



Abed v Ali (Civil Appeal E140 of 2022) [2025] KECA 1323 (KLR) (18 July 2025) (Judgment)

Neutral citation: [2025] KECA 1323 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E140 OF 2022
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA
JULY 18, 2025

BETWEEN

SAID MABRUK ABED APPELLANT

AND

MARGARET MUMBUA ALI RESPONDENT

(Being an appeal from the Judgment and Decree of the Environment & Land Court at Mombasa (Munyao Sila, J.) dated 2nd February 2022 in ELC Appeal No. 11 of 2018)

JUDGMENT

1. The Respondent, Margaret Mumbua Muli, filed a plaint on 26th February 2009 in the Chief Magistrate's Court against the Appellant, Said Mabruk Abed. Through a Further Amended Plaint filed on 20th August 2015, the Respondent filed the suit against Faisal M. Ali who was the 1st defendant, and the appellant as the 2nd defendant in the trial Magistrates court.

In her suit, the Respondent sought judgment in the following terms:

- (a) A permanent injunction restraining them, or their agents, from interfering, trespassing or dealing in any way with the Plot No. 217/I/MN (the subject plot);
 - (b) A declaratory order to the effect that Plot No. 217/I/MN and the house (the suit house) thereon standing belongs to her absolutely;
 - (c) Loss of income at Kshs. 30,000 per month from 1st January 2010 until the date the appellant and Faisal Ali ceased interfering with the respondent's enjoyment of the suit property and
 - (d) Costs and Interest.
2. It was the Respondent's case that she is the widow and legal representative of the late Patrick Nzuki Joel (the deceased), and that the 1st defendant, Faisal Ali was the registered owner of the suit property. She claimed that, by an agreement entered into on 1st August 2005, the 1st defendant, Faisal M. Ali,



leased to the deceased a portion measuring 40 x 60 feet and permitted the deceased to develop a Swahili type house comprising a plastered cement stone house on the land. The lease agreement was on the basis of what the parties termed as a “house without land”.

3. According to the agreement, the Respondent’s husband was to pay a premium of Kshs. 380,000 for which Faisal M. Ali acknowledged receipt and a monthly rent of Kshs. 300. He was also required to build the house within 12 months, and that the tenancy was not transferable without the written
4. permission or consent of the landlord. If there was any breach by the tenant, the tenancy would become void, and the landlord had a right to require the tenant to vacate the premises without any compensation.
5. It was the Respondent’s case that her deceased husband prepared the building plans which were approved and commenced construction but, unfortunately, he died on 16th December 2005 before he could finish the suit house. In 2008, she visited the property and found a man who identified himself as Hamza who told her that he had been contracted to undertake renovations on the suit house. Upon making enquiries, she was informed that the property had been sold to the Appellant by one Asma Swaleh Ahmed (Asma Ahmed). She further established that, on 16th December 2008, the suit house was the subject of a sale, where one Jacob Kilonzo Nzuki sold it to Asma Ahmed for a consideration of Kshs. 1,000,000, and that the 1st defendant, as the land owner, consented to the transfer of the house.
6. It also transpired that, on 4th February 2010, Asma Ahmed sold the suit house to the Appellant for Kshs. 3,200,000.00. As part of her evidence, she produced an exhibit that raised doubt as to the existence of the person called Jacob Kilonzo Nzuki. She claimed that the records from the Registrar of Persons showed that the identity card relied upon in the sale agreement of 16th December 2008 was not issued to anyone bearing the name of Jacob Kilonzo Nzuki, but actually belonged to a female. The Respondent testified that she does not know anyone going by the name of Jacob, and contended that there could not have been any proper sale of the suit house from the estate of the deceased. She claimed that the transactions were fraudulent as the lease continued to exist in favour of her late husband, and that one Hamsa was unlawfully renovating the suit house.
7. In response, the Appellant filed a defence in which he claimed that the Respondent was a stranger. He admitted that the subject plot had indeed been leased to the deceased, who only owned the suit house and not the land and that, upon his death, the family of the deceased and his sons sold the suit house to take care of his dependants. He claimed to have bought the suit house from one Asma Ahmed pursuant to a sale agreement made between Asma Ahmed and Jacob Kilonzo dated 16th December 2008, and that the 1st defendant, Faisal M. Ali had consented to the sale, though he did not sign the agreement. He claimed that as at the time of purchase, the house was complete and that the land owner signed the transfer document; that he had since rented it out and was earning rental income of Kshs. 61,000.00 per month from the building.
8. Asma Ahmed who testified as DW2 stated that she purchased the suit house from one Jacob Kilonzo, a son of the Respondent’s deceased husband by way of an agreement dated 16th December 2008, which was witnessed by the land owner. She stated that, when she bought the house, it was incomplete, and that she had completed the construction and rented it out. She later sold the suit house to the Appellant whom she claimed was the rightful owner.
9. During cross examination, she reiterated that the house belonged to the Respondent’s husband, but she bought it from their son, Jacob Kilonzo. She admitted not having seen any document showing that the house was owned by Jacob Kilonzo, or any grant of letters of administration in his favour. She



