

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT SIAYA

ELC APPEAL NO. E034 OF 2024

STEPHEN WANDEMA OCHIENG.....1ST  
APPELLANT

YAHUMA OKOKO P.N.....2ND APPELLANT

JAEL J.A. YAHUMA OKOKO.....3RD APPELLANT

HILDA LILIAN ODUNDO.....4TH  
APPELLANT

-VERSUS

EVANS OMOLLO OJERA .....1st  
RESPONDENT

PETER OJERA.....2ND RESPONDENT  
(Sued as personal representatives of the Estate of NABOTH  
OYAYA-Deceased)

**JUDGEMENT**

1 Stephen Wandema Ochieng, Yahuma Okoko PN, Jael J.A. Yahuma Okoko and Hilda Lilian Odundo (the Appellants herein) approached the Chief Magistrate's Court Siaya vide their further amended plaint dated 9/12/2022 seeking judgment against the defendants in the following terms; -

1. An order of court cancelling the registration of the 1st and 2nd defendants as owners of the L.R. NO. NORTH GEM/NDERE/180 and in their place restoring the name of the deceased NABOTH OYAYA.
2. An order of court cancelling the sub-division of L.R NO. NORTH GEM/NDERE/186 into NORTH GEM/NDERE/1015 and 1016 and also cancellation of the sub-division of

NORTH GEM/NDERE/1015 and the further sub-division of NORTH GEM/NDERE/1144 into NORTH GEM/NDERE/1346 & 1348 and an order for restoration of the said parcels back into NORTH GEM/NDERE/186 in the names of the deceased NABOTH OYAYA.

3. An order of eviction of the 1st 2nd 3rd 4th 5th and 8th defendants.

4. Costs of the suit.

2 The basis of the plaintiffs case was that the land parcels NORTH GEM/ NDERE/180 and NORTH GEM/NDERE/186 were ancestral land belonging to Naboth Oyaya Ogola(Naboth) who had two wives Maria and Catherine. With Maria he sired Charles Ogola. That Charles had two children Fredrick Ogola and Judith. That by his wife Catherine Naboth had three children Uanita, Gladys, and Elisha. That Elisha begot Appolo, Evans Omollo, Wellington, Benson and Peter.

3 The first defendant is a legal representative of the estate of Wellingtone Onyango Ojera, the 2nd defendant is sued a legal representative of the estate of Charles Ogola Oyaya the plaintiff and the 1<sup>st</sup> defendant are the grandsons of Naboth by his wife Catherine and the 2nd defendant is a son to Naboth by his other wife Maria.

4 According to the plaintiff Naboth died intestate on 9/8/1981. That on 21/9/1998 Wellingtone his brother (represented by the 1st defendant) without carrying out succession sold parcel NORTH GEM/ NDERE/180 to the 3rd defendant. That in January 1999 Charles represented the 2<sup>nd</sup> defendant without

carrying out succession transferred to himself parcel NORTH GEM/ NDERE/186. That Charles also sub-divided parcel 186 to create NORTH GEM/ NDERE 1015 and 1016 and illegally sold and transferred 1016 to 4th defendant leaving 1015 in his name. That Charles died on 24/10/2005 and in December 2005 the 7th defendant caused NORTH GEM/ NDERE 1015 to be sub-divided into parcels NORTH GEM/ NDERE 1144, and 1145. The signature of Charles was used post humus to transfer NORTH GEM/ NDERE/1145 to the 6th defendant. The signature of Charles was also used post humus to sub-divide NORTH GEM/ NDERE 1144 into NORTH GEM/ NDERE/ 1346,1347 registered to the 5th defendant and 1348 registered to 6th defendant. It is the case for the plaintiff that the 3rd 4th and 5th defendants are related. The fourth defendant a purchaser is the husband of 5th defendant and 5th defendant is a sister to the 6 defendant. That the 3rd ,4th and 5th defendants who are related excised parts of the estate of Naboth unlawfully while knowing that they were disinheriting heirs of the estate against the law of succession.

