



**Kojwang v Ondiek & another (Environment and Land Appeal  
E010 of 2023) [2024] KEELC 7078 (KLR) (24 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 7078 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL E010 OF 2023**

**E ASATI, J**

**OCTOBER 24, 2024**

**BETWEEN**

**RICHARD OGADA KOJWANG ..... APPELLANT**

**AND**

**BENARD ODHIAMBO ONDIEK ..... 1<sup>ST</sup> RESPONDENT**

**GEORGE OWUOR OKOTH ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal arising from the judgement of Hon.  
F. Rashid ( PM) delivered on 28th February 2023)*

**JUDGMENT**

**Background**

1. Vide the Memorandum of Appeal dated 5<sup>th</sup> March, 2023, Richard Ogada Kojwang, the Appellant, appealed to this court against the Judgement dated 28<sup>th</sup> February, 2023 in Kisumu CMC L & E CASE NO. E093 of 2021 (the suit) and sought that the appeal be allowed and the judgement be set aside.
2. A brief background to the appeal as can be gathered from the record of appeal is that the Appellant sued the Respondents in the suit vide the plaint dated 19<sup>th</sup> July, 2021. He claimed that he bought land parcel known as Kisumu/nyahera/56 (the suit land) from John Orimba Misula, (deceased) sometimes in the year 1988 and has enjoyed quiet possession thereof until after the year 2017 when the 2<sup>nd</sup> Respondent and his agents sought to dispossess him of the land and obtained title thereto fraudulently. The Appellant sought for a declaration that he is the beneficial and rightful owner of the land, cancellation of the title held by the Respondents, transfer of the land in his favour, general damages and costs of the suit.
3. The Respondents filed Statement of Defence dated 27<sup>th</sup> January, 2022 denying the Appellant's claim.



4. The record of appeal shows that the suit was heard by the trial court which, vide the judgement dated 28<sup>th</sup> February 2023, found that the Appellant had failed to prove, on a balance of probabilities, that he is the beneficial and rightful owner of the suit land. The trial court further found that fraud had not been proved and therefore proceeded to dismiss the suit with no orders as to costs.
5. Aggrieved by the judgement, the Appellant preferred the present appeal.

### **Submissions**

6. The appeal was canvassed by way of written submissions. Written submissions dated 19<sup>th</sup> January, 2024 were filed by the firm of Agutu & Company Advocates on behalf of the Appellant.
7. Counsel framed what the appellant considered to be the issues for determination as;
  - a. whether the registration of the land parcel NO. KISUMU/NYAHERA/56 in the name of George Owuor Okoth, the 2<sup>nd</sup> Respondent, and the subsequent transfer thereof to Benard Odhiambo Ondiek, the 1<sup>st</sup> Respondent, was lawful.
  - b. whether the Appellant is the beneficial and rightful owner of land reference NO. KISUMU/NYAHERA/56.
  - c. whether the 1<sup>st</sup> Respondent is a bona fide purchaser for value without notice of the Appellant's claim to the title of the suit property.
  - d. whether the Executive Officer/Court is empowered to execute the transfer documents in favour of the Appellant should the court find that the Appellant is the beneficial and rightful owner of the suit property.
  - e. What remedies is the Appellant entitled to?
8. On the issue of whether registration of the suit land in the name of the 2<sup>nd</sup> Respondent and subsequent transfer thereof to Benard Odhiambo Ondiek, the 1<sup>st</sup> Respondent, were lawful, Counsel submitted that the orders issued by the trial court in succession Cause No.110 of 2019 on 13<sup>th</sup> July, 2021 are yet to be either reviewed or set aside. That the said orders were to the effect that the Grant of Letters of Administration issued and confirmed on 12<sup>th</sup> January, 2021 be revoked, that any transfer, charge, conveyance or certificate of title transmitted or issued using the said grant be declared null and void and costs were awarded to the Applicant.
9. That since the said orders declaring transactions done using the revoked grant null and void are still valid, it was the submission of the Appellant that an order be issued directing the Land Registrar, Kisumu to cancel entries number 3, 4, 5 and 6 made in the land register as contained in the green card. Counsel relied on the case of John Charo Katana Charo & Another –vs- Emmanuel Katana Charo & 5 Others [2021]eKLR
10. Counsel submitted further that where fraud has been proved section 26(1) allows the court to impeach a title that has been procured fraudulently and un-procedurally. That section 80(1) of the [Land Registration Act](#) allows the court to rectify the register by directing that any registration be cancelled or amended, if it is satisfied that the registration was obtained, made or committed by fraud or mistake. Counsel relied on the case of Elija Makeri Nyangwara –vs- Stephen Mungai Njuguna & Another [2013]eKLR where it was held, inter alia, that the title of an innocent person is impeachable so long as that title was obtained illegally, un-procedurally or through a corrupt scheme. That the title holders need not to have contributed to the vitiating factors. That the purpose of section 26(1)(b) is to protect the real title holders from being deprived of their titles by subsequent transactions.



