Ndatho & 7 others v Nkabu & another (Civil Appeal 301 of 2019) [2025] KECA 944 (KLR) (9 May 2025) (Judgment)

Neutral citation: [2025] KECA 944 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 301 OF 2019

JW LESSIT, FA OCHIENG & A ALI-ARONI, JJA

MAY 9, 2025

BETWEEN

MUTUA JAPHET NDATHO ..... 1ST APPELLANT

FELICITY MPINDA MIRITI ..... 2ND APPELLANT

GRACE IGOKI MBAE ..... 3RD APPELLANT

JOSHUA MURETI MBAE ..... 4TH APPELLANT

RUTH NKATHA NKANATA ..... 5TH APPELLANT

STEPHEN KITHINJI JASPHER ..... 6TH APPELLANT

RUTH GAKII MBAE ..... 7TH APPELLANT

JAPHET MUTHOMI MUGWIKA ..... 8TH APPELLANT

AND

GIDEON GITONGA NKABU ..... 1ST RESPONDENT

FLORENCE GACHERI ELIAS ..... 2ND RESPONDENT

(Being an appeal from the judgment and decree of the High Court at Meru (A. Mabeya, J.) dated 16th May, 2019 in HC. Succession Cause No. 55 of 1999)

JUDGMENT

1. The appeal herein originates from the matter of the estate of M'Mbwiria M'Mairanyi, in which he left his sons, Marete Mairanyi (the petitioner before the High Court); Benson Muriungi; and daughter-in-law, Flora Gacheri Elias (the 2nd respondent herein and the 2nd applicant in the High Court), land parcel No. Abogeta/L-Kiungoni/334 (hereinafter the "suit land") measuring about 5.5 acres, as the only asset forming his estate.

2. A grant of letters of administration was issued to Marete on 28th April 1999. Subsequently, the grant was confirmed on 11th November 1999 as follows:

    1. Marete Mairanya - 1.5 acres
    2. Benson Muriungi - 1.5 acres
    3. Flora Gacheri Elias - 1.5 acres
    4. Gedion Gitonga Nkabu - 1 acre

3. However, the confirmation of the grant was never effected as Marete subdivided the suit land and sold the subdivisions to the appellants. This prompted the respondents herein to apply for the revocation of the grant and the cancellation of the subdivisions arising out of the suit land on 10th July 2009. A similar application had been filed by the 1st respondent on 30th January 2018.

4. The application was premised on the grounds that; despite the grant having been confirmed in 1999, Marete had not yet distributed the shares to the beneficiaries in terms of the grant, and that he had sold parts of the suit land to third parties.

5. According to the respondent's first witness, he was the son of the 1st respondent and the personal representative of his estate. He claimed that Marete had not shown him the share of his late father, despite there being a grant confirming that he was entitled to 1 acre of the suit land.

6. The 2nd respondent told the court that she was the widow of one of the sons of the deceased. Although she was entitled to 1.5 acres of the suit land, Marete had subdivided the suit land and sold portions thereof to the appellants. She testified that she discovered that the portion she was occupying had been sold when the 1st appellant sued her, seeking to have her evicted.

7. The son of the deceased testified that they had agreed as a family on the distribution of the suit land, as was confirmed in the grant. However, Marete had not given him his share. A dispute arose when he asked for his share which resulted in his hospitalization for over 5 years.

8. A church member who testified on behalf of the respondents told the court that after the deceased's son was discharge from the hospital, he lived under a tree. When the church sought to construct a house for him, they were met with resistance from the appellants. She and some other people reported the matter to the authorities, and the Registrar of Land inhibited the titles that had resulted from the subdivision of the suit land.

9. Marete conceded that he had not given effect to the confirmed grant. He told the court that he had subdivided the suit land into Abogeta/L-Kiungone/994; 995; 996; 997; 998; 1102; 1103; 1104; and 1105. He sold parcel 994 to the 1st appellant, who had since been issued with a title.

10. He asserted that parcel 995 was meant for the 2nd respondent, but she had failed to pay the transfer fees. He then confirmed that he had transferred the subdivisions to five other buyers, and he had not transferred any shares to any of the beneficiaries.

11. He stated that the 1st respondent had not paid any consideration for the 1 acre distributed to him. He thus sold the shares of the other beneficiaries on their behalf. He also admitted that his brother was currently living under a tree.

12. PW2 stated that she was the widow of the 1st appellant. When her husband purchased 2 acres of the land from Marete, they did not involve the beneficiaries of the estate or conduct any investigations. She entered the property in 2017.

13. The 3rd appellant testified that the 4th and 7th appellants were her children. She purchased parcels 1102 and 1103 from Marete in 2007.

