



REPUBLIC OF KENYA



**KENYA LAW**  
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**Musa v Musa & 6 others (Civil Appeal 264 of 2019)  
[2025] KECA 1283 (KLR) (11 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1283 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL 264 OF 2019  
HA OMONDI, LK KIMARU & JM NGUGI, JJA  
JULY 11, 2025**

**BETWEEN**

**ERIC SYDNEY MUSA ..... APPELLANT**

**AND**

**MARY KEMUNTO MUSA ..... 1<sup>ST</sup> RESPONDENT**

**IBRAHIM ONKOBA MAKAYA ..... 2<sup>ND</sup> RESPONDENT**

**PAMELA ADHIAMBO OUKO ..... 3<sup>RD</sup> RESPONDENT**

**FAMILY BANK LIMITED ..... 4<sup>TH</sup> RESPONDENT**

**LAND REGISTRAR - KISII COUNTY ..... 5<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 6<sup>TH</sup> RESPONDENT**

**KENNEDY BOSIRE GICHANA ..... 7<sup>TH</sup> RESPONDENT**

*(Being an appeal from the Ruling and Order of the High Court of Kenya at Kisii (Majanja, J.) dated 15th August, 2019 in Succ. Cause No. 215 of 2011)*

**JUDGMENT**

1. This appeal arises from the decision of the High Court in Kisii Succession Cause No. 215 of 2011, In the Estate of Musa Omurwa (Deceased) wherein the High Court (Majanja, J.) ordered Mary Kemunto Musa [Mary] the 1<sup>st</sup> respondent herein to refund to the estate of the deceased the sum of Kshs. 2,000,000/- which represented the price she sold Kisii Municipality Block No.1/126 [suit property] to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents within ninety (90) days and dismissed the case against the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents with no order as to costs.



2. Briefly, the facts of the matter as presented at the trial court were that through the summons dated 12<sup>th</sup> August 2016, filed by Irene Kerubo Musa [she later died and was substituted by Erick Sydney Musa-appellant] against the respondents seeking the following orders:
  - i. That this Honorable court be pleased to declare the transactions and / or registration of entry numbers 8, 9, 10 and 11 in the register of land parcel No. Kisii Town / Block I/126 illegal, null and void.
  - ii. That entry Numbers 8, 9, 10, and 11 of the register to land parcel no. Kisii Town /Block I / 126 be cancelled and the property be reverted back to the original owner the late Musa Omurwa for purposes of completing this succession cause.
  - iii. That land parcel no. Kisii Town / Block I/126 forms part of the free property of the deceased herein and the same should not be disposed of and/or transferred before confirmation of grant of letters of administration issued to the applicant herein.
  - iv. That the estate of the deceased herein be compensated accordingly.
  - v. That [any] other suitable orders and/ or direction be made.
  - vi. That the costs of and incidental to this application be provided for.
3. It was Irene's case that Mary had fraudulently caused Kisii Town/Block I/126 ("Plot 126") to be registered in her name and thereafter transferred it to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents who then charged it to the 4<sup>th</sup> respondent ("the Bank") as a security for a loan of Kshs.20,000,000/=. She asserted that the transactions involving the suit property were conducted in violation of orders of a temporary injunction barring any dealings pending the hearing and determination of an application for revocation of the grant. She alleged that the Land Registrar either acted incompetently or was improperly influenced in making entries in the land register, which resulted in the unlawful loss of the property from the deceased's estate. Irene further stated that the deceased had unlawfully sold Plot No. 126 to the interested party. In her oral testimony, consistent with her affidavit, Irene emphasized that Mary knowingly disposed of the suit land to the 2<sup>nd</sup> and 3<sup>rd</sup> respondent despite a court order and the prior sale to the interested party and urged the court to nullify the impugned entries, rectify the land register, and reinstate the property in the deceased's name.
4. The summons were opposed by Mary through the affidavit sworn on 4<sup>th</sup> October 2016 in which she deponed that vide a Parental Responsibility Agreement entered into by the deceased, it was agreed that the suit land be given to her as surety for the upkeep of their children. When the lease for Plot No.126 expired in December 1999, she proceeded to apply for extension of the lease. Upon being issued with a letter of allotment by the Kisii Municipal Council, she settled the outstanding land rates amounting to Kshs.272,268/= and the lease for Plot 126 was extended from 1<sup>st</sup> January 2000 and registered in her name and she subsequently sold the suit land to her brother, the 2<sup>nd</sup> respondent herein. Mary declined any knowledge of any prior sale of the property to the interested party.
5. In his evidence, Ibrahim Onkoba Mokaya the 2<sup>nd</sup> respondent herein stated that he lawfully purchased Plot 126 from his sister, Mary, in October 2014 for Kshs.2,000,000/=. Prior to the purchase, he engaged an advocate who conducted an official search confirming that the property was free from encumbrances. Upon receipt of the title in October 2014, he demolished an existing structure and commenced construction of a four-storey building. Together with his wife, Pamela Adhiambo Ouko, the 3<sup>rd</sup> respondent, he secured a loan of Kshs.20 million from a bank using the property as security. He testified that he was unaware of any claim by the interested party at the time of purchase; and had no knowledge of the deceased having another family. He further stated that Mary's adult children