- claimed that, when she bought the house, Jacob Kilonzo was with his mother, but could not remember her name. She also confirmed that she had not signed a new lease with the land owner at the time.
10. The trial Magistrate, upon considering the evidence, held that there was no evidence that Jacob Kilonzo was a son of the deceased, or that he held letters of administration in respect of the estate of the deceased. The court held that Jacob Kilonzo was not an owner of the property and, therefore, was incapable of transferring title to Asma Ahmed. The court further found that it could not be claimed that the 1st defendant terminated the lease agreement, and yet allow a person claiming to be the relative of the deceased to sell it; and that the only person who could legitimately deal with the property was the Respondent who held a grant of letters of administration. The trial Magistrate concluded by declaring that the suit house belonged to the Respondent absolutely and, in so doing, issued an injunction against the Appellant and 1st defendant restraining them from dealing with the suit house. The trial court dismissed the claim for loss of income upon finding that there was no evidence that the deceased was earning any income from the property. He nevertheless awarded costs to the Respondent.
 11. Aggrieved, the Appellant filed an appeal to the Environment and Land Court on grounds that the trial Magistrate was in error in failing to dismiss the Respondent's suit against the Appellant; in holding that the Respondent had the locus standi to institute the suit on behalf of the late Patrick Nzuki Joel; in finding that the Respondent held a better or superior title over the suit house than one Jacob Kilonzo Nzuki when the Respondent had no capacity to represent the estate; in holding that the 1st defendant did not formally terminate the lease agreement when the same was not an issue to be determined; and in failing to hold that a house without land is not immovable property.
 12. It was further asserted that the trial Magistrate wrongly held that the deceased had erected a house on the subject plot when there was no evidence on record to support such a finding, and wrongly issued a prohibitory injunction against the Appellant who has always been in possession and occupation of the suit plot; in failing to find that the Appellant was an innocent purchaser without notice for valuable consideration; in holding that the suit house belonged to the Respondent absolutely when the suit had been brought on behalf of the estate of the deceased, and on behalf of the dependents who were not named or particularized in the plaint as required by law; in failing to find that the Respondent's claim, if any, was for damages against the 1st defendant; in failing to find that failure to enjoin Asma Ahmed to the suit was fatal since the Appellant purchased the suit house from her; and in allowing the Respondent's suit for injunction when there was no sufficient evidence on record.
 13. Upon considering the appeal, the 1st Appellate court held that Jacob Kilonzo from whom Asma Ahmed bought the suit house did not have the capacity to sell the deceased property without a grant of letters of administration; that the act of selling the property amounted to meddling in the estate of a deceased, which offends the provisions of Section 45 of the *Law of Succession Act*; that only a personal representative, under Section 82 of the Act, had power to sell; and that, therefore, the sale by a person who is not the legal representative of a deceased person was null and void. The court further held that Jacob Kilonzo had no title to pass to Asma Ahmed, who did not obtain good title to the suit house and that, therefore, had nothing to pass on to the Appellant. The learned Judge concluded that the trial court's findings were correct and in declining to interfere with the decision, dismissed the appeal, but corrected the orders with regard to ownership of the suit house. The court held that the suit house belonged to the estate of the deceased and falls to be distributed in accordance with the provisions of the *Law of Succession Act*.
 14. Dissatisfied, the Appellant has appealed to this Court on grounds that: the learned Judge was in error in finding that the Respondent had proved that the deceased built the suit house when the evidence produced by the Respondent was that the deceased was allowed to construct a temporary structure on the subject property; in failing to find that the suit house that stood on the subject property was



constructed by Asma Ahmed, who later sold it to him for valuable consideration; in failing to find that the Respondent and the deceased had no legally enforceable right over the subject plot where the deceased was allowed to construct a temporary structure; in failing to find that the deceased and the landlord entered into a periodic tenancy which was subject to termination upon issuance of 1 months' notice or failure on the part of the deceased to pay ground rent as agreed; in failing to find that Asma Ahmed entered into a fresh and new tenancy agreement with the landlord which she later transferred to the Appellant, and that any tenancy that may have existed in favour of the deceased had been terminated by effluxion of time or operation of law upon the demise of the tenant; in holding that Jacob Kilonzo had no title to sell or pass when the deceased's only interest was based on the tenancy agreement, which was terminated; and in wrongly issuing an order of eviction against the Appellant contrary to the weight of the evidence.

