

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT
KAKAMEGA
ELC LAND APPEAL NO. E028 OF 2024

JAMES EYAUMA NANDWA.....
APPELLANT

VERSUS

SELPHA OMENDA KUYA.....1ST
RESPONDENT

ELIJAH MUKARA ANJONI2ND
RESPONDENT

***(Being an appeal against the judgment and decree of
Hon. J.R Ndururi, (SPM) delivered on 16th May 2024 in
Kakamega MCELC Case No. 28 of 2020)***

JUDGMENT

Introduction

1. This appeal emanates from the judgment of Hon. J.R. Ndururi (Senior Principal Magistrate) delivered on 16th May 2024 in Kakamega CM ELC Case No. 28 of 2020. In the impugned judgment, the learned trial Magistrate held that the 1st and 2nd defendants were fraudulently registered as proprietors of **Land Parcel No. Idakho/Shikulu/2482** and that their respective registrations on 20th November 2007 and 19th November 2018 respectively, together with the resultant title deeds, were null and void *ab initio*. The court further ordered the Land Registrar, Kakamega County, to cancel entries Nos. 2, 3, 4 and 5 on the register and revert the suit property to the name of Likhodio Muliango, with costs of the suit to be borne by the defendants. Aggrieved by that decision, the 2nd defendant (Appellant herein) lodged the present appeal seeking to have the judgment set aside.

Background

2. By a plaint dated 12th October 2020, the plaintiff (now the 1st respondent), instituted a suit before the trial court against the 1st and 2nd defendants seeking, *inter alia*, orders for cancellation of the subsequent subdivisions and transfers

arising from **Land Parcel No. Idakho/Shikulu/2482** and reversion of title in the name of the deceased, Alfonse Likhodio Amuliango alias Likhodio Muliango. She further sought a declaration that the purchase of the suit property by the 2nd defendant from the 1st defendant was founded on a defective title and was therefore null and void. Costs of the suit were also sought.

3. The plaintiff pleaded that she was the duly appointed legal representative of the estate of the deceased, Alfonse Likhodio Amuliango and filed the suit on behalf of the family. It was her case that the suit property, which was registered in the name of the deceased, was fraudulently transferred to the 1st defendant without compliance with the Laws of Succession and thereafter transferred to the 2nd defendant. She set out particulars of fraud against the 1st defendant, including procuring forged transfer documents, effecting change of ownership without undertaking succession proceedings, purporting to dispose of the property without capacity, and procuring fraudulent Land Control Board consent.

4. As against the 2nd defendant, she alleged that he entered into a land sale agreement over property whose ownership was irregular and held a title deed obtained through fraud. On that basis, she sought cancellation of the impugned transfers and titles as against the defendants jointly and severally.
5. The 2nd defendant opposed the plaint by filing a defence dated 12th July 2023 wherein he denied the allegations of fraud and maintained that he was the lawful and registered proprietor of **Land Parcel No. Idakho/Shikulu/2482**. That he legally and procedurally purchased the suit property from the 1st defendant, who at the material time was the registered owner. Further, that prior to entering into the sale agreement dated 6th November 2017, he conducted due diligence and confirmed from the Land Registry that the property was duly registered in the name of the 1st defendant and that there were no encumbrances registered against the title.
6. He stated that upon execution of the sale agreement, he paid the full purchase price of Kshs. 750,000/=, whereupon the 1st defendant obtained the requisite Land Control Board

consent. That the transfer documents were thereafter lodged at the Kakamega Land Registry and a title deed issued in his name. He maintained that he followed due process in acquiring the title and that the suit was bad in law and prayed that the plaintiff's suit be dismissed with costs.

7. The suit proceeded to hearing through *viva voce* evidence. The plaintiff testified as the only witness in support of her case, whereas the 2nd defendant also testified as the only defence witness. The 1st defendant did not participate in the proceedings, having passed away shortly after the matter was filed in court.

Plaintiffs' evidence.

8. PW1 was Selpha Omenda Kuya, the plaintiff. She adopted her witness statement dated 12th October 2020 as her evidence in chief and produced documents in her list of documents filed on even date, including the green card for the suit land, official search, Letters of Administration *ad litem*, and the death certificate of the deceased. She testified that the suit property was initially owned by her

deceased father. That the suit property was registered in the name of her deceased father during his lifetime. That the 1st defendant irregularly and fraudulently transferred the suit property from the deceased to himself and subsequently to the 2nd defendant.