- 5 The 3<sup>rd</sup> 4<sup>th</sup> 5<sup>th</sup> 6<sup>th</sup> and 8<sup>th</sup> defendants were sued mostly as buyers of the various subdivisions arising from the mother parcels NORTH GEM/ NDERE/ 180 and 186. The 7<sup>th</sup> defendant is the Land Registrar and is sued for aiding these parties by causing the registrations including the registrations in the 1<sup>st</sup> and 2<sup>nd</sup> defendants' names without following the due process of law largely the absence of letters of administration.

6 The 1<sup>st</sup> to 6<sup>th</sup> defendants' case was that the plaintiff fraudulently obtained Naboth death certificate in 2007 without submitting the deceased ID and burial permit which were in the custody of Maria. Further that succession proceedings purportedly filed in Succession Cause No.30/2007 Busia High court were for a different deceased estate and not Naboth. According to the defendants this was purely a family issue involving ancestral land and succession and ought not to have been raised before the ELC.

7 The dispute was heard by Hon. L.Simiyu Senior Principal Magistrate who, after hearing the evidence of the Evans Omollo Ojera the plaintiff and Stephen Wandema Ochieng the 3<sup>rd</sup> defendant allowed the plaintiffs claim as prayed.

8 Aggrieved by the judgment, the Appellants who were defendants in the suit have now moved to this Court on appeal seeking the following verbatim orders be made:

1) THAT this appeal be allowed.

2) THAT the judgment of the learned trial magistrate dated and delivered on 11th September, 2024 be set aside, reviewed and/or varied and the Respondents' claim in the lower court be dismissed.

3) THAT the appellate court do issue any such orders as it deems fit in the circumstances.

4) THAT the Respondents be condemned to pay the cost of this appeal and at the lower court.

9 In urging this Court to set aside the impugned judgment, the Appellant has proffered the following grounds of appeal:

1. THAT the honourable trial magistrate erred both in law and fact in failing to hold that the Respondents lacked the locus standi to sue for reason that the Limited Grant of Letters of Administration ad collegenda bona in Busia High Court Succession Case No. 30 of 2007 were forged.
2. THAT the honourable trial magistrate erred both in law and fact in failing to find that the appellants had acquired their respective parcels of land by way of operation of law and their adverse possession thereof had crystalized.
3. THAT the learned trial magistrate erred in law in allowing the Respondents' claim against the appellants, who were diligent and innocent purchasers for value without notice of any fraud or illegality.
4. THAT the trial magistrate misdirected herself on the interpretation and import of Section 26 of the Land Registration Act.
5. THAT there was no evidence of illegality, unprocedural or corrupt scheme as between the appellants and the vendors from which the appellants purchased their portions and the trial magistrate erred both in law and fact in holding the appellants to account for the mistakes in transmission of the suit property from the deceased NABOTH OYAYA OGOLA to the vendors.
6. THAT the learned trial magistrate erred in law and fact in shifting the burden of proof to the appellants when it was upon the Respondents to proof their case on the balance of probabilities.

7. THAT the decision of the learned trial magistrate was against the weight of evidence and has resulted in a miscarriage of justice.
8. THAT the learned trial magistrate failed to analyse the appellants pleadings, documents and submissions.
9. THAT the trial magistrate erred in law and fact in holding that Peter S.O. Ojera was the 2nd plaintiff when in fact only the 1st plaintiff Evans Omollo Ojera forged the Grant of Letters of Administration Collegenda Bona for the estate of Naboth Oyaya (Deceased) dated 25th July, 2007 and the 2nd plaintiff was not an Administrator of the estate of NABOTH OYAYA.
10. THAT the trial magistrate erred in law and fact when she proceeded with the case inspite of the appellant informing her that the 4th, 5th and 6th defendants shall not proceed with the case until determination of the Appeal in Kisumu Court of Appeal Civil Application No. E066 of 2024.
11. THAT the trial magistrate erred in both law and fact in holding that the court had complied with order 11 when in fact it has not done pretrial conference when the amended plaint dated 9th December, 2022 and filed 13th December, 2022, the plaint that brought two new defendants Caroline Achieng Onyango and Fredrick Ogola who were not parties when this matter allegedly went for pre-trial conference on 15th July, 2020.
12. THAT the trial court erred in law and fact when it was crystal clear that this suit was a succession matter

amongst the family members being camouflaged to be a land case.

