



Ouko & another ((Suing as the Administrators of the Estate of the Late Jason Atinda Ouko)) v Mworia (Environment & Land Case 502 of 2011) [2023] KEELC 18564 (KLR) (3 July 2023) (Judgment)

Neutral citation: [2023] KEELC 18564 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 502 OF 2011**

JO MBOYA, J

JULY 3, 2023

BETWEEN

AARON TAFARI OUKO 1ST PLAINTIFF

ROSALYN DOLA OUKO 2ND PLAINTIFF

(SUING AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE JASON ATINDA OUKO)

AND

JOHN MWORIA DEFENDANT

JUDGMENT

1. The instant suit was filed and/or commenced vide Plaintiff dated the 19th September 2011, but which Plaintiff was thereafter amended 4th November 2022.
2. Consequently and in the premises, the operative Plaintiff is the amended Plaintiff dated the 4th November 2022; and in respect of which the Plaintiff herein seeks for the following Reliefs;
 - i. A declaration that the Plaintiff is entitled re-entry and take possession of all the piece of Land previously known as L.R No. 3589/6 (Now known as L.R No. 3589/51).
 - ii. A declaration that the Defendant wrongfully dispossessed the Plaintiffs' their Property that is the piece of Land previously known as L.R No. 3589/6 (Now known as L.R No. 3589/51) and should be ejected.
 - iii. A Mandatory Injunction compelling the Defendant to vacate and hand over that piece of Land L.R No. 3589/51 being part of L.R No. 3589/6 (now subdivided) in which he is in possession.



- iv. That pending the hearing and determination of this Application this Honorable Court do issue an Injunction restraining the Defendant whether by himself, his agents, servants, employees and whomsoever from continued occupation, trespassing onto, constructing and/or interfering in any manner with the Plaintiff's quiet and peaceful possession and use of any part/portion of Land previously L.R No. 3589/6 (Now known as L.R No. 3589/51), the suit property herein.
 - v. That this Honorable court be pleased to issue a Temporary Injunction restraining the Defendant whether by himself, agents, servants, employees or whomsoever from stopping, blocking and/or preventing the Plaintiffs from taking possession of the portion of the suit property that is previously L.R No. 3589/6 (Now known as L.R No. 3589/51), which is occupied by the Defendant.
 - vi. An Ejection order be and is hereby issued compelling the Defendant himself, servants, agents and/or legal representatives to move out of the Plaintiff's Property and the portion in which the Defendant occupies, being L.R No. 3589/51, part of the piece of land previously known as L.R No. 3589/51 pending the hearing and determination of this suit.
 - vii. Costs of the suit.
 - viii. Interests at court rate on (iii) and (iv).
3. Upon being served with the original Plaint, the Defendant herein duly entered appearance and thereafter filed a Statement of Defense dated the 3rd of August 2011. For good measure, the Defendant denied the claims made by and on behalf of the Plaintiffs' herein.
 4. Furthermore, the Defendant contended that same had bought and/or purchased the disputed portion of the suit property from Nahashon Kebwaro Omenga and Marcella Omwenga, respectively; who had themselves bought a portion of the suit property from Jason Atinda, now deceased.
 5. Even though the instant suit was filed and/or commenced on the 19th September 2011; the hearing over and in respect of the subject matter only commenced on the 11th October 2022. For good measure, the Plaintiff testified and called one witness, whereas the Defendant called one witness.

Evidence by the Parties

Plaintiffs' case:

6. The Plaintiffs' case revolves and gravitates around the Evidence of two (2) witnesses; namely, Aaron Tafari Ouko and Emanuel Karisa Kenga , who testified as PW1 and PW2 respectively.
7. It was the Evidence of PW1 that same is the lawful and duly appointed Legal Administrator of the Estate of Jashon Ouko, now deceased. In this regard, the witness stated that same was appointed together with other co-administrators, with a view to administering the Estate of the deceased.
8. Further and in addition, the witness stated that the Defendant herein unlawfully entered upon, commenced construction of and ultimately developed a residential home on a portion of the suit property, albeit without the consent and/or authority of the Estate of the Deceased.