14. The 5th appellant purchased parcel 1105 on 22nd May 2007, and was cultivating thereupon. In 2017, she started constructing thereon.

15. Justus Kimathi Mbui told the court that he purchased a quarter of an acre each from Kenneth Githinji Jasper and the 2nd appellant in 2003 and 2008 respectively. He took possession in 2008 and has substantially developed the same.

16. The 8th appellant stated that he was an innocent purchaser for value without notice of parcel 1104. He ascertained from the land office that the land was in the name of Marete before he bought it.

17. At the instance of the Court, Catherine Makau, the Land Registrar, Buuri North, South, and Central Imenti produced the register in respect of the suit land, and the resultant subdivisions. She testified that Marete was registered as the administrator on 31st January 2000. On 7th November 2003, the title for the suit land was closed due to the resultant subdivision of parcels 993, 994, 995, 996, 997, and 998.

18. She further stated that Marete later subdivided parcels 993 and 996 into 1102, 1103, 1104, 1105, and 1106. Marete had transferred all the subdivisions, save for 995 and 1106.

19. She visited the locus in quo with the District Surveyor and filed a report of her findings dated 5th July 2018. The report showed that the suit land, which had now been severally subdivided, was occupied as follows:

    1. Parcel 994 - built on and occupied by the 2nd respondent Parcel 1106 - built on and occupied by Marete
    2. Parcel 998 - built on and occupied by Justus Kimathi
    3. Parcels 995, 1104, and 1105 - vacant and unoccupied Parcel 997 - being used by Justus Kimathi, but no buildings
    4. Parcels 1102 and 1103 - being used by Grace Igoki

20. The witness told the court that the Certificate of Confirmation of Grant was not adhered to, and that Marete had acted irregularly.

21. Upon considering the pleadings, the evidence adduced, and submissions by the parties, the learned judge held that the jurisdiction to annul a grant was provided for under Section 76 of the *Law of Succession Act*. As Marete had failed in his duties set out under Section 83, nearly 20 years after the grant was confirmed, the court found that he had acted arrogantly and criminally against the beneficiaries. Consequently, the grant was revoked.

22. On whether or not the appellants were innocent purchasers for value as provided for under Section 93, the learned judge held that the section was meant to protect bona fide purchasers for value without notice, and not to shield fraudulent administrators and their cohorts from innocent beneficiaries.

23. The court further held that:

> " Such a purchaser must show that he made reasonable inquiries, not only to the register, but also a physical inspection of the property. When the property is in the possession of another, per se is constructive notice and should raise a red flag on the conscience of an intended purchaser."

24. The learned judge held that the appellants had proved to have purchased the properties they claimed for valuable consideration, by producing copies of the sale agreements and titles.

25. However, the court noted that; none of the appellants told the court that they had conducted a search at the lands registry to confirm the sanctity of the title they sought to purchase; had they done so, they would have discovered that Marete was registered as the owner *vide* RL 19, meaning that he was only an administrator and he had no authority to sell the suit land to third parties; other than the 3rd appellant, none of the appellants produced the Land Control Board Consent of the alleged transfers in their favour; neither did they produce a copy of the transfer by which their purported interest was transferred, as some transfer, parcels 994, 997, and 998 were transferred through RL 7, with transferees purporting to be beneficiaries; all the appellants were neighbours to the suit land, they knew Marete, his brother, and the respondents; the appellants were all in agreement that the 2nd respondent and Marete's brother were in possession at the time of their purchases; none of the appellants had taken possession prior to the respondent's first application in 2012, despite the purchases happening between 2003 and 2008; and only Justus Kimathi Mpui had settled on the property, in a house that was built by his predecessor, he however, did not have title to the said portion, and the doctrine of bona fide purchaser, could not apply to him.

26. Subsequently, the learned judge held that the appellants were not innocent purchasers for value without notice. They had constructive notice of the claim by the 2nd respondent and Marete's brother, who were in possession of the suit land. Therefore, Section 93 was not available to the appellants.

27. Consequently, the respondent's application was allowed in the following terms:

    a. The grant issued to Marete Mairanya is hereby revoked and a fresh one issues to Flora Gacheri Elias forthwith.

    b. The said grant is hereby confirmed in terms of the Certificate of confirmation of grant issued on 29th November 1999, save that the share of Gedion Gitonga Nkabu will be issued in the name of his estate.

    c. All the entries made on the title of the suit land after 29th November 1999 are hereby cancelled, nullified, and set aside. Consequently, all subdivisions arising from the suit land are hereby nullified and the titles therefor revoked.

    d. The Lands Registrar, Meru, do forthwith effect the said Certificate of confirmation of grant in the normal manner.

    e. The costs of the applications be borne by Marete and the appellants.