13. THAT the trial court erred in law and fact to hear and to determine this matter after the defendant protested to the source of the alleged Grant of Letter of Administration which was confirmed to have been forged from Busia High Court.
14. THAT the court erred in both law and fact by dismissing the suit against the 1st and 2nd defendant and later on cancelling the registration of the title against them.
15. THAT the trial magistrate erred in both law and fact by purporting to cancel the title deeds which were transmitted to the 3rd to 6th defendants without annulling the succession that transferred the titles.
16. THAT the trial magistrate erred both in law and fact in holding that the 3rd -6th defendants committed fraud when there was no evidence to that effect.
17. THAT the trial magistrate erred both in law and fact by issuing the orders that were never sought by the plaintiffs in their further amended plaint.
18. THAT the trial magistrate erred in law and fact by holding that the 3rd defendant is related to the 4th 5th and 6th defendants and there was no evidence to that effect.
19. THAT the trial magistrate erred both in law and fact in branding the 3rd, 4th 5th and 6th defendants as fraudsters yet there was no evidence to that effect.

20. THAT the trial magistrate erred both in law and fact by disregarding the evidence adduced by the defendant that Naboth had distributed his estate by the time of his death, the fact was confirmed by the plaintiff in his statement that "Wellington and Charles sold their apparent share of Parcel No. NORTH GEM/NDERE/ 180 to the 3rd defendant in September, 1998.

21. THAT the trial magistrate erred both in law and fact by purporting to evict the 3rd, 4th 5th and 6th defendants who were innocent purchasers without finding that their contract and respective sale agreements with the 1st and 2nd defendants were illegal, but based her findings on the succession of the estate of Naboth Oyaya.

### **SUBMISSIONS**

10 Directions were taken that the appeal be canvassed by way of written submissions. The appellants submissions are dated 1<sup>st</sup> July 2025 filed by Nandwa & Co. Advocates and the Respondents submissions are dated 6<sup>th</sup> August 2025 by the firm of Mulinge & Ochieng Co. Advocates. Counsels were also given the opportunity for oral highlighting on 26/02/2026.

### **ANALYSIS AND DETERMINATION**

11 I have considered the record of appeal herein and the submissions by counsel on record for the parties.

12 This being a first appeal, the court will analyze and re-assess the evidence on record and reach independent

conclusions in the matter. This approach was adopted in **Arthi Highway Developers Limited vs. West End Butchery Limited & 6 Others [2015] eKLR**, where the court cited the case of **Selle vs. Associated Motor Boat Co. [1968] EA 123** that held as follows;

*“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. 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 allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”*

13 While I note that the appellant raised 20 grounds of appeal herein, Counsel on record for the appellant consolidated them into 5 grounds as follows; -

- 1) Whether the respondents were properly sued.
- 2) Whether the failure to conduct a pre-trial was fatal to this suit

- 3) Whether the Respondents have locus standi to file and defend a suit on behalf of the estate of the late Naboth Oyaya.
  - 4) Whether the Respondents satisfied the trial court on the necessary grounds on which to impeach the Appellants' title.
  - 5) Whether the suit was time barred
- 14 The appellant having consolidated the grounds as such I will proceed on the same premise. However, I will add that the issue of jurisdiction of the trial court to hear and determine the suit is pertinent. I will first deal with the issue of jurisdiction and locus standi as the later also goes to jurisdiction.