15. When the appeal came up for hearing on a virtual platform, both the Appellant and the Respondent filed written submissions. Learned counsel Mr. Mutubia for the Appellant submitted that the Respondent had no locus standi to institute a suit to enforce the tenancy since the deceased was a mere tenant on a portion of the subject plot and had failed to demonstrate how the deceased's tenancy survived his death. It was argued that the tenancy agreement relied on by the Respondent did not specify that the tenancy would include the tenant's legal representatives, administrators or executors, and that the learned Judge was in error in failing to appreciate that the lease or tenancy did not form part of the deceased's estate and, furthermore, that the alleged incomplete house was no longer in place or in existence; that the tenancy or lease of the portion of the plot was personal to the deceased and could not be inherited by beneficiaries to his estate; that, further, since the Respondent was not in occupation of the leased portion, no tenancy relationship existed between the landlord or the Respondent or the deceased's estate at the time the landlord entered into the Agreement with Asma Ahmed as a bona fide purchaser, who was entitled to sell the lease to the Appellant.
16. Counsel further submitted that the learned Judge failed to appreciate that the lease was clear that, in the event of breach, the landlord was under no obligation to issue a notice of termination or forfeiture, particularly when none of the deceased's beneficiaries were in occupation of the subject plot; that the Appellant purchased a house that was completed by Asma Ahmed, and not the incomplete structure that was left by the deceased; that the learned Judge did not appreciate the special regime of land tenancy known as 'house without land' and wrongly concluded that the deceased purchased the land which could then form a part of his estate upon his death, yet the deceased's only right was the periodic monthly tenancy determinable upon issuance of a 1 months' notice or death of a tenant, and was therefore not transferrable to his beneficiaries or his estate.
17. On their part, learned counsel Mr. Gikandi for the Respondent submitted that Asma Ahmed was fully aware that the deceased owner of the suit house, Joel, had passed away when she purchased the suit house, given that she testified that one Jacob Kilonzo was the alleged son of the deceased who had acquired authority from his family to enter into an agreement for sale of the suit house to her; that there was no evidence that the one Jacob Kilonzo was the son of the deceased and, even if he was, there is no evidence that he was a representative of the deceased's estate; that, in effect, the Appellant and Asma Ahmed failed to show that Jacob Kilonzo was authorised to transfer the suit house to them.
18. It was further submitted that the sale transaction was entered into before the Grant of Letters of Administration and confirmation were issued in respect of the deceased's estate; that the grant of letters of administration were conferred to the Respondent on 6th February, 2016 which was 2 months after the sale agreement with one Jacob Kilonzo was executed; that no valid grant of letters of administration existed to validate the purported transaction between one Jacob Kilonzo and Asma Ahmed; that the transaction offended against Sections 45(1) and 82(b)(ii) of the *Law of Succession Act*, and was therefore



a nullity as a consequence of which she was incapable of transferring of a valid title to the Appellant by virtue of the principle of *nemo dat quod non habet*.

19. This is a second appeal to this Court. That being the case, this Court will confine itself to matters of law only as guided in *Kenya Breweries Limited vs Godfrey Oduyo* [2010] eKLR, (Civil Appeal No. 127 of 2007) where Onyango Otieno, JA. put it succinctly that:

“In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.”