9. On cross-examination, PW1 stated that her late father had nine daughters and that her mother resided on the suit land. She stated that the 1st defendant was their neighbor and that his son, Michael Anjoni, resided on their land. She testified that she had no knowledge of how the land was transferred to the 2nd defendant and that she had placed a restriction on the land upon discovering the transfer. PW1 further stated that the matter had been heard by the Provincial Administration and that the 2nd defendant was ordered to vacate the land, despite not participating in the meetings. That marked the close of the plaintiff's case.

Defence evidence

10. DW1 was James Eyauma Nandwa. He adopted his witness statement dated 30th August 2023 as his evidence in chief and produced documents in his list of documents of even

date, including the land sale agreement between himself and the 1st defendant, bank slip showing payment of Kshs. 750,000/- to the 1st defendant, application and consent to transfer, land transfer forms, and copies of the register showing the 1st defendant as the previously registered owner.

11. He testified that on 6th November 2017 he purchased the suit property from the 1st defendant at a consideration of Kshs. 750, 000/= which he paid in full, after confirming that the land was registered in the 1st defendant's name and free of encumbrances. That the 1st defendant then applied for consent to transfer the land on 6th December 2017, which was granted on 8th December 2017. That thereafter, he lodged the transfer documents at the Kakamega Land Registry on 18th January 2018 and obtained a new title in his name on 19th January 2023. He stated that he followed due process and that the title was procedurally issued. DW1 further testified that when he sought to develop the land, he encountered resistance from the plaintiff, who had since obstructed his attempts to take possession and denied knowing the deceased, Alfonse Likhodio Amuliango.

12. On cross-examination, DW1 confirmed that he saw an elderly lady in the suit property, whom he was informed was the seller's mother at the time of the transaction and that the 1st defendant had two homesteads on the suit property. That he did not obtain copy of the register. That marked the close of the defence case.

13. Upon consideration of the pleadings, evidence adduced at trial and parties' rival submissions, the trial court held that the suit property, parcel L.R. IDAKHO/SHIKULU/2482, originally belonged to the deceased. That the 1st defendant irregularly transferred it to himself and subsequently to the 2nd defendant. The trial court further held that whereas the 2nd defendant claimed to have purchased the land in good faith, he failed to carry out due diligence to verify the status of the suit property and its occupation. The court thus held that the 2nd defendant could not be regarded as an innocent purchaser for value, and ordered for the cancellation of the subsequent register entries to the 1st and 2nd defendants.

14. Having been dissatisfied with the trial court's decision, the appellant herein lodged the present appeal vide a

Memorandum of appeal dated 12th June 2024, citing the following grounds of appeal:

- a) THAT that trial Magistrate erred in law and in fact by failing to take into account the fact that there was no material on record to affirm that the 1st respondent was the legal representative of the estate of the deceased and therefore she did not have capacity to lodge, sustain and prosecute the matter.**
- b) THAT the trial Magistrate erred in law and in fact by failing to recognize that the appellant bought the land which had been in possession and ownership of the 2nd respondent for a period exceeding 10 years thus he may not have been party to any fraud if any.**
- c) THAT the trial Magistrate applied wrong principles of law in the entire judgment by concluding that the appellant was party to fraud yet there was no material on record to suggest any form of fraud.**
- d) THAT the trial Magistrate erred in law and in fact by completely ignoring the appellant's submissions in this judgment.**
- e) THAT the trial Magistrate erred in law and fact in his entire judgment by failing to recognize**

the fact that the appellant was an innocent purchaser for value.

f) THAT the learned Magistrate erred in law and fact by failing to determine this case on merit.

15. Consequently, the appellant prayed that:

i. The appeal herein be allowed.

ii. The Judgement and decree of the Hon J.R Ndururi delivered on 16.05.2024 be set aside and a proper finding be made by this honorable court.

iii. Cost be awarded and provided for both the lower court and this court.

16. The appeal was canvassed by way of written submissions.

On record are submissions dated 30th April 2025 filed by the appellant and submissions dated 13th August 2025 filed by the 1st respondent; both of which this court has carefully considered.

Appellant's submissions.

17. In arguing grounds 2, 3 and 4 of the Memorandum of appeal, counsel for the appellant submitted that the trial court erred in finding fraud was proved against the

appellant when no particulars of fraud had been pleaded by the 1st respondent, contrary to the well-established principle that parties are bound by their pleadings and that fraud must be specifically pleaded and distinctly proved. Reliance was placed on the cases of **Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others (2014) e KLR** and **Vijay Morjaria v Nansingh, Madhusingh Darbar & Another (2000) e KLR** for the proposition that parties are bound by their pleadings and that allegations of fraud must be pleaded and proved, for the court to conclude that fraud was proved. It was contended that the trial Magistrate improperly amended the pleadings by making a finding of fraud which had not been asserted, and in so doing, arrived at a determination that was unsupported by evidence.