**Whether the trial court had jurisdiction to hear and determine the dispute**

- 15 The defendants in the trial court pleaded and submitted that the trial court did not have jurisdiction to hear and determine the dispute. It was contended that the suit was a succession matter disguised as a land matter and ought to have been filed before the succession court. But I must note that the defendants in its submissions before the trial court dealt more with the issue of locus and the trial court did not identify jurisdiction as an issue for determination.
- 16 I have looked at the plaintiffs' pleadings the main prayer sought is on cancellation of the registration of the mother titles in the names of the 1st and 2nd defendants as

owners and or proprietors for having been obtained fraudulently and illegally without following due process. It also seeks cancellation of the subdivisions emanating from the mother parcels. Assuming the issue would have been raised as a preliminary objection it would not have met the threshold of a pure point of law because the incidences of the fraud would have to be ascertained by looking into the facts and evidence.

- 17 Moreover having keenly read the judgement of the court, I deduced that the trial court was clearly aware of the issues that would fall under the ambit of the succession court and rightly steered off the same.
- 18 It is the finding of this court that the trial court was properly seized of the matter and had the jurisdiction to hear and determine the dispute.

**Whether the Respondents have locus standi to file and defend a suit on behalf of the estate of the late Naboth Oyaya.**

- 19 The defendants in the trial proceedings faulted the filing of the suit against them on the basis that the plaintiffs had no locus standi to do so. It is submitted by the appellants that the plaintiffs (herein Respondents) locus is pegged on the limited grant ad colligenda bona (page 96 of the Record of Appeal) issued to the 1<sup>st</sup> plaintiff respondent for purposes of filing suit. That the grant was limited for purposes of filing suit for cancellation of title to the 3<sup>rd</sup> defendant and moved the trial court 11 years after the

limited grant had issued. The court has been referred to the provisions of Rule 36 of the Probate & Administration Rules.

- 20 According to counsel for the appellant the time taken to file the present suit beats the purpose of the limited grant ad colligenda bona. That after filing PMCC No. 50 of 2007 the said grant was spent and the plaintiff should have sought a fresh grant to bring the present proceedings.
- 21 Counsel for the respondents have submitted in support of the trial courts finding that a limited grant had been produced (PEX8). The same was in form 47 limited for purposes of filing suit for cancelation of registration. That the contention that a fresh grant ought to have been sought 11 years later for purposes of filing the present proceedings is not grounded on the law. That to the contrary the plaintiff's position is supported by Section 36(1)(2) of the Probate & Administration Rules.
- 22 I will now look at the trials court finding on the issue of locus standi which was also identified as an issue for determination. In its judgement the learned trial Magistrate found as follows; -

*'The position in law as regards locus standi in succession matters/dealing with estates is well settled. A litigant is clothed with locus standi upon obtaining a limited or a full grant of letters of administration in cases of intestate succession.....'*

*In this matter the plaintiff produced PEX8 a limited grant in Form 47. The exhibit is clear that it was issued in the high court BUSIA limited for purposes of filing suit for cancellation of registration. Submission on invalidity of the grant is not an issue for this court to determine and similarly issues of whether MARIA OYAYA ranked first in priority to the plaintiff herein is also not an issue for this court. The defendant reserved a right to challenge the said grant in the succession proceedings/court to have the grant set aside/revoked. I find that the plaintiff has locus as the grant he relied on has not been challenged in the correct forum.'*

- 23 To further put matters into perspective I noted the following arguments raised by the respondents' submissions before the trial court dated 16/07/2024. The defendants citing the provisions of section 2 of the Civil Procedure Act submitted that the 1<sup>st</sup> plaintiff Peter Ojera is not and has never been a personal representative of the estate of Naboth apart from being a grandson of the deceased by blood. That the plaintiff ranked lower in priority to Maria (Naboth's wife) and ought to have sought the consent of Maria before making the application for the grant. That failure to obtain consent and failure to include the widow rendered the limited grant issued to the 1<sup>st</sup> plaintiff ripe for revocation under the provisions of section 76 of the Law of Succession Act. On the ranking counsel cited the provisions of section 66 of the same Act.