11. On the issue of whether or not the Appellant is the beneficial/rightful owner of the suit land, Counsel submitted that it was not in dispute that the Appellant has at all material times been in occupation of the suit land. That the Appellant produced evidence that he bought the suit land from one JOHN ORIMBA MISULA and was given the original title deed by the seller which original title deed he produced as exhibit. That the issue of occupation was confirmed by the 1<sup>st</sup> Respondent's Advocate's letter to the Appellant asking him to vacate the suit property. Counsel relied on the cases of Justin Mwangi Chonga –vs- Mwarome Munga Janji & 4 Others [2021]eKLR and Evanson Wambugu Gachugi –vs- Simon Wainaina Gatwiki & 2 Others [2014]eKLR on the issue of surrender of the original title deed and concluded that it was evident that the Appellant was the beneficial and rightful owner of the suit property.
12. On the issue of whether or not the 1<sup>st</sup> Respondent was a bona fide purchaser for value without notice of the Plaintiff's claim of the title to the property, Counsel submitted that it is now a settled principal of law that a party who claims to be an innocent purchaser for value must demonstrate steps taken before the acquisition of the property. That the 1<sup>st</sup> Respondent ought to have visited the suit property first before committing any money for the same.
13. Counsel relied on the case of Suleiman Rahemtulla Omar & Another –vs- Musa Hersi Faluye & 5 Others [2014]eKLR where the Court of Appeal held that the Appellant could not rely on the doctrine of bona fide purchaser since he failed to carry out sufficient due diligence before entering into the sale agreement. That it was incumbent upon the 1<sup>st</sup> Respondent to undertake due diligence which he did not.
14. On the issue of whether or not the court is empowered to execute transfer documents in favour of the Appellant should the court find that the Appellant is the beneficial owner of the suit property, Counsel submitted that in order to give effect to the judgement, there is need for an order for the execution of the transfer documents in favour of the Appellant. Counsel relied on the case of John Simiyu Palanga (deceased) & Another –vs- Chopkose Koskei and Another [2018]eKLR where it was held that the court could sign transfer forms.
15. On the issue of general damages, Counsel submitted that the Appellant has suffered loss as a result of the actions and/or omissions of the Respondents and was therefore entitled to general damages.
16. Counsel relied on the case of John Charo Mwaro & Another (Supra) where the Plaintiffs were awarded Kshs.800,000/- as general damages.
17. No submissions were filed by or on behalf of the Respondents. On 20<sup>th</sup> March, 2024 when the appeal came up for mention to confirm filing of submissions, Counsel for the Respondents requested for time to enable them file the submissions. The court granted the Respondents 21 more days within which to file and serve the written submission. No submissions were however filed.

### **Issues for determination**

18. The Memorandum of appeal listed 11 grounds of appeal. Counsel for the Appellant condensed the 11 grounds of appeal into five (5) issues for determination. I adopt the issues as framed by Counsel for the appellant as the issues for determination.