18. Counsel contended that the appellant had no knowledge of any alleged fraud or of the 1st respondent's claim as a beneficiary of the deceased original owner. That evidence demonstrated that the 2nd respondent was in possession and presented as the lawful owner at the time of sale, and the appellant had no reason to question a title that had

subsisted for over a decade. It was emphasized that the 1st respondent failed to adduce any evidence linking the appellant to the alleged fraudulent scheme, and the trial court's finding in this regard was therefore against the weight of evidence.

19. On the issue of whether the appellant was a *bona fide* purchaser for value without notice having acquired the suit property from the 2nd respondent in 2017, Counsel submitted that prior to the transaction, the 2nd respondent had been the registered proprietor of the land for over ten years, and the appellant conducted due diligence by visiting the property, confirming possession by the 2nd respondent's family, obtaining an official search that revealed no encumbrances, and securing the necessary Land Control Board consent. Further, that the appellant paid the full purchase price of Kshs. 750,000/= via bank transfer to the 2nd respondent and was subsequently issued with a title deed, thereby vesting in him absolute ownership under **Sections 24(a), 25(1), and 26(1) of the Land Registration Act, 2012.**

20. On the issue of due diligence, counsel submitted that prior to the transaction, the 2nd respondent had been the registered proprietor of the suit property for over ten years and that the appellant conducted due diligence by visiting the property, confirming possession by the 2nd respondent's family, obtaining an official search which revealed no encumbrances, and securing the requisite Land Control Board consent. Counsel further submitted that the appellant paid the full purchase price of Kshs. 750,000/= via bank transfer and was subsequently issued with a title deed.

21. Counsel further submitted that the appellant's title was indefeasible and could only be impeached on grounds of fraud or misrepresentation to which he was proved to be a party, or if acquired illegally or unprocedurally. That since none of these exceptions were established, the trial court ought to have protected the appellant's interest as an innocent purchaser for value without notice. In that regard, the court was referred to the case of **Katende v Haridar & Company Limited [2008] 2 E.A. 173** and **Weston Gitonga & 10 Others v Peter Rugu Gikanga & Another [2017] e KLR**. It was contended that the 1st respondent's

claim, predicated on long occupation and beneficial interest, could not override a duly registered title that had been lawfully transferred to a *bona fide* purchaser for value.

22. On due diligence, counsel cited that case of **Esther Ndegi Niiru & Another v Leonard Gatei (2014) e KLR** for the proposition that due diligence goes beyond obtaining an official search certificate.

1st Respondent's submissions.

23. Counsel for the 1st respondent submitted that the trial court correctly held that the suit property belonged to the estate of the 1st respondent's late father, Alfonse Likhodio Amuliango. Counsel maintained that no succession proceedings had been conducted regarding the property, and therefore the 2nd respondent had no lawful title to pass to the appellant.

24. Counsel submitted that while **Sections 24, 25, and 26 of the Land Registration Act** provide for the indefeasibility of title, but that such protection is not absolute. Relying on **Joseph Arap Ng'ok v Justice Moiwo Ole Keiwua [1997] eKLR**, it was argued that a title is

challengeable if acquired through fraud or misrepresentation. The 1st respondent maintained that fraud was specifically pleaded and proved through exhibits including the green card, official search, grant of letters of administration *ad litem*, and the death certificate, which demonstrated that the deceased died long before the impugned transfer. She submitted that the appellant's title was acquired on a defective and unprocedural foundation, rendering it open to challenge and nullification.

25. It was further submitted for the 1st respondent that the appellant's claim of lawful acquisition was untenable, as the 1st respondent, being the lawfully appointed administrator of the deceased's estate, never sold any portion of the estate to the 2nd respondent for onward sale to the appellant. Counsel contended that the 2nd respondent could not have passed good title to the appellant because the 2nd respondent himself had no valid claim to the suit property. That the transfer to the appellant was therefore predicated on an illegality, and as a matter of law, an illegality cannot be cured by the passage of time or by the appellant's alleged due diligence.

26. Counsel further submitted that the trial court was right to make findings based on the pleadings and evidence before it. Fraud, they submitted, was properly pleaded and demonstrated by the documentary evidence and the procedural history of the land. That any subsequent claim by the appellant to have acquired the land in good faith could not cure the underlying illegality of the transfer. They maintained that the appeal represents an attempt to relitigate matters already determined and was therefore an abuse of court process and prayed that it be dismissed in its entirety with costs to the 1st respondent.

