the 1st appellant.

Relying on the provisions of section 3 of the Law of Contract Act, Counsel submitted that there existed a sale agreement between the respondent and the 1st appellant which met the threshold for contracts for sale of land.

On whether there was breach of the sale agreement by the 1st appellant, Counsel submitted that before the agreed date of completion of the payment which was February, 2022 the respondent had on several occasions reached out to the 1st appellant. That it was clear from the text messages produced, reminding the 1st appellant that she was waiting for her so as to complete the transaction.

That the 1st appellant was buying time while courting a second buyer to whom she intended to part the suit land. That it was in fact the 1st appellant who breached the agreement.

On whether the 2nd appellant was an innocent purchase for value, Counsel relied on the case of Lwanga - vs - Mubiru and Others (Civil Appeal 18 of 2022) [2024] UGSC7 where it was held that a bona fide purchase for value without notice is “that buyer who has paid a stated price for the property without knowledge of existing or prior claims or prior equitable interest.” Counsel submitted that a person who relies on the defence of bona fide purchaser for value without notice has the burden to prove that he or she acted in good faith.

That the 2nd appellant did not conduct due diligence. That once the root of title has been challenged a party cannot derive a benefit from the doctrine of bona fide purchaser. Counsel submitted that the appeal was devoid of merit and must fail.

Analysis and determinations

This being a first appeal the court has a duty to re-examine the whole evidence placed before the trial court, re-evaluate it and arrive at its own independent conclusion. While doing so, the court keeps in mind the fact that the trial court had the advantage, which this court does not have, of seeing and hearing the parties and their witnesses first hand. In the case of Gitobu Imanyara & 2 others -vs- Attorney General [2016] e KLR the court held that the principles upon which a first appellate court proceeds are well settled and stated that: -

“Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect”.

Guided accordingly, I proceed to determine the issues raised in the appeal.

A reading of the judgement appealed against shows that the court framed the issues for determination to include; whether or not there was a valid agreement between the parties, whether there was breach of the said agreement and if so by whom, whether the plaintiff had proved her case on a balance of probabilities and who should pay costs.

It was common ground that the agreement between the 1st appellant and the respondent provided timelines within which the purchase price was to be paid.

It was also common ground that the amount of the purchase price was not paid in accordance with the agreement.

The trial court however found that the respondent was not in breach of agreement because the 1st appellant did not go to collect the money and that the 1st appellant did not give notice of breach the agreement and of intention to sell the property to a third party.

The messages referred to where the 1st appellant is said to have informed the respondent that he could go for her money are messages done after the timelines provided for in the agreement

for payment of the purchase price had elapsed. It was not demonstrated that the terms of the agreement were altered by the said messages. The terms of the agreement remained as they were and the parties were bound by them.

The respondent did not explain why she did not pay the entire balance in February when she claims to have paid the additional amounts beyond the initial payment of Kshs. 120,000/=. The agreement provided expressly that the balance of the purchase price was to be paid by February 2022.

The defence of the 2nd appellant was that he was an innocent purchaser for value. He testified vide his witness statement dated 8th March 2024 that he was an innocent purchaser for value. That he paid Kshs 800,000/ for the land. That he was not aware of any other sale of the property as at the time he was buying the property.

This defence was not discounted. There was no evidence that he acted in bad faith or that he had knowledge of prior claims or interests over the suit land. The 2nd appellant testified that he already had title to and occupation of the suit land. That he had had active physical occupation since 29th June 2022 and that he had developed the property for the purpose of generating income. There was no evidence that the title of the 2nd appellant was impeachable under the provisions of sections 26 and 80 of the Land Registration Act.

The respondent and the 1st appellant were bound by the terms of their agreement.

In the circumstances I find that the trial court erred in finding that the 1st appellant breached the agreement, in finding in favour of the respondent and in allowing the prayers sought in the plaint.

I find that the Appeal has merit and hereby allow it. The judgement of the trial court is hereby set aside and replaced with a judgement a judgement dismissing the respondent's suit. The respondent has recourse to recover any monies he paid to the 1st appellant.

Costs of the appeal are awarded to the 2nd appellant to be paid by the respondent.

Orders accordingly.

Judgement dated and signed at Kisumu and delivered this 5th day of February, 2026 virtually through Microsoft Teams Online Application.

**E. ASATI,
JUDGE.**

In the presence of:

Maureen - Court Assistant.

Angiela for the Appellants.

Akinyi for the respondent.