### **Analysis and determination**

19. I have considered the grounds of appeal, the entire record of appeal and the submissions made on behalf of the Appellant. My powers as an Appellate Court as spelt out in section 78 of the *Civil Procedure*



Act are to either determine the case finally, remand the case, frame issues and refer them for trial, take additional evidence or require additional evidence to be taken and/or to order a new trial.

20. Being a first appeal, this court is duty bound to re-examine the evidence placed before the trial court and come to an independent conclusion and thereby determine whether the trial court erred or not in its findings and decision.
21. The evidence placed before the trial court by the Appellant who was the Plaintiff in the suit comprised of his own testimony and the exhibits he produced. The Appellant who testified as PW1 adopted the contents of his witness statement dated 19<sup>th</sup> July, 2021 as his evidence in chief. He had stated in the said witness statement that sometimes in the year 1988 or thereabout he bought the suit land from John Orimba Misula (deceased) who was a grandfather to the 2<sup>nd</sup> Respondent. That the deceased gave him the original title deed for the suit land. That he took possession of the suit land and has remained in occupation thereof. That the deceased died on 23<sup>rd</sup> March, 1990 before he could officially transfer the suit land to him.
22. The appellant stated further that the deceased's widow Dina Owuor Misula, agreed to transfer the suit land to him at the completion of succession process. That Grant of Letters of Administration to the estate of the deceased were issued to Dina Owuor Misula on 26<sup>th</sup> May, 2000 but Dina Owuor Misula also died on 16<sup>th</sup> August, 2017 before she transferred the land to the Appellant. That the Appellant has enjoyed quiet possession of the suit land from 1988 until 2017 when Dina Owuor Misula died. That after the death of Dina Owuor Misula, the 2<sup>nd</sup> Respondent and his agents sought to fraudulently dispossess him of the suit land. That they obtained title to the suit land without following the due process. That the Appellant became aware of the 2<sup>nd</sup> Defendant's actions when he was served with Notice of eviction on 26<sup>th</sup> May, 2021 requiring him to vacate the suit property.
23. That the 2<sup>nd</sup> Respondent fraudulently sold the suit property to the 1<sup>st</sup> Respondent using a Grant that was fraudulently obtained vide Winam Succession Cause No.110 of 2019 which grant has since been revoked.
24. The Appellant produced documents attached to the list of documents dated 19<sup>th</sup> July, 2021 as exhibits 1 to 10. The exhibits included the title deed for the suit land in the name of the deceased and copy of the ruling revoking the Grant.
25. On cross-examination, the Appellant stated that he did not sign any land sale agreement with the seller or attend any Land Control Board with the seller. That he did not have any structures on the suit land. That the deceased had only one wife known as Cecilia Odembo Orimba and that the 2<sup>nd</sup> Respondent was the grandson of the deceased.
26. The evidence the Respondents placed before the trial court comprised of the testimonies of both Respondents, a witness they called and the documents they produced as exhibits.
27. The 2<sup>nd</sup> Respondent testified as DW1. He adopted the contents of his witness statement dated 26<sup>th</sup> March, 2021 as his evidence in chief. He stated in the said statement that the suit land was initially registered in the name of the deceased who was his grandfather. That the deceased had only one daughter by the name of Anna Atieno Orimba who was his mother. That it was him (2<sup>nd</sup> Respondent) and Alex Owuor Okoth who are surviving the deceased.
28. That they have been in actual occupation and use of the suit land since the death of their grandfather until they sold the land to the 1<sup>st</sup> Respondent.