Analysis and determination.

27. The court has carefully considered the appeal, parties' rival submissions and the entire record. This being a first appeal, the duty of this court is to re-evaluate, re-analyze and re-assess the evidence tendered before the trial court and make its own independent conclusions bearing in mind that it had no advantage of seeing or hearing witnesses and therefore make due allowance for that.

28. The duty of the first appellate court was discussed in the case of ***Gitobu Imanyara & 2 Others v. Attorney General [2016] eKLR***, where the Court of Appeal stated as follows;

“An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must consider the evidence, evaluate it itself and draw its own conclusions, although it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”

29. Having considered the grounds of appeal raised in the Memorandum of Appeal, my view is that the same raises the issue as to whether the trial court was right in concluding that the appellant obtained registration of the suit property through fraud.

30. Section 26 of the Land Registration Act provides for conclusiveness of title as follows;

Certificate of title to be held as conclusive evidence of proprietorship

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

31. Therefore, registration vests in a proprietor of land, absolute and indefeasible rights, unless it is proved that the acquisition of such registration was by fraud, misrepresentation, illegality, without proper procedure or corruption, whether or not the registered proprietor was party thereto. In view of the provision in section 26 of the Land Registration Act, the appellant's argument that the

rights of an innocent purchaser who is not party to demonstrated fraud should be protected as against the rights of an innocent proprietor is not plausible.

32. In the case of **Dina Management Ltd v County Government of Mombasa & 5 Others [2023] e KLR** the Supreme Court of Kenya held that for a title to be held to be valid, it ought to arise from a process that is lawful and procedural and a title obtained unlawfully or unprocedurally is invalid, even if the registered owner obtained it in good faith.

33. Similarly, in the case of **Munyu Maina v Hiram Gathiha Maina, Civil Appeal No.239 of 2009**, the Court of Appeal held that:-

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all

interests which would not be noted in the register.”

34. In the present case, the 1st respondent's case before the lower court was simple and straight forward. That the suit property had originally been registered in the name of her late father Alphonse Likhodio Amulianga alias Likhodio Muliango. That her father died on 28th March 1994 as per the death certificate produced. That several years after her father's death, on 20th November 2007, the suit property was transferred to the 1st defendant, one Elijah Mukara Anjoni and that subsequently the 1st defendant sold and transferred the same to James Eyauma Nandwa the 2nd defendant.

35. The 1st respondent argued that the transfer to the appellant was fraudulent because at the time of the transfer, her father had long been dead and therefore the 2nd respondent had no good title to pass to the appellant.

36. In view of the provisions of Article 40 (6) of the Constitution of Kenya as read with section 26 (1) of the Land Registration Act, an innocent purchaser of property that was sold and or transferred to them by a person who

had initially unlawfully acquired it, has no legal protection under the law.

37. The parties herein represented themselves before the trial court. Not much light was shone on the circumstances of transfer of the suit property to the 1st defendant in the lower court who passed on before the suit was heard and no substitution was done.

38. The fact that the suit property was originally lawfully registered in the name of the late Likhodio Muliango is not disputed. Besides, the fact that the deceased died in 1994 is also not disputed. It is also not in contention that Elijah Mukara Anjoni got registered as proprietor of the suit property in 2007, which is 13 years after the death of the registered proprietor. There was no evidence that this registration was done by a legal representative of the estate of the deceased proprietor Likhodio Muliango. What is in dispute is whether the transfer from the late Likhodio Muliango to Elija Mukara Anjoni was unlawful and fraudulent.

39. Having considered the history of the transfer of the suit property from the late Likhodio Muliango to James Eyauma Nandwa, I am satisfied that the appellant failed to demonstrate that the transfer from Likhodio Muliango to the 2nd respondent was lawful and was done by the owner because the late Likhodio had been dead 13 years earlier, as at the time the transfer from his name to Elijah was effected. On the basis of the doctrine of *nemo dat quod non habet*, which means that a person cannot pass a better title than what he holds, the 2nd respondent had no good title to pass to the appellant. Therefore, the trial court was right in concluding that the appellant's acquisition of the suit property was unlawful and his title was rightly impeached.

40. In the premises, I find no merit in this appeal, which I hereby dismiss with costs to the 1st respondent.

41. It is so ordered.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA
IN OPEN COURT/VIRTUALLY THROUGH
MICROSOFT TEAMS VIDEO CONFERENCING
PLATFORM THIS 4TH DAY OF MARCH 2026**

A. NYUKURI
JUDGE

In the presence of

Mr. Mabonga for the appellant

No appearance for the respondents

Court Assistant: Delphine