20. Where an appeal is confined to questions of law only, an appellate court has to accept the findings of fact made by the courts below, and should not interfere with such findings unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion. This would be the same as holding the decision is bad in law. (See *Charles Kipkoech Leting vs Express (K) Ltd & another* [2018] eKLR).
21. Having considered the grounds of appeal, submissions by counsel and the authorities cited by all the parties, the main issues for determination are: i) whether the Respondent was entitled to file suit against the Appellant and the Faisal Ali, the 1st defendant; ii) whether the suit house without land constructed on the subject plot belonged to the deceased; iii) whether the lease with the deceased was terminated by the land owner; and iv) whether the Appellant was a bona fide purchaser for value and therefore acquired good title to the suit property.
22. Beginning with whether the Respondent had the locus standi to bring the suit against the Appellant and Faisal Ali, this issue was addressed in part by the learned Judge who, upon observing that the Respondent produced a limited grant of letters of administration ad litem issued on 6th February 2005, found that the grant permitted her to file a suit in respect of the estate of the deceased, and there being no evidence of any attempt to nullify the grant nor any evidence that the grant has been nullified, it followed that she had the necessary locus standi to file the suit in respect of the estate of the deceased and, as a consequence, was properly before the court.
23. Based on the fact that the Respondent had obtained letters of administration in order to commence the suit against the Appellant and the 1st defendant, we are satisfied, as was the learned Judge, that the Respondent had the requisite locus standi to bring the suit as the deceased’s legal representative.
24. However, upon further consideration of the Appellant’s grounds of appeal, it appears that the Appellant’s further complaint is that the deceased was a mere tenant on a portion of the subject plot, and that the Respondent failed to demonstrate how the deceased’s tenancy survived his demise; that the tenancy agreement did not specify that the tenancy included the deceased legal representatives, administrators and executors, or otherwise formed part of the deceased’s estate and, since the incomplete house ceased to exist, the Respondent was left with no rights to enforce.
25. In discerning this issue, it is not in dispute that the subject plot belonged to one Faisal Ali, and that the deceased entered into an agreement under the concept of “house without land”. This was confirmed by the agreement made between Faisal Ali and the deceased dated 1st August 2005.
26. This then brings us to the concept of land tenure peculiar to the Kenya coastal region known as the “house without land” which was historically recognized within the land tenure system under the Indian Transfer of Property Act, 1882 and the Land Titles Act. Following the promulgation of *the*



Constitution that led to the enactment of the Land Act, 2012 where the existing land regime defines interests in land as land or leases, the status of the ‘house without land’ appears to have been displaced. The “house without land” was aptly described in the case of *Famau Mwenye & 19 others vs. Mariam Binti Said*, Malindi H.C.C.C. No. 34 of 2005 (Ouko, J.) (as he then was) as:

“The dispute arises from land tenure unique ... to Mombasa, which has baffled scholars, practitioners and even jurists. That land system is only referred to as ‘house without land’. That is, the owner of the house is different from the owner of the land on which it stands. It therefore defies the common law concept of land expressed in the Latin maxim, *cujus est solum ejus est usque ad coelum* [meaning, ‘whose is the soil, his is also that which is above it’].”

27. In the above-cited case, the learned Judge discerned that the concept gave rise to a tenancy arrangement between a landlord and the tenant. Similarly, Musinga, J. (as he then was) held in the case of *Stephen Ronoh vs Harun Cheboi* [2006] eKLR that:

“The concept of a “house without land,” to the best of my understanding is an arrangement that is prevalent at the Coast Province of Kenya whereby a landlord allows a person (whom I will refer to as a tenant) to put up a house on his land either for the tenant’s own occupation or for rental and the tenant initially pays to the landlord a given amount of money at the commencement of that often loose arrangement and thereafter continues to pay some premium either monthly or annually. The “tenancy” may be for a fixed period of time or an indefinite one and quite often there is no written agreement between the parties but the landlord may signify his consent by signing the tenant’s building plan and applications for water and electricity supply”.

Whilst in the case of *Birithia vs Mshila & another* (Environment & Land Case 292 of 2018) [2024] KEELC 3718 (KLR) (N. Matheka, J.) observed:

“I take judicial notice that under the Land Titles Act (repealed) the peculiar phenomenon of ‘houses without land’ were recognized that the properties belong to the Defendants. Accordingly, they cannot be demolished without following the proper procedure dealing with landlord and tenant relationships”.

28. The Appellant has asserted, and it is not disputed, that a tenancy arrangement existed between the landlord and the deceased. It is, however his argument that the tenancy arrangement terminated upon the demise of the deceased and that, as a consequence, the tenancy or lease of the portion of the plot, being personal to the deceased, it could not be inherited by his estate. It was further argued that the alleged incomplete house was no longer in place or in existence.

Given the existence of the tenancy arrangement between the deceased and the landowner evidenced by the agreement of 1st August 2005, and the undisputed evidence of the existence of the incomplete house, we hold the view that it cannot be disregarded that, by the time of his death, the deceased maintained an interest in both the tenancy arrangement and the incomplete house, both of which formed a part of his estate within the meaning of the Law of Succession Act. We say this because, under the Act, “estate” means the free property of a deceased person”. And “free property”, in relation to a deceased person, means the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death.”

29. Given that the deceased retained an interest in the tenancy arrangement and the incomplete suit house by the time of his demise, we find that they remained part of his free property for which he was legally



competent freely to dispose of during his lifetime, and which interests subsequently became a part of his intestate estate upon his demise.

30. Needless to say, the Appellant further argued that the deceased's tenancy was subject to termination upon issuance of one month's notice, or for failure to pay ground rent, and that since Asma Ahmed entered into a fresh lease for valuable consideration, the tenancy with the deceased was terminated by effluxion of time upon his demise.
31. Concerning the question as to whether the tenancy over the suit plot was terminated, the learned Judge had this to say:

“There was a position taken that the lease to the deceased lapsed because the deceased did not comply with its terms. I do not agree. First none of the defendants pleaded that the deceased never complied with the terms of the lease. I have gone through the defences of the appellant and the 1st defendant and they never pleaded that the lease was forfeited for non-compliance with its terms. What they pleaded is that the house was sold by the deceased bonafide family members to support the children of the deceased and claimed that the respondent is a stranger with no right over the house. Apart from there being no pleading to that effect the person who would have been the one to forfeit the lease, that is the 1st defendant never testified. He never came to court to say that he considered the lease to the deceased cancelled for failure to pay the premium or the rent, or for any other reason. The appellant cannot purport to speak for the landlord and claim that the landlord was not paid or there was a breach of the terms of the lease. He was certainly not privy to this transaction.

32. Our re-evaluation of the evidence does not disclose that this issue was ever pleaded by the defence. It is therefore not a matter that can be raised this late in the day, particularly when it should be observed that whether or not the lease was terminated by the landlord are matters of fact not capable of being addressed in this Court where we are limited to addressing matters of law only. We agree with the learned Judge that, there having been no proof that the tenancy was terminated, it followed that, by the time of his demise, the deceased retained an interest in the tenancy arrangement and the suit house that became a part of his estate capable of disposition to his dependants.
33. We turn next to consider whether the Appellant was an innocent bona fide purchaser for value having purchased the suit house from Asma Ahmed, who he asserts purchased the suit house for valuable consideration having dealt with the landlord owner, and was therefore entitled to sell the suit house to the Appellant. This issue was also considered by the learned Judge who stated thus:

“The appellant traces his title to Asma. It is not clear who exactly Jacob is, for the identity Card which is displayed in the sale agreement that he(Jacob) had with Asma identifies a completely different person. But let us assume that Jacob does exist. Could he pass good title to Asma? My answer is no. The property that he was selling was the property of a deceased person. Jacob could not have had capacity to sell the property of a deceased person for he held no grant of letters of administration. His act of selling the property was an act of meddling in the estate of a deceased person which offends the provisions of Section 45 of the *Law of Succession Act*. It is only a personal representative, under Section 82 of the same Act, who has power to sell. Any sale by a person who is not the legal representative of a deceased person is null and void”.



Section 45 of the *Law of Succession Act* stipulates that there is to be no intermeddling with property of deceased person:

- “(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
- (2) Any person who contravenes the provisions of this section shall—
- a. be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
 - b. be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

Concerning the property of deceased persons, section 79 specifies that it shall vest in the personal representative thus:

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

The powers of personal representatives are set out in Section 82.

34. As to whether the suit house belonged to the deceased, as seen above, the Respondent’s evidence was that the deceased was in the process of constructing a Swahili type house by the time of his demise. This evidence was corroborated by Asma Ahmed who testified that the incomplete house belonged to the Respondent’s late husband, and that she purchased it from his son, Jacob Kilonzo. The fact of the construction of the house was not rebutted by the Appellant or his witness Asma Ahmed from whom the Appellant purchased the house. In the absence of any evidence rebutting the Respondent’s evidence that the suit house belonged to the deceased, as did the courts below, we too find that it was sufficiently proved that the suit house was constructed by and belonged to the deceased.
35. As to whether the Appellant acquired good title from Asma Ahmed, the sale agreement between Asma Ahmed and Jacob Kilonzo was entered into in 2008. This was three years after the death of the deceased. According to the sale agreement, Jacob Kilonzo is described as the owner of the suit plot. There is no mention of the Respondent’s deceased husband or issuance of a grant of letters of administration for his estate.