- 24 A look at the definition of locus standi is pertinent. In the case of **Law Society of Kenya ...Vs... Commissioner of Lands & Others, Nakuru High Court Civil Case No.464 of 2000**, the Court held that; -

*“Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law”.*

- 25 Further in the case of **Alfred Njau and Others ..Vs.. City Council of Nairobi (1982) KAR 229**, the Court also held that; -

***“The term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings”.***

- 26 In Christopher **Mutiembu Machimbo & 3 others v County Surveyor, Trans-Nzoia & 4 others [2022] eKLR** Justice DR. IUR Fred Nyagaka had this to say; -

*17. Therefore, locus standi means the right to appear before and be heard in a court of law. Without it, even when a party has a meritorious case, he cannot be heard because of that. Locus standi is so important that in its absence, party has no basis to claim anything before the Court.*

- 27 Locus standi therefore is the right or power of a person to sue or be sued before a court of law. It also goes to the jurisdiction of the Court to entertain any matter before it.
- 28 In the case of **Joshua Kamoing v Simon Barchok & 2 others [2016] eKLR.A** the court held that a claimant will lack locus standi if no grant of letters of administration has been secured in circumstances where the claimant brings the action for and on behalf of the estate of a deceased person.
- 29 The Court in **Otieno v Ougo & Another [1986-1989] EA 468 cited** by the trial Magistrate affirmed that; -
- “An administrator is not entitled to bring an action as an administrator before he has taken out letters of administration.”*
- 30 The pertinent issue is whether the 1<sup>st</sup> and 2<sup>nd</sup> plaintiff had locus to bring the action as pleaded. According to paragraph 1 of the further Amended plaint the plaintiffs plead that they brought the suit as personal representatives of the estate of Naboth Oyaya Ogola.
- 31 Who is a personal representative in law. Section 2 of the Civil Procedure Act defines a legal representative as follows; -
- ‘...Means a person in who in law represents the estate of a deceased person and where a party sues or is sued in representative character the person on***

***whom the estate devolves on the death of the party so suing or sued'***

- 32 As already noted the 1<sup>st</sup> plaintiff is a son of Charles one of Naboth's sons and therefore the grandson of Naboth the original registered owner of the mother title. The registration of Naboth as registered proprietor is not a disputed fact the green cards were also adduced in evidence by the 1<sup>st</sup> plaintiff who gave evidence as PW1.
- 33 Guided by the law and case law cited, the burden was upon the plaintiff as a requirement to produce proof that he is a legal representative of the said estate in the form of a grant of representation issued to him with regard to the estate of the said Naboth. In the present case PW1 stated in his witness statement that he obtained a Grant from Court for purpose of filing suit which he filed in Siaya PMCC no. 59 of 2007. A perusal of this grant indeed reveals it was issued by the High Court Busia Succession Cause No. 30 of 2007 on 25/07/2007 to Evans Omollo Ojera - LIMITED FOR THE PURPOSE OF INSTITUTING A SUIT FOR CANCELLATION OF REGISTRATION OF THIRD PARTIES.
- 34 I think I have no issue with the limited grant produced in evidence for the reason that for purposes of filing suit on behalf of the estate of Naboth legally it would suffice. I state prima facie because its validity has been put into question by the appellants. I further agree with the trial courts finding that the trial court was not the proper forum for determining the issue of validity of the grant. The

jurisdiction vested in the High Court pursuant to its inherent powers and section 73 of the Probate & Administration Rules. Moreover, the court was not led to evidence that the said grant was nullified.

35 The ELC sitting on this appeal would equally be divested of jurisdiction, its jurisdiction having been clearly stated in article 162 (2)(b) of the Constitution of Kenya 2010 read together with Section 13 of the ELC Act 2012.