9. Nevertheless, it was the testimony of the witness that the Defendant herein who is himself an Advocate of the High Court of Kenya used and relied on his influence muscle and connection to enter upon, construct on and thereafter reside on the Disputed portion of the suit property.
10. Additionally, the witness testified that despite his protest to the Defendant, the Defendant continued to and completed the construction of his residential house on the named portion of the suit property.
11. Nevertheless, the witness testified that on or about May 2011, the Plaintiff herein retained, instructed and retained the firm of M/s Ahmednasir Abdikadir & Company Advocates; for purposes of generating and serving a Demand notice.
12. It was further the testimony of the witness that upon their advocate dispatching the Demand Letter, the Defendant herein replied thereto vide his undated Letter wherein the Defendant is said to have admitted and acknowledged that he is a trespasser onto the suit portion.
13. Other than the foregoing, the witness referred to the witness dated the 19th September 2011; and thereafter the witness adopted his Witness Statement. Furthermore, the witness also alluded to a List and Bundle of Documents dated the 19th September 2011; and which the witness sought to adopt and rely on.
14. For coherence, the documents at the foot of the List dated 19th September 2011; were thereafter admitted and produced as Exhibits on behalf of the Plaintiffs herein. For good measure, the documents at the foot of the List dated 19th September 2011 were produced and marked as Exhibits P1 to P5 respectively.
15. On the other hand, the witness also alluded to a Supplementary List and Bundle of documents dated the 17th March 2022; and which the witness herein sought to adopt and rely on as Further Evidence on behalf of the Plaintiffs’.
16. However, the production of the document at the foot of the Supplementary List and Bundle of documents was objected to and in this regard same was marked for Identification as DMFI 6.
17. Additionally, the witness also alluded to the amended Plaint dated the 4th November 2022; and thereafter implored the Honourable court to enter Judgment in favor of the Plaintiffs’ and in accordance with the amended Plaint.
18. On cross examination by counsel for the Defendant, the witness herein testified and indicated that following the death of Jashon Atinda Ouko, now deceased; same applied for and procured a Grant of Letters of Administration of the Estate of Jashon Atinda Ouko, now deceased.
19. Besides, the witness also testified that the suit Property measures approximate 87.6 acres and that currently there about 20 people living and/or residing on the suit land. In addition, the witness stated that the 20 people have since established and constructed their homes on various portions of the suit property.
20. On the other hand, it was the testimony of the witness that upon entry onto a portion of the suit land, the Defendant herein forcibly constructed his Residential home on a portion of the suit property.
21. Whilst still under cross examination, the witness testified that by the time of filing of the instant suit, the Defendant’s House was complete/concluded.
22. Furthermore, the witness testified that as a result of the offensive activities by and on behalf the Defendant, same was constrained to and indeed lodged complaint with the Police so as to facilitate the due investigation.



23. Further and on the other hand, the witness stated that even though he had lodged various complaints with the Police, no precipitate action was taken against the Defendant.
24. It was further the testimony of the witness that the purported Transfer Instrument, alleged to have been signed by Jashon Atinda Ouko, now deceased, was equally fraudulent and illegal. In any event, the witness added that upon referring the impugned Transfer Instrument to the Forensic Document Examiner, a Report was prepared and which report confirmed that the offensive signature did not belong to his Father, Jashon Atinda Ouko, now Deceased.
25. Other than the foregoing, the witness further testified that he (Witness) does not have any relationship with the Defendant herein.
26. Additionally, the witness stated and reiterated that by the time of the filing of the instant suit, the Defendant had concluded the construction of his house.
27. The Second witness who testified on behalf of the Plaintiffs' was one; Emanuel Karisa Kenga, who testified as Pw2.
28. It was the evidence of Pw2, that same a Forensic Document Examiner and further that same is widely travelled while performing and executing his Duties. Further, the witness also testified that same received a Letter dated 19th June 2019; and which Letter forwarded assorted documents for examination.
29. Furthermore, the witness added that after due examination of the Documents, same prepared and generated a Report, which same forwarded to the Plaintiffs' together with the Sampled Documents.
30. Other than the foregoing, the witness referred to the Report dated the 26th June 2019; and thereafter sought to adopt and rely on the Report. Instructively and in this respect, the Documents Examiner's Report was thereafter produced and marked as Exhibit P6.

Defendant's Case:

31. The Defendant's case gravitates and revolves around the Evidence of one (1) witness namely; John Mworira, who indicated that same is the Defendant in respect of the matter before the Honourable court.
32. Furthermore, the Witness stated that same bought the suit property measuring 0.5 acres from one Nashon Kebwaro Omwenga and Mrs. Marcella Omwenga, (hereinafter referred to as the Vendors) for the sum of Kes.1, 500, 000/=Only.
33. It was the further evidence of the witness that prior to or before purchasing the suit property, same confirmed that the Vendors who were selling the land to him had indeed bought 2.5 acres from the Deceased.
34. Other than the foregoing, the witness testified that even though the Vendors had bought and purchased the suit property from Jashon Atinda Ouko, now deceased, the transfer and registration of the portion that was bought had not been registered in their favor.
35. Further and in any event, the witness testified that same is aware that the original parcel of land, namely L.R No 3589/6, is occupied by several other person who had bought from Jashon Atinda Ouko, Deceased.



36. Nevertheless, it was the evidence of the witness that despite the fact that Jashon Atinda Ouko, Deceased, had sold to and in favor of Nashon kebwaro Omwenga and Marcella Omwenga respectively, the named purchasers had not acquired title to their portion of land.
37. Further and in addition, it was the evidence of the witness that having bought the designated portion of land, same entered upon and constructed thereon. In any event, the witness testified that he entered upon and constructed his Matrimonial home thereof.
38. It was the further evidence of the witness that same has since acquired Equitable and Legal rights to and in respect of the 0.5 acres.
39. Other than the foregoing, it was the testimony of the witness that same is well known to the Plaintiffs herein who were previously his clients. In any event, the witness has added that despite the fact that the Plaintiffs herein are well known to him, the Plaintiffs did not raise any objection touching on and/ co concerning his ownership rights.
40. Furthermore, the witness testified that same has been in occupation and possession of the Disputed portion of the suit property for more than 12 years. In this regard, the witness averred that he has therefore acquired lawful and legitimate title to the designated portion of the suit property.
41. In any event, the witness added that on or about August 2011, same received a demand notice from the law firm of M/s Ahmednasir Abdikadir & Co. Advocates; pertaining to and or concerning the portion of the suit property.
42. Upon receipt of the said Demand notice, the witness herein testified that same was enjoined to and indeed responded thereto. However, the witness denied that same acknowledged and admitted that he is a trespasser on the portion of the suit property.
43. Other than the foregoing, the witness also averred that same did not acknowledge and promise to regularized his occupation of a portion of the suit property. To the contrary, it was the testimony of the witness that it is the Administrator of the Estate of the deceased, who were expected to complete the granting of title to and in favor of Nashon Kebwaro Omwenga and Marcella Omwenga, respectively; to enable same transfer the portion of the suit property to the Defendant herein.
44. Further and in addition, the witness also testified that same bought and acquired the disputed portion of land with the knowledge of the Plaintiffs herein and hence the Plaintiffs have no lawful claim to and in respect of the portion of the suit property, which was sold unto him (Defendant).
45. In any event, the witness testified that the Plaintiffs' herein have neither challenged nor contested the sale to and in favor of Nashon Kebwaro Omwenga and Marcella Omwenga, respectively.
46. Other than the foregoing, the witness referred to and sought to adopt the contents of the Witness Statement dated the 3rd October 2011. For good measure, the named witness statement was duly adopted and thereafter constituted as the further Evidence of the witness.
47. On the other hand, the witness also pointed out to the List and Bundle of Documents dated the 3rd of October 2011; and same sought to produce and adopt same as his further Evidence in chief. In this respect, the documents at the foot of the List dated the 3rd October 2011 were duly constituted and marked as Exhibits D1 to D15, respectively.
48. On cross examination, the witness stated that the land in question belongs to the late Jashon Atinda Ouko, now deceased. Nevertheless, the witness also conceded that same did not purchase a portion of



the suit land from Jashon Atinda Ouko, Deceased but instead he bought the disputed portion from Nashon Kebwaro Omwenga and Marcella Omwenga, respectively.

49. Whilst still under cross examination, the witness admitted and acknowledged, that the vendor who sold to and in his favor the disputed portion of land did not have title to the land.
50. Further and at any rate, the witness also stated that at the time when he purchased the disputed portion of land, the Vendors who sold to him had not acquired any title over the designated portion of land.
51. Additionally, it was the testimony of the witness that same relied on a copy of the Transfer documents which had been executed by Jashon Atinda Ouko, now deceased, albeit in favor of Nashon Kebwaro Omwenga and Marcella Omwenga, respectively.
52. In addition, the witness herein admitted that same has not availed and produced before the Honourable court a copy of the Sale Agreement that was entered into between Jashon Atinda Ouko, Deceased, on one hand; and Nashon Kebwaro Omwenga and Marcella Omwenga, respectively, on the other hand.
53. Other than the foregoing, it was the testimony of the witness that same was aware that Nashon Kebwaro Omwenga and Marcella Omwenga, respectively, had bought and acquired a portion of the suit property from Jashon Atinda Ouko, now deceased.
54. It was the further testimony of the witness that after entering into a sale agreement with the Vendors, same paid to and in their favor the entire purchase price, to and in favor of the vendors. In any event, the witness added that there is no outstanding claim/segment of the consideration to the vendors over and in respect of the designated portion of the suit property.
55. Premised on the foregoing, the witness herein contended and averred that same is a Bona fide purchaser for value of the portion of the suit property, which was sold unto him.
56. With the foregoing testimony, the Defendant's case was duly closed.

Submissions by the Parties:

Plaintiffs' submissions:

57. The s' filed written submissions dated the 27th January 2023; and in respect of which the Plaintiffs have raised, highlighted and canvassed three (3) issues for due consideration by the Honourable court.
58. Firstly, Learned counsel for the Plaintiffs' has submitted that the original parcel of land, namely, L.R No 3589/6 Lang'ata- Nairobi; belonged to and was registered in the name of Jashon Atinda Ouko, now deceased.
59. Furthermore, Learned counsel for the Plaintiffs' has submitted that insofar as the original parcel of land belonged to and was registered in the name of Jashon Atinda Ouko, now deceased, same could not be alienated, disposed of or otherwise sold to third parties without the knowledge and involvement of the named Deceased person.
60. Nevertheless, the Learned Counsel for the Plaintiffs' has submitted that the Defendant herein entered upon and took possession of a portion of the original parcel of land, albeit without the permission, consent of the deceased or the Legal administrators of the Estate of the deceased.
61. In any event, Learned counsel has submitted that the persons who allegedly sold the disputed portion of land to the Defendant had no authority over the suit property and hence same could not pass any and Legitimate title.



62. Based on the foregoing, Learned counsel for the Plaintiffs' has therefore submitted that the Defendant herein who entered onto the suit property without the consent and authority of the administrator of the Estate, has essentially denied and deprived the Plaintiffs of the right to and in respect of the suit property.
63. Secondly, Learned counsel for the Plaintiffs has submitted that the Defendant herein did not acquire any valid title and/or claim to and in respect of the disputed portion of the suit property, insofar as the person who sold to them had no title capable of transferring to and in favor of the Defendant.
64. As pertains to whether or not the vendors who sold to and in favor of the Defendant herein had any title, Learned counsel for the Plaintiffs' has submitted that the Doctrine of nemo dat quod non habet, is relevant and applicable.
65. Furthermore, Learned counsel has submitted that the vendors who sold to and in favor of the Defendant herein had no title over and in respect of the disputed portion of land to warrant any sale or at all.
66. Thirdly, Learned counsel for the Plaintiffs' has submitted that the entry upon and retention of the disputed portion of the suit property by the Defendant constitutes and amounts to trespass. In this regard, Learned counsel has submitted that insofar as the Defendant did not procure and/or obtained the authority and permission of the registered owner of the suit property, then any activity and/or action perpetrated by the Defendant on the portion of the suit property constitutes trespass.
67. Additionally, Learned counsel for the Plaintiffs has submitted that to the extent that the Defendant is a trespasser over and in respect of the suit property, it is imperative that same be evicted from the suit property.
68. In support of the foregoing submissions, Learned counsel for the Plaintiffs has cited and relied on, inter-alia, the case of *Joseph Kipchirchir Koech versus Philip Cheruyiot Sang* (2018)eKLR, *Eliud Njoroge Gichiri versus Stephen Kamau Ng'anga* (2018)eKLR and *Jaj Super Power Cash & Cary Ltd versus Nairobi City Council & 2 Others* Civil Appeal No. 111 of 2002 (UR), respectively.

Defendant's Submissions:

69. The Defendant filed written submissions dated the 21st March 2023; and in respect of which same has raised, highlighted and canvassed four (4) issues for due consideration and determination by the Honourable court.
70. First and foremost, Learned counsel for the Defendant has submitted that the Defendant has lawful and legal rights to and in respect of the disputed portion of the suit property, insofar as same bought and acquired same from Nashon Kebwaro Omwenga and Marcella Omwenga, respectively, for valuable consideration.
71. Furthermore, Learned counsel has submitted that Nashon Kebwaro Omwenga and Marcella Omwenga, respectively, had bought and acquired a portion of L.R No. 3589/6 from Jashon Atinda Ouko, now Deceased, upon payment of consideration of Kes.400, 000/= only.
72. It was the further submissions of Learned Counsel for the Defendant that upon purchasing a portion of the suit property from Jashon Atinda Ouko, now Deceased, the said Jashon Atinda Ouko executed a Transfer instrument which was intended to facilitate the transfer and its registration of the said portion to Nashon Kebwaro Omwenga and Marcella Omwenga, respectively.



73. Further and in addition, Learned