36. In the case of *Trouistik Union International & another vs. Jane Mbeyu & another* [1993] eKLR, the Court concluded that action taken by a party without letters of administration is incompetent at the date of its inception.
37. Further, this Court in the case of *Winnie Kinyua Kaburu vs Ali Juma Abdirahman & another* [2018] eKLR stated that:

“A party who has no letters of administration has no legal capacity or authority to transact or deal with the estate of the deceased. In the words of Section 45 of the Act that is tantamount to intermeddling.”

We therefore find the learned Judge’s conclusion that the 2nd respondent could not have validly entered into a sale agreement is anchored in law, this ground of appeal fails as no amount of other evidence such as the alleged receipt of deposit and the appellant taking possession of the suit property would change the position of a null and void transaction.”

See also the case of *Kadzo Charo vs Alex Nzai Dzombo* [2019] eKLR.

38. The above authorities are clear that, in the absence of letters of grant of representation, one Jacob Kilonzo had no legal capacity to sell the suit house to Asma Ahmed. In addition, it is trite that a person can only transfer what he owns. The above cited position gets credence from the Latin maxim of *Nemo dat quod non habet*, which means that one can only give what he/she has, or can only transfer what he/she owns. More particularly, a person who does not own property cannot confer it on another except with the true owner’s authority.
39. As stated by Lord Denning M.R in the case of *Macfoy vs United Africa Co.Ltd* [1961] 3 All ER 1169 At Pg. 1172:

...If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse”.

See also *Gathondu (As Administrator of the Estate of the Late Thumbi Kariuki) & 3 others vs Registrar & 7 others* [2024] KECA 668 (KLR).

40. In the circumstances, Jacob Kilonzo having had no capacity to sell the suit house, no valid title passed to Asma Ahmed.
41. That said, the Appellant claims to have been a bona fide purchaser for value without notice having purchased the suit house from Asma Ahmed. The Black’s Law Dictionary 9th 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.”
42. The concept of an innocent purchaser for value was emphasized by the Supreme Court in the case of *Law Society of Kenya vs. Commissioner of Lands & Others* [2001] eKLR where it was stated:

A bona fide purchaser for value without notice of any fraud or irregularity is protected by law. Such a purchaser acquires a good title to the property, even if the vendor’s title was defective, provided that the purchaser acted in good faith and without knowledge of the defect.”



43. In the case of Jones vs Smith [1841] I Hare 43, the Chancery Court held:

...a purchaser has constructive notice of fraud if he had actual notice, that there was some encumbrance and a proper inquiry would have revealed what it was (but if) it abstained either deliberately, carelessly from making those inquiries which a prudent purchaser would have made... then the defence cannot be available to him or her.”

The Appellant claimed that Asma Ahmed having obtained consent from the landlord to sell the suit house to him, he became an innocent bona fide purchaser for value, and ought to have been viewed as such. In determining this issue, the question that begs resolve is whether in purchasing the suit house the Appellant exercised the necessary due diligence to ascertain the original owner, particularly in precarious circumstances such as this that concerned a “house without land”.

44. A consideration of the surrounding facts shows that the Appellant acquired the suit house from Asma Ahmed who in turn had acquired it from an imposter, one Jacob Kilonzo, and not from the deceased or his estate. Prior to purchasing the suit house, the Appellant ought to have undertaken a thorough investigation into the suit house and its origins. Had he done so, he would have discovered that it belonged to the deceased, and that Asma Ahmed purchased it from a person who did not hold letters of administration in respect of the deceased’s estate, and who was therefore not authorised to sell the suit house. The sale to Asma Ahmed was therefore unlawful, invalid, and incapable of passing a good title to her. Correspondingly, the Appellant would have realized that Asma Ahmed was incapable of passing good title to him. Having failed to conduct a proper due diligence on the suit house, we find that the Appellant did not qualify to be a bona fide purchaser for value without notice. In view of the foregoing, the courts below cannot be faulted for so finding.

45. As such, we agree with both the trial Magistrate’s and the learned Judge’s decisions that the Respondent proved her case to the required standard that the suit house belonged to the deceased, and that the Appellant did not acquire proper title to the suit house having acquired it from a person who had no capacity to sell the property to him. For this reason, we have no basis upon which to interfere with those decisions.

46. In sum, the Appeal has no merit and is hereby dismissed with costs to the Respondent.
It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 18TH DAY OF JULY, 2025.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CARb, FCIArb.

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JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a True copy of the original



Signed

Deputy Registrar