36 It has been urged that the plaintiffs ought to have applied for a fresh adlitem for the present proceedings. Section 36(1)(2) of the Probate & Administration Rules reads as follows; -

**Grant *ad colligenda bona* under s. 67 of the Act**

**(1)Where, owing to special circumstances the urgency of the matter is so great that it would not be possible for the court to make a full grant of representation to the person who would by law be entitled thereto in sufficient time to meet the necessities of the case, any person may apply to the court for the making of a grant of administration *ad colligenda bona defuncti* of the estate of the deceased.**

**(2)Every such grant shall be in Form 47 and be expressly limited for the purpose only of collecting and getting in and receiving the estate and doing such acts as may be necessary for the preservation of the estate and until a further grant is made.**

- 37 My reading of the above provisions does not place any time limitation but limits the grant to the specific purpose for which it is issued. In the present case the purpose for which the same was issued was to file suit for cancellation of registration and the suits were filed.
- 38 In view of the foregoing I find no reason to deviate from the finding of the learned trial Magistrate. It is therefore my finding that the 1<sup>st</sup> respondent had locus standi to file the suit.
- 39 With regard to the 2<sup>nd</sup> plaintiff I agree with the submission that he had no capacity to file the suit because the ad litem was issued to only one person the 1<sup>st</sup> plaintiff.

**Whether the defendants were properly sued.**

- 40 The trial court framed this issue as '*whether the 1<sup>st</sup> and 2<sup>nd</sup> defendants are rightly sued*'. It is noteworthy that according to the judgement of the trial court the 1<sup>st</sup> and 2<sup>nd</sup> defendants were struck out from the proceedings by the trial court for having been sued yet they had not taken out succession proceedings with regard to the estates of Charles and Wellingtone. I understand this to mean that they were not the legal representatives of the said estates and could not therefore be sued as representatives thereof. Counsel for appellants urged that the estates of the said Charles and Wellingtone were condemned unheard.

41 It was submitted on behalf of the respondents that no suit should be defeated on the basis of joinder or non-joinder. However, in my view based on the authorities cited hereinbefore, locus standi cuts both ways to sue and being sued. But of importance is the fact that Order 1 Rule 4 is to the effect that the court may give judgement for or against one or more of joint parties and specifically one or more of such defendants as may be found to be liable according to their respective liabilities. Other defendants were sued and had to defend their title which they did not succeed in doing so.

42 Moreover this court did not come across any grants of representation produced by the plaintiffs issued to the said individuals as representatives to the said deceased persons. I have no reasons to fault the trial Magistrates finding that led to the striking out of these two parties from the proceedings. It has been contended that the estates of the two were condemned unheard but a look at the law I do not see how their presence would have made the titles survive. This will become clearer shortly.

**Whether the Respondents satisfied the trial court on the necessary grounds on which to impeach the Appellants' title.**

43 The appellants submit that the trial court faulted Wellington a grandson of Naboth and Charles Ogola a son of Naboth for causing the transfer of the land into their names and selling them to the 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup>

defendants. That the 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> defendants were innocent purchasers for value without notice and did not participate in any fraudulent actions. That they should not be condemned for the actions of Wellingtone and Charles. The court is referred to the case of **Katende Vs Harridar & Company Limited (2008) 2 EA 173.**

44 The trial court framed the issue as whether Naboth distributed his land to his sons as submitted by the defendants and whether the impugned subdivisions were legal. The trial court found that Naboth had not distributed the land as alleged since the title remained in his name. Further that the defendants had failed to show the legality of their instruments. The result of the trial courts finding was that all the titles issued post the death of Naboth were impeached mainly for the reason that the transfer of the mother titles to Charles and Wellingtone was affected without letters of administration and confirmation of grant of the estate of Naboth. Those subsequent subdivisions arising therefrom would also be impeached. Further reliance was placed on the provisions section 26(1)(b) of the Land Registration Act which speaks to impeachment of title on grounds of fraud, illegalities and corrupt scheme.

45 From the trial courts analysis the learned Magistrate was guided and rightly so by the provisions of Section 26 of the Land Registration Act and the case of **Elijah Makeri Nyangwira Vs. Stephen Mungai Njuguna & Another (2013) eKLR** which speaks to the need for a party whose

title is challenged to prove its root. Therefore, both the plaintiff and the defendants were supposed to defend their titles. Further that the same decision had interpreted the essence of the provisions of section 26(1)(b) as being the removal of protection from an innocent purchaser or innocent title holders. The innocent person though seen to have innocently purchased the land has no protection, protection is to the rightful owner of the land and this case it was the deceased Naboth.

46 The evidence led before the trial court by the plaintiff was that the 1<sup>st</sup> and 2<sup>nd</sup> defendants had not taken out letters of administration. The confirmation of grant had also not been finalised. It is trite that an administrator cannot transfer a property belonging to the estate of the deceased before the confirmation of grant.

47 In the case of **Virginia Mwari Thurania -vs- Purity Nkirote Thurania [2017] eKLR**, the court nullified the sale agreement under Section 82(b)(ii) of the [Law of Succession Act](#), for the seller had not become a legal representative with authority to deal with the estate, since dealing with the land amounted to intermeddling with the property, hence was an illegality or a nullity.

48 Section 82 provides thus'-

**82. Powers of personal representatives  
Personal representatives shall, subject only to  
any limitation imposed by their grant, have the  
following powers—**

**(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;**

**(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—**

**(i) any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and**

**(ii) no immovable property shall be sold before confirmation of the grant;**

49 Moreover the position of an innocent purchaser has since been settled all the way to the Supreme Court of Kenya in **SC Petition 8 (E010) of 2021 Dina Management Limited Vs County Government of Mombasa & 5 Others** where the Supreme Court of Kenya pronounced thus; -

**[111]** *Article 40 of the Constitution entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights 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.'*

108 Further, we cannot, on the basis of indefeasibility of title, sanction irregularities and illegalities in the allocation of public land. It is not enough for a party to state that they have a lease or title to property. 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.'***

50 This court hands are tied and so was the trial courts hands. The title of an innocent purchaser cannot be afforded protection of the law as long as its root is found to be legally wanting. This court therefore upholds the trial court finding that the subdivisions without succession are illegal and can only have been obtained through an illegality. A little diligence by the 3<sup>rd</sup> 4<sup>th</sup> 5<sup>th</sup> and 6<sup>th</sup> defendants could not have saved the day.

51 It is further my finding that the Respondents/Plaintiffs satisfied the trial court on the necessary grounds on which to impeach the Appellants' title.

### **Whether the suit was time barred**

- 52 The plaintiff's suit is termed as having been time barred. The Defendants have cited the provisions of Section 7 of Limitation of Actions Act urging that any claim to recover land cannot be brought after the end of 12 years from the date on which the right of action accrued to him or if it first accrued to some persons through whom he claims. That the suit was filed 20 years after the 1<sup>st</sup> appellant came into the land parcel 180 while the 4<sup>th</sup> appellant came into the land 13 years before the filing of the suit. That they were adults when the appellants came into the land and failed to pursue them.
- 53 The plaintiff urges that the provisions of section 7 of the limitation of Actions Act should be read together with section 20 of the same Act which exclude the application of section 7 to trusts. That the appellants who were in possession of the suit property proceeded to fraudulently transfer the same to the detriment of beneficiaries.
- 54 The trial court did not deal with the issue of whether the suit was time barred though I have noted it was identified by the defendants as one of the issues for determination. I think for me I would look at the issue from the basis of the plaintiffs claim. The claim is based on fraudulently acquisition of titles belonging to the estate of Naboth by the defendants. I agree with the point that anyone who was holding the land was holding it in trust for the benefit of the beneficiaries of the estate of Naboth until lawful distribution by a court of law. They went ahead to transfer