- consented to the sale and that Mary informed him she had been given the land by her husband and was selling it to raise school fees for one of her children.
6. Valentine Jeptoo Yator, a Senior Relationship Manager with the Bank confirmed to the court that the 3<sup>rd</sup> respondent had applied for a loan of Kshs.10,000,000/= and later on applied for a further loan of Kshs.10,000,000/=. Both applications were approved. She testified that the Bank had acted in good faith and conducted due diligence before Plot No.126 was charged in its favour.
  7. Kennedy Bosire Gichana recalled the deceased offered him Land Parcel Kisii Municipality/Block 1/135 for sale. He conducted a search and noted that the land was still registered in the name of the deceased's father. He paid the deceased a deposit of Kshs. 250,000/= to facilitate the succession cause and paid him a further Kshs.110,000/= when the deceased requested for more money. Later on, the deceased offered to sell him Plot 126 instead. They entered into an agreement on 24<sup>th</sup> May 2010 where it was agreed that the deceased would process the extension of the lease. Gichana paid Kshs. 560,000/= and the balance was to be paid as the lease was being processed. He also testified that he gave the deceased a cheque of Kshs.260,000/= to facilitate payment of his daughter's fees and at the time of his demise, he had paid a total purchase price of Kshs.920,000/=. He further testified that at that time, Mary filed a suit against him and the deceased alleging that the land did not belong to the deceased.
  8. It was his evidence that when the deceased gave him possession of the land, there were 3 (three) tenants paying rent to him. When he discovered that Mary had filed a succession cause, he applied for an injunction when the structures on the land were demolished. He stated that Mary proceeded with the demolition despite being served with the court order and was of the view that the estate should complete the transaction notwithstanding the developments that had been made on the land.
  9. Upon being summoned, Steve Mokaya, the Land Registrar Kisii testified that the then County Council of Gusii had issued a lease of 33 years from 1<sup>st</sup> January 1967 to the first lessor who was Nyandika Mayiro. On 29<sup>th</sup> January, 1974, Nyandika Mayiro transferred the land to the deceased. A certificate of lease was issued to the deceased and later reissued on 12<sup>th</sup> April, 2006. In 2000, the lease expired and the property reverted back to the County Government. One Tom Mageka Omurua claiming a beneficiary interest, caused a caution to be registered in his favour on 13<sup>th</sup> March 2009 and another caution was also registered in Mary's favour on 23<sup>rd</sup> June 2010. These entries were withdrawn on 2<sup>nd</sup> July 2012 and Mary was registered as administrator vide Kisii Succession Cause No. 215 of 2011.
  10. The Registrar explained that he lacked the authority to extend leases and that such applications must be submitted to the Ministry of Lands Headquarters in Nairobi. He confirmed that Mary applied for an extension of the lease on 3<sup>rd</sup> December 2013, which was approved, resulting in the issuance of a new lease in her name for a term of 66 years commencing on 1<sup>st</sup> January 2000. Subsequently, on 22<sup>nd</sup> October 2014, the property was transferred to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents for Kshs.2 million, and a certificate of lease was issued in their favour. The property was then charged to Family Bank for Kshs.10 million on 26<sup>th</sup> October 2015, with a further charge of Kshs.10 million registered thereafter. Under cross- examination, the Registrar admitted that all register entries made between 13<sup>th</sup> March 2009 and 2<sup>nd</sup> July 2012 were invalid, as they occurred after the expiry of the original lease.
  11. In his determination, the learned judge found that Mary, the 1<sup>st</sup> respondent being the legal administrator of the estate of Musa Omurwa (the deceased) violated her duties to the estate of the deceased as administrator by procuring the renewal of the lease in respect of suit land in her name and processing it as such and subsequently selling and transferring it to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, termed the 2<sup>nd</sup> and 3<sup>rd</sup> respondents innocent purchasers for value as they knew nothing about the deceased's estate's interest in the property, and absolved them of liability as innocent purchasers under section 93



of the *Law of Succession Act* (LSA). The learned judge directed Mary to account for the proceeds of the sale of the suit land to the estate of the deceased.

12. Aggrieved by the above decision, the appellant appealed against the ruling and order of the trial court. The record shows the existence of two appeals, that is, Civil Appeal No. 264 of 2019 and Civil Appeal No. 282 of 2019. On 20<sup>th</sup> February, 2025, the appeals were consolidated with Civil Appeal No. 282 of 2019 being the lead file, both against the impugned decision.
13. In Appeal No. 282 of 2019 the single prayer was that the property reverts to the estate of the deceased and that the estate of the deceased be compensated accordingly. In Civil Appeal No. 264 of 2019 the learned judge is faulted for failing to find the sale of Land Parcel No. Kisii Municipality/Block 1/126 was illegal, holding that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were innocent purchasers for value without notice, failing to cancel the transfer in respect of the suit property and directing the interested party to claim the purchase price as a liability to the estate.
14. In support of the appeal, the appellant contends that the learned judge correctly made his finding that the suit property belonged to the deceased but erred in failing to note that the 1<sup>st</sup> respondent had no legal powers to deal with the deceased properties before the confirmation of the grant as enshrined under Section 55[1] of the *Law of Succession Act*. Relying on the case of Dina Management Limited vs County Government of Mombasa and 5 Others SCoK Petition No. 8 of 2021, the appellant submitted that the process through which the 1<sup>st</sup> respondent obtained the lease was illegal and thus the title acquired by both the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondent cannot be held to be valid.
15. It is submitted that the trial court correctly found that the 1<sup>st</sup> respondent unlawfully used Form 19 to transmit the property to herself prior to the confirmation of the grant but erred in holding that the 1<sup>st</sup> respondent lawfully transferred the suit land to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. Reliance was laid in the case of Musa Nyaribari Gekone & 2 Others vs. Peter Miyianda & Another Civil Appeal No. 2 of 2014, the appellant faulted the learned judge for restating the law that no legal administrator of an estate should sell land using a grant that had not been confirmed. Further, the 2<sup>nd</sup> and 3<sup>rd</sup> respondent were aware of the succession cause, thus the learned judge was wrong in absolving them of liability as innocent purchasers under Section 93 of the Act.
16. The appellant contends that from the record, the purported agreement was signed on 25<sup>th</sup> December 2012 while the certificate of lease was issued on 22<sup>nd</sup> October, 2014; thus, it is apparent that the agreement was made before the 1<sup>st</sup> respondent was registered as the owner of the suit land. Further, the 1<sup>st</sup> respondent did not have a good title to pass to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents to charge to the bank and that the bank failed to exercise due diligence before they charged the suit property.
17. Opposing the appeal, it was submitted for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents that in his determination, the learned judge made a finding that the lease held by the deceased had expired on 31<sup>st</sup> December 2000 and therefore the suit land did not form part of the deceased's estate. The learned judge further found that the 1<sup>st</sup> respondent not truthful in her dealings considering that she had listed the suit property as part of the assets of the deceased; that the judge proceeded to order the 1<sup>st</sup> respondent to refund the deceased estate a sum of Kshs.2 million which the 1<sup>st</sup> respondent is ready and willing to refund.
18. It is further submitted that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents are innocent purchasers for value as they were not aware of any illegality or fraud that had passed on before they sought to purchase the suit property; thus, they are entitled to protection under the law.



19. This being a first appeal, the Court's duty is to reconsider the evidence, re-evaluate it, and draw its own conclusions in deciding whether the ruling of the trial court should be upheld or not - see *Selle vs. Associated Motor Boat Co.* [1968] EA
123. But at the same time, the Court needs to exercise caution and respect the trial court's findings on the demeanor of witnesses, especially since it had the advantage of seeing and hearing the witnesses. See *Peters vs. Sunday Post Ltd.* [1958] EA 424.
20. Upon reviewing the evidence on record, the rival submissions by counsel, and the relevant judicial authorities cited, the issues for determination are whether the suit property formed part of the deceased's property and whether the 1<sup>st</sup> and 2<sup>nd</sup> respondents qualified as innocent purchasers for value without notice.
21. The appellant alleged that the 1<sup>st</sup> respondent fraudulently transferred the suit property to himself without first obtaining a confirmed grant of letters of administration.
22. It is on record that the 1<sup>st</sup> respondent (Mary) filed Succession Cause No. 215 of 2002, which was in respect of the estate of the deceased, obtained a limited grant of letters of administration intestate on 28<sup>th</sup> September, 2010. Using these documents, the 1<sup>st</sup> respondent, as the administrator of the estate, applied for the extension of the lease in respect of the suit property and transferred the suit property to herself as the sole beneficiary of the estate. Thereafter, Mary sold the suit land to her brother the 2<sup>nd</sup> respondent herein who in turn charged it to the bank as security to secure a loan of Kshs.20,000,000/=.
23. It is apparent that in her petition for grant of letters of administration, Mary listed the suit property as forming part of the deceased's estate. Among the duties of personal representatives of a deceased's estate is to gather and protect the property that forms part of a deceased's estate. In this case, the lease in respect of the land in question was said to have expired. As the administrator, Mary had an obligation to renew the lease in favour of the deceased estate and not in her name.
24. By dint of section 45 of the *Law of Succession Act*, any transaction on a deceased's property amounted to intermeddling. The sale contravened sections 45 and 82 of the *Law of Succession Act* and there is no possibility that the 2<sup>nd</sup> respondent could have acquired any valid title from the sale, for the person who purported to sell the property to him had no title to it.
25. From the record, Mary whom the 2<sup>nd</sup> respondent transacted with was one of the administrators with whom the letters of administration had been issued which letters were yet to be confirmed. The property in question, therefore, had not yet vested in her as the administrator by virtue of section 79 of the *Law of Succession Act*, and therefore she could not exercise the powers of sale over that property given by section 82 of the *Law of Succession Act*.
26. Since Plot 126 formed part of the deceased's estate, the administrator sold it when, clearly, she lacked the legal capacity to deal in the property without the consent of all beneficiaries and more so when the grant had not been confirmed. In his determination, the learned judge observed thus

“The fact that the lease had, in law expired, in my view, it does not absolve Mary of any liability. Nor does the fact that she held a Parental Responsibility Agreement with the deceased. I have read the agreement and it states that the property was only a surety for the maintenance and upkeep of the children. It was neither a gift nor transfer and that is why when Mary applied for the grant, she listed it as an asset of the deceased. It is also worth recalling that at the time she applied for allocation of the land to herself, she had commenced the process by representing that she was an administrator of the estate of the deceased as she was holding the grant of letters of administration. In addition, Mary was applied to be



registered as a proprietor by transmission through Form RL 19 dated 2nd July 2012 and was duly registered despite the fact that the grant had not been confirmed. Further, the grant had been issued to Mary and her son, Felix Musa yet she alone purported to apply to be the registered owner by transmission. Although the Land Registrar alluded to the fact the documents were recorded in the wrong register, Mary's intention and action were clear and they were that she intended to take what she knew was the estate's property for her own benefit."

27. Having found that the 1<sup>st</sup> respondent title was obtained illegally and unprocedurally, the learned judge ought to have cancelled the same and nullified the purported sale of the suit land to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

28. Regarding the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, the learned judge observed as follows:

"While I am equally skeptical of the assertion by 2<sup>nd</sup> and 3<sup>rd</sup> respondents that they knew nothing about the deceased's estate's interest in the property, the fact that a lease had been issued to Mary by the time they purchased the Plot 126 and there being no evidence that they were involved in the fraud perpetrated by Mary to the deceased's estate, I absolve them of liability as innocent purchasers under section 93 of the LSA. Likewise, the Bank cannot be blamed for lending money to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents."

29. Were the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' innocent purchasers for value without notice? Who is an innocent purchaser for value without notice? Black's law Dictionary (8<sup>th</sup> 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."

30. This Court in *Pande & another (Suing as the Legal Representatives of the Estate of Aboma Otieno (Deceased)) vs. Karia & 4 others (Civil Appeal 110 of 2020) [2025] KECA 741 (KLR) (25 April 2025) (Judgment)* cited with approval the decision in *Midland Bank Trust Co. Ltd and Another vs. Green and Another [1981] 1 ALL ER 155*, where the House of Lords held that:

"... the character in the law known as the bona fide (good faith) purchaser for value without notice was the creation of equity. In order to affect a purchaser for value of a legal estate with some equity or equitable interest, equity fastened on his conscience and the composite expression was used to epitomise the circumstances in which equity would, or rather would not, do so. ... Equity, in other words, required not only absence of notice but genuine and honest absence of notice. As the law developed, this requirement became crystallized in the doctrine of constructive notice....it would be a mistake to suppose that the requirement of good faith extended only to the matter of notice, or when notice came to be regulated by statute the requirement for good faith became obsolete. Equity still retained its interest in, and power over, the purchaser's conscience. ... good faith there is stated as a separate test which may have to be passed even though absence of notice is proved.

31. Similarly, in the case of *In the case of Dina Management Limited vs. County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR)*, the Supreme Court stated that, for a court to establish whether a party is a bona fide purchaser for value, the court must first establish the



root of the title right from the first allotment. The Court upheld the dicta in *Samuel Kamere vs. Lands Registrar, Kajiado* [2015] eKLR and stated that:

“...in order to be considered a bona fide purchaser for value, they must prove; that they acquired a valid and legal title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property ...”

32. From the cited authorities, it is evident that to establish that a purchaser exercised due diligence, he must demonstrate that he conducted an official search of the property’s title, made reasonable inquiries into the property’s condition and ownership history, and undertook a physical inspection of the property.

33. This position has recently been reaffirmed by the Supreme Court of Uganda in *Lwanga vs. Mubiru and Others* (Civil Appeal 18 of 2022) [2024] UGSC 7, where the court held:

“The principle of bona fide purchaser for value without notice is a general defence in any transaction of sale or purchase of any property particularly land.

The definition of bona fide purchaser for value without notice is “that buyer who has paid a stated price for the property without knowledge of existing or prior claims or prior equitable interest”. Bona fide is a Latin word meaning good faith, without fraud, sincere, genuine. See (Black’s Law Dictionary 9th Edn Page 199)

A bona fide purchaser is a buyer who buys without constructive or actual notice of any defects or infirmities against the seller’s title. See (page 1355 Black’s Law Dictionary 9<sup>th</sup> Edn.

It is trite law that a person who relies on the defence of bona fide purchaser for value without notice has the burden to prove that he or she acted in good faith.

The purchaser must have given due consideration and purchased the land without notice of the fraud. Such notice cover both actual and constructive notice of fraud.

In the case of *Jones v. Smith* [1841] 1 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” See *Yakobo M. N Senkungu & Others v. Cresencio Mukasa* Civil Appeal No 17 of 2014.

34. The court reaffirmed the law regarding the importance of due diligence in land transactions holding that:

“...Lands are not vegetables which are bought from unknown sellers. Lands are very valuable properties and buyers are expected to make thorough investigations not only on land but also of the owner before the purchase.”

35. In the Supreme Court decision in *Dina Management Limited vs. County Government of Mombasa* (supra), the Court went on to state that, once the root of the title has been challenged, a party cannot derive benefit from the doctrine of bona fide purchaser.

36. Did the 2<sup>nd</sup> and 3<sup>rd</sup> respondents acquire a valid and legal title to the suit property? The 2<sup>nd</sup> respondent’s case was that he purchased the suit property from the 1st respondent who was the registered title



holder; that his advocate conducted a search at the Lands Registry and confirmed that the land was owned by the 1<sup>st</sup> respondent. However, of significance is that the 2<sup>nd</sup> respondent made no effort to conduct further inquiry into the 1<sup>st</sup> respondent's title. In other words, he did not establish the root of the 1<sup>st</sup> respondent's title, which essentially required that he ascertain how it had come into existence, and how the 1<sup>st</sup> respondent, who is his sister, came to be the registered owner upon the demise of her husband. Had the 2<sup>nd</sup> respondent conducted sufficient enquiry into the 1<sup>st</sup> respondent's title, he would have discovered the anomalies aforesaid. He ought to have inquired into the history behind the 1<sup>st</sup> respondent's title before making the decision to purchase the suit property.

37. In the instant case, had the 2<sup>nd</sup> and 3<sup>rd</sup> respondents interrogated the root of the 1<sup>st</sup> respondent's title, they would have found that it emanated from a transfer of land that belonged to the estate of the deceased. Further enquiry would have led them to ascertain whether the process of succession was concluded and would have come to the conclusion that a lawful process of transmission to the 1<sup>st</sup> respondent was not effected and that ultimately, they could not have obtained a valid title to the suit property that he sought to purchase as such they were not bona fide purchasers for value of the suit property without notice.
38. From the foregoing, it is our finding that the appeal is merited and we allow it. The suit property shall revert back to the estate of the deceased where it shall be distributed to the beneficiaries in accordance with the law. In that regard, any entries made in the register of the suit parcel of land at the Land Registry reflecting the respondents as having any proprietary interest in the suit parcel of land including the charges in favour of the Family Bank registered therein are hereby ordered cancelled. We award costs of the suit to the appellant.

**DATED AND DELIVERED AT KISUMU THIS 11<sup>TH</sup> DAY OF JULY, 2025.**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

**L. KIMARU**

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**JUDGE OF APPEAL**

**JOEL NGUGI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR**