28. Being dissatisfied with the judgment of the court, the appellants lodged the present appeal in which they raised nine grounds of appeal as follows:

    a. The Learned Judge erred in law and fact by failing to find that the appellants were innocent purchasers for value and having bought their various parcels of land after the confirmation of the grant, and their Title Deeds being valid.

    b. The Learned Judge erred in law and fact by finding that the appellants were neighbours of the objector and therefore knew of the objector's interest, despite there being no evidence to support this finding.

    c. The Learned Judge erred in law and fact by finding that the appellants were part of the fraud when they bought their various parcels of land.

d. The Learned Judge erred in law and fact by failing to find that the appellants had conducted a search at the lands office and established that the land was registered in the name of the petitioner, the contracts for which they later entered into being between them and the petitioner and were valid.

e. The Learned Judge erred in law and fact by finding that the interested parties did not produce consents from the Land Control Board despite the issues regarding consent being raised by the objectors.

f. The Learned Judge erred in law and fact by finding that the appellants were assisting the petitioner to acquire the land of the objectors and that they had constructive notice.

g. The Learned Judge erred in law and fact by ordering the cancellation of the appellants' Title Deeds when there was no prayer for such cancellation in the pleadings.

h. The Learned Judge erred in law and fact by finding that the appellants should pay costs despite being innocent purchasers for value without notice and not participating during the hearing of the succession cause.

i. The Learned Judge erred in Law and fact by failing to consider the written submissions which were tendered to the court by the appellants.

29. Based on these grounds, the appellants prayed for the following orders:

a. That the appeal be allowed and the Judgment and Decree of the Superior Court dated and delivered on 16th May 2019 be set aside.

b. That the Honourable Court do supersede the Superior Court and dismiss the respondents' suit.

c. That the costs of this appeal and those of the Superior Court be paid by the respondents.

30. When the appeal came up for hearing on 20th January 2025, Ms. Mugo, learned counsel, appeared for the appellants. The firm of Okubasu and Munene Advocates and Gikunda Anampiu Advocates were on record for the respondents and interested parties, respectively, but there was no appearance.

31. Although the matter was scheduled for hearing, the court noted that none of the parties had filed their written submissions. Having expressed their concern over the delay, emphasizing that the matter was already six years old, and the court has a strict no adjournment policy, Ms. Mugo opted to proceed with oral submissions.

32. Counsel submitted that the appellants were purchasers of parcels of land from the petitioner in the succession cause. They had entered into agreements to buy portions of land that were to be subdivided and had conducted an official search at the Lands Registry, which showed the land was registered under the petitioner's name, and the petitioner had also confirmed the sales.

33. Counsel relied on the doctrine of bona fide purchaser for value, submitting that the appellants had provided their titles and the petitioner's title deed in the High Court. She submitted that they bought the property in good faith, verified the ownership, did not know about fraud, and were not party to any fraud.

34. She cited Section 26 of the *Land Registration Act* regarding the conclusiveness of title. She prayed for the appeal to be allowed, the High Court's judgment to be set aside, and the respondents' suit to be

dismissed, arguing that the appellants were innocent purchasers for value after the confirmation of the grant and registration of the land in the petitioner's name.

35. This is a first appeal. It is now well-settled law that the first appellate court must re-evaluate the evidence in the trial court, both on points of law and facts, and come up with its own findings and conclusions. In *Abok James Odera t/a A.J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, this Court held that:

> "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."

36. We have carefully perused the record of appeal, submissions by counsel, the authorities cited, and the law. The issues for determination are: whether the High Court erred in holding that the appellants were not innocent purchasers for value without notice; whether the High Court erred in revoking the grant and cancelling the appellants' titles; whether the learned judge misdirected himself on the issue of constructive notice and fraud; whether the appellants' procedural rights were breached, particularly regarding the lack of pleadings seeking cancellation of title; and whether the High Court erred in awarding costs against the appellants.

37. *Black's Law Dictionary*, 8th Edition defines a bona fide purchaser as:

> "One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims."
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> (See also *Athi Highway Developers Ltd v West End Butchery Ltd & 6 Others* [2015] eKLR and *Katende v Hardidar & Company Ltd* [2008] 2 EA 173).

38. The doctrine of bona fide purchaser is anchored in Section 93 of the *Law of Succession Act* and further supported by Section 26 of the *Land Registration Act*, 2012. Section 93 provides that:

    1. All transfers of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act, by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.

    2. A transfer of immovable property by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties, and legacies of the deceased have not been discharged nor provided for.

39. Whilst Section 26 provides that:

    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.