29. That after undertaking succession to the estate of the deceased vide Winam Succession Cause No.110 of 2019, they sold the land to the 1<sup>st</sup> Respondent and transferred it to him on 12<sup>th</sup> May, 2021. He testified further that he was a stranger to the sale of the suit land to the Appellant. That he was not aware of any succession cause in any court until he sold the land to the 1<sup>st</sup> Respondent. That the Grant which was obtained in KISUMU HC SUCCESSION CAUSE NO.122 OF 1997 was obtained fraudulently since the only widow of the deceased was one Cecilia Odemba Orimba who died on 30<sup>th</sup> August, 1976.
30. That he validly sold the land to the 1<sup>st</sup> Respondent while he was a holder of a valid confirmed Grant and handed over possession to him. That the Appellant has never been in possession of the suit land.
31. The 2<sup>nd</sup> Respondent produced documents attached to the list of documents dated 25<sup>th</sup> March, 2022 as exhibits D.1 to D.6. In cross-examination, the 2<sup>nd</sup> Respondent stated that the property in dispute belonged to John Orimba Misula, who was his grandfather from his mother's side. That he did not know whether the grandfather sold the land. That Dina Owuor Misula was a wife to the brother of his grandfather.
32. That he petitioned the court in a succession cause but the Grant was revoked. That the land was divided so that Richard was using one portion and Wycliffe the other portion.
33. DW2 was the 1<sup>st</sup> Respondent. He adopted the contents of his witness statement dated 25<sup>th</sup> May, 2022 as his evidence in chief. He stated in the witness statement that sometimes towards the end of the year 2021, he was introduced to the 2<sup>nd</sup> Respondent who was selling a parcel of land belonging to his grandfather. That when he carried out search, he found that the land was registered in the name of John Orimba Misula. That the 2<sup>nd</sup> Respondent showed him a Certificate of Confirmation of Grant issued in WINAM PM SUCCESSION CAUSE NO.110 OF 2019. That the 2<sup>nd</sup> Respondent also showed him a Chief's letter in confirmation of the 2<sup>nd</sup> Respondent's relationship with the deceased.
34. That there being no encumbrances registered against the title, he proceeded and did an agreement for sale and paid the purchase price in full. That he obtained consent of the Land Control Board to transfer the suit parcel in his name. That he is a stranger to the alleged purchase of the suit parcel of land by the appellant.
35. On cross-examination, he stated that he had visited the property when he signed the agreement, that he instructed his advocate to ask Ogada Ojwang to vacate the land.
36. DW3 was one Peter Anyango Amoth, the area chief. He testified on how he handled a case between the Plaintiff and the 2<sup>nd</sup> Defendant. He testified further that when he visited the land, he found that there were no developments thereon, save for the fence that was being erected. That the land was not under cultivation and that there were no farming activities on the land.
37. On cross-examination, he stated that John Orimba had only one child by the name Anna. That the Appellant had divided the land into two and given one part to the family of Agutu. That one Dina Owuor Orimba who was a sister-in-law of the deceased took out Letters of Administration in respect of the estate of the deceased in the year 2000. That he could not confirm that the Plaintiff has been using the land he is claiming. That the land has been lying idle.
38. The first issue is whether or not the registration of the suit land in the name of the 2<sup>nd</sup> Respondent and the subsequent transfer thereof to the 1<sup>st</sup> Respondent were lawful.
39. The Appellant pleaded in paragraph 9 of the plaint that after the death of Dina Owuor Misula in 2017, the 2<sup>nd</sup> Defendant and his agents sought to fraudulently dispossess him of the suit land and fraudulently obtained title to the land. He pleaded in paragraph 14 that the 2<sup>nd</sup> Respondent



- illegally, fraudulently and unlawfully transferred the suit property to the 1<sup>st</sup> Respondent. The appellant itemized the particulars of fraud. He testified on the same and produced as exhibits; certificate of official search dated 26<sup>th</sup> May, 2021 showing that the suit land was on 4<sup>th</sup> May, 2021 registered in favour of Benard Odhiambo Ondiek the 1<sup>st</sup> Respondent.
40. He also produced ruling dated 13<sup>th</sup> July, 2021 in Winam succession cause No.110 of 2019. The ruling revoked the grant which had been issued and confirmed and declared null and void any conveyance or transfer that had been done using the said Grant.
  41. It is the Respondents' case that as at the time of the sale, transfer and registration of the suit land in favor of the 1<sup>st</sup> Respondent, the 2<sup>nd</sup> Respondent was holder of a duly confirmed Grant of Letters of Administration issued in WINAM SUCCESSION CAUSE NO.110 OF 2019 and hence the transaction was not fraudulent. The record shows that the 1<sup>st</sup> Respondent vide the statement of defence dated 18<sup>th</sup> July 2022 denied that the transaction was fraudulent.
  42. Perusal of copy of register (green card) produced by the Appellant as exhibit shows that transmission of the suit land from the name of the deceased to 2<sup>nd</sup> Respondent was done pursuant to SUCCESSION CAUSE NO.110 OF 2019 in WINAM Court. And from the 2<sup>nd</sup> Respondent to the 1<sup>st</sup> Respondent and one CLARIS K. KAVULANI ONAMU by way of transfer.
  43. The transmission was done on 12<sup>th</sup> April, 2021 and the transfer on 4<sup>th</sup> May, 2021, all before 13<sup>th</sup> July, 2021 when the ruling declaring the transaction null and void was delivered. The particulars of fraud itemized under paragraph 14 of the plaint revolve around the grant that was revoked. However, it is clear that as at the time of the transactions, the same were being done lawfully pursuant to an existing duly confirmed Grant of Letters of Administration which had distributed the suit land to the 2<sup>nd</sup> Respondent.
  44. The burden of proof under sections 107 to 109 of the *Evidence Act* was with the appellant to prove that the transaction was fraudulent. The appellant needed to prove that the Respondents had made a false assertion that the original title deed was lost, that the Respondents knew that the original title deed was with the appellant, that they concealed his interest in the suit land when they got Letters of Administration in WINAM SUCCESSION CAUSE NO. 110 OF 2019 and all the other particulars of fraud pleaded.
  45. The law requires that allegations of fraud be specifically pleaded and proved. The standard of proof required for claims based on fraud is higher than in the ordinary civil cases. In *Koinange & 13 others vs Charles Karuga Koinange* 1986 KLR at page 23 the court held that:

“When fraud is alleged by the Plaintiffs the onus is on the Plaintiffs to discharge the burden of proof. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond a reasonable doubt, something more than a balance of probabilities is required.”
  46. I find that the appellant did not discharge the burden of proof. The ruling that revoked the Grant came after the transaction had taken place. Further although the ruling declared the transaction void it did not award the land to the appellant.
  47. The second issue for determination is whether or not the Appellant is the beneficial and rightful owner of the suit land.



48. Although the Appellant claims to have bought the suit land from the deceased, no land sale agreement was exhibited to prove this. No witness was called to support the appellant's testimony. The Respondents denied that the appellant bought the suit land from the deceased.
48. Section 3(3) of the [Law of Contract Act](#) provides; -
- “No suit shall be brought upon a contract for the disposition of an interest in land unless: -
- (a) The contract upon which the suit is found-
    - (i) is in writing
    - (ii) is signed by all the parties thereto; and
  - (b) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party.”
50. There was no evidence of compliance with the provisions of section 6 of the [Land Control Act](#) which requires that controlled transactions be subjected to the Land Control Board within six (6) months from the date of transaction. The Act provides that the transaction is rendered void for all intents and purposes unless the Land Control Board for the area where the land is situate gives its consent for the transaction in accordance with the Act. The appellant's claim was based entirely on the sale of the land between himself and the deceased. He sought to recover the land he purchased. Under section 7 of the [Limitation of Actions Act](#), the claim was obviously time barred.
51. The Appellant claimed that the wife of the deceased by the name of Dina Owuor Orimba did succession with a view to transfer the suit land in his favour but unfortunately died before she could transfer the land to him. It emerged from the evidence and it was common ground that the said Dina Owuor Orimba was not the widow of the deceased. That the deceased was survived by only one child by the name Anna who is the mother of the 2<sup>nd</sup> Respondent and that the deceased's wife by the name Cecilia Odembo Orimba died many years ago. The Appellant admitted on cross-examination that “the deceased only had one wife called Cecilia Odembo Orimba. I am aware”.
52. Black's Law Dictionary, 9<sup>th</sup> Edition defines a ‘beneficial owner’ as one who enjoys, uses and manages property as of right and can convey it to others; an equitable ownership. After analyzing the evidence, the court is not satisfied that the appellant fits in this description
53. I find no basis to hold that the Appellant is the beneficial or rightful owner of the suit land. The original title deed that he claims to have been holding was reported and published in the Kenya gazette by the 2<sup>nd</sup> Respondent as having been lost. There was no evidence that the Appellant responded to the Kenya Gazette that published the loss of the title deed. The purpose for gazette notice was discussed in Catholic Diocese of Mosh -vs- Attorney General [2000] 1 EA 25 (CAT), where it was held that the whole objective behind such publication is to bring the purport of the order concerned to the notice of the public or persons likely to be affected by it.
54. Perusal of the judgement appealed against shows that the trial court upon hearing the evidence placed before it found that the appellant had failed to prove on a balance of probabilities that he was the beneficial and rightful owner of the suit land. I uphold this finding.
55. The third issue for determination is whether the 1<sup>st</sup> Respondent is an innocent purchaser for value without notice of the Appellant's claim.



56. The 1<sup>st</sup> Respondent pleaded in paragraph 7 of his Statement of Defence dated 18<sup>th</sup> January, 2022 that he is an innocent purchaser of the suit property for value without notice from the 2<sup>nd</sup> Respondent who was lawfully registered as proprietor. He testified that he did due diligence. That he did search and found that the land was registered in the name of the deceased. That the 2<sup>nd</sup> Respondent showed him confirmed Grant of Letters of Administration in respect of the estate of the deceased and a letter from the Chief confirming the relationship between the deceased and the 2<sup>nd</sup> Respondent. That he visited the suit land when he did the agreement. The evidence of the Chief was that there were no developments or farming activities on the land. That the land was idle.
57. In *Dina Management Limited v County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment) the court quoted Black’s Law Dictionary 9<sup>th</sup> Edition which defines a bona fide purchaser for value 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.”
58. The Court of Appeal of Uganda in *Katende -vs- Haridar & Company Ltd* [2008] 2 EA 173, defined a bona fide purchaser for value as follows: “For the purposes of this appeal, 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: 1. he holds a certificate of title;2. he purchased the property in good faith;3. he had no knowledge of the fraud;4. he purchased for valuable consideration; 5.the vendors had apparent valid title;6. he purchased without notice of any fraud; and 7. he was not party to the fraud.”
59. The Court of Appeal in *Samuel Kamere -vs- Lands Registrar, Kajiado Civil Appeal No 28 of 2005* [2015] eKLR stated as follows:“...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...”
60. The 1<sup>st</sup> respondent produced documents to demonstrate that he purchased the land from the 2<sup>nd</sup> Respondent and paid the agreed consideration. There is no evidence that he knew or was part of any fraud in respect of the suit land or that he knew of the appellant’s claim over the same. He testified that he visited the suit land and that he saw documents that confirmed the seller’s ownership.
61. I find that the 1<sup>st</sup> Respondent was an innocent purchaser for value without notice of the appellant’s claim.
62. The record shows that sale transaction was however later declared null and void in the succession cause. The parties may need to address this in the said succession cause as the same court that declared the sale null and void in the succession cause later found in the suit that the appellant had not proved his claim of being a beneficial and rightful owner of the suit land.
63. The fourth issue for determination is whether or not the court is empowered to sign the transfer documents in favour of the Appellant.
64. Court has power to execute documents to enable execution of its orders. But this happens where there is a party who ought to sign pursuant to a court order but who has declined to do so. Given the findings and circumstances in this case, I find no basis to order the Deputy Registrar of the court to sign transfer documents in favour of the Appellant.
65. Regarding what remedies the Appellant is entitled to,



The trial court found that the Appellant had not proved his case. Having re-examined the evidence, this court is in agreement with the findings of the trial court.

66. The upshot is that the court finds no merit in the appeal and hereby dismisses it. Costs to the Respondents.

Orders accordingly.

**JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 24<sup>TH</sup> DAY OF OCTOBER, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

**E. ASATI,**

**JUDGE.**

In the presence of:

Ann & Alex: Court Assistants.