land to themselves and proceeded to subdivide and sell. The claim herein is that this was fraudulent and irregular. This is clear in paragraph 7, 8 and 9 and 11 of the further Amended plaint dated December 2022. Paragraph 11 of the same alludes to fraudulent collusion between the 6,4<sup>th</sup> and 5<sup>th</sup> defendants. Indeed the 3<sup>rd</sup> defendant denies in his statement of defence to the allegations imputing to him fraud and unlawful conduct.

55 It is no doubt that the 1<sup>st</sup> Plaintiff is a beneficiary being a grandson of Naboth. I would exempt the claim from the limitation of 12 years based on the provisions of section 20 (1) (a) (b) of the Limitation Act which provide as follows; -

**20. Actions concerning trust property**

(1)None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust, which is an action—

(a)in respect of a fraud or fraudulent breach of trust to which the trustee was a party or privy; or

(b)to recover from the trustee trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use.

56 In response to the issue of trust it was urged during the plenary hearing that this was not pleaded. But looking at the facts of the case I think the court can safely infer the

existence of trust which was fraudulently breached. The basis of the plaintiff claim was fraud and illegalities committed against the estate of the deceased of which he was a beneficiary which both parties addressed during the hearing. In my view the pleading by the plaintiff and the particulars are adequate for purposes of fraudulent breach of trust by the defendants. This court is persuaded by the decision of Mabeya J in **Mae Properties Limited Vs Joseph Kibe & Another (2012) eKLR.**

**Whether the failure to conduct a pre-trial was fatal to this suit**

57 This issue has been raised by the Appellants. It is contended that pre-trial conference alleged to have been conducted on 15/7/2020 was way before the further amended plaint was filed. That the trial court stated in the judgement herein that pretrial is simply procedural to enable fairness in trial and to avoid ambush. Counsel submits that the matter is significant in the present appeal and states that the amendments are difficult to note and severely offends rules for amendment in Order 8 Rule 7 of the Civil Procedure Rules. That the prayers sought cannot be located save for paragraph 15 which seeks for cancellation of the titles. That the further amended plaint which was relied upon is without prayers.

58 I would not put much emphasis to the absence of pretrial conference post the amendment of the pleadings. Pretrial directions is a case management tool and it would not to

me go to the root of the trial provided that it also does not affect the substantive evidence produced by the parties.

59 I have seen the plaint further amended in 23<sup>rd</sup> August 2022 and it has prayers upto item 5 which seeks a permanent injunction including eviction. This draft was annexed to the Notice of Motion application dated 23/8/2022 (page 55 of the Record). It is the draft that is supported by the verifying affidavit sworn on 23/8/2022. The prayer was for it to be deemed as duly filed upon payment of requisite fees. This is the version that the court used to extract the prayers as seen in the judgement as it is the one that was approved.

60 Based on the foregoing then I find no merits in the argument that there was no basis for the grant of the orders of eviction and injunction.

61 Moreover the environment and Land Court has powers under section 13 of the Environment & Land Court to grant any orders that it may deem necessary to meet the ends of justice. Orders of cancellation of titles having been pleaded and issued then it would defeat justice to have the people in occupation remain therein.

62 I think I have said enough to show that the present appeal lacks merit. It is hereby dismissed. The property being one belonging abnatio to a deceased person I will make an order that each party bears its own costs of this appeal.

DATED at SIAYA this 9<sup>th</sup> Day of April 2026

**HON. JUSTICE A. E. DENA**

**JUDGE**

**9/04/2026**

**Judgement delivered virtually through Microsoft Teams  
Video Conferencing Platform in the Presence of:**

Mr. Idi for appellants

Mr. Ochieng for Respondents

Court assistant: Abiud Wekesa

ORIGINAL