2. A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

40. To rely on the doctrine, the purchaser must show that they gave valuable consideration; they had no notice of any fraud or illegality; and they undertook reasonable due diligence, including searches and inspections. This Court in the case of *Weston Gitonga & 10 Others v Peter Rugu Gikanga & Another* [2007] eKLR, *Katende v Haridar & Company Limited* [2008] 2 EA p.173, in holding that:

> "... it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that–
>
> a. he holds a certificate of title;
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> b. he purchased the property in good faith;
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> c. he had no knowledge of the fraud;
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> d. he purchased for valuable consideration;
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> e. the vendors had apparent valid title;
>
> f. he purchased without notice of any fraud; and
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> g. he was not party to any fraud."

41. In this case, the learned judge rightly noted that while most appellants had sale agreements and title deeds, they failed to demonstrate that they conducted due diligence beyond verifying Marete's administrative title. Specifically: the appellants were aware the land was under succession, yet none produced Land Control Board consents or transfers bearing beneficiaries' names; the land was occupied by beneficiaries at the time of the alleged purchases, which should have triggered further inquiry; and several transactions occurred via RL 7, a form reserved for transfers to beneficiaries, yet the transferees were third parties.

42. It is a settled principle that a purchaser cannot acquire a better title than the vendor possesses. Marete, as an administrator, held the property in trust for the beneficiaries and had no authority to sell the parcels of land without the confirmation of the grant. It is also evident from the record that the title held by Marete was under RL 19. Therefore, had the appellants exercised due diligence, they would have known that such a title meant that Marete held the title as an administrator. In the case of *Moses Lutomia Washiali v Zephaniah Ngaira Angweye & Another* [2018] KECA 640 (KLR), this Court held that:

> "We are not persuaded, from the evidence on record, that the appellant was a bona fide purchaser for value without notice. He had actual notice of the challenges to Malinya's title but still proceeded with the purported sale. To use the words of this Court in *Athi Highway Developers Ltd v West End Butchery Ltd & 6 Others* (*supra*), it is a foolhardy rather than a diligent person who purchases land with the alacrity of a potato dealer at Wakulima

market. Our conclusion that the appellant was not a bona fide purchaser for value without notice, coupled with his failure to conduct due diligence even after express notification of a fundamental question pertaining to Malinya' purported title to the suit property, is adequate to dispose of this appeal in its entirety. Accordingly, we do not deem it necessary to delve into the other issues raised by the appellant, because a finding in his favour in those issues cannot salvage his purported title to the suit property, which is irredeemably vitiated by the finding on bona fides."

43. In the circumstances, we agree with the learned judge's finding that the appellants, at best, had constructive notice of the beneficiaries' claims, given that the 2nd respondent and Marete's brother were in actual possession of portions of the suit land at the time of the purchases. They cannot be deemed bona fide purchasers.

44. Section 76 of the *Law of Succession Act* empowers the court to revoke a grant where the administrator fails to comply with their statutory duties. The section provides that:

> " A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—
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> a. that the proceedings to obtain the grant were defective in substance;
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> b. that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
>
> c. that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
>
> d. that the person to whom the grant was made has failed, after due notice and without reasonable cause either-
>
> i. to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
>
> ii. to proceed diligently with the administration of the estate; or
>
> iii. to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
>
> (e) that the grant has become useless and inoperative through subsequent circumstances."

45. We find that Marete's conduct, which included ignoring of the confirmed grant for over 20 years and disposing of the estate contrary to court orders, justifies revocation under this section.

46. The cancellation of subdivisions and resultant titles is a necessary consequence, especially where the root of the title is founded on fraud or administrative overreach. The court cannot uphold titles derived from illegality. The appellants argue that there was no specific prayer for cancellation. However, the High Court had inherent jurisdiction to grant effective relief upon revoking the grant. Moreover, the reliefs sought by the respondents were broad enough to encompass cancellation.

47. The finding that the appellants acted fraudulently or aided the fraudulent conduct was a matter of inference drawn from the facts. While there may not have been overt fraud by the appellants, their inaction, disregard of due diligence, and acquisition from a party known to be holding the land in a representative capacity amounted to willful blindness. The court finds no fault in the High Court's conclusion.

48. The award of costs is discretionary. The appellants' role in perpetuating the illegality justified the High Court's order that they bear the costs alongside Marete.

49. In view of the foregoing, we find no merit in this appeal. The judgment of the High Court was well-reasoned and grounded in law and fact.

50. Accordingly, we make the following orders:

    1. The appeal is dismissed in its entirety;

    2. The judgment and decree of the High Court dated 16th May 2019 is upheld;

    3. The costs of this appeal shall be borne jointly and severally by the appellants.

    It is so ordered.

DATED AND DELIVERED AT NYERI THIS 9TH DAY OF MAY, 2025.

J. LESIIT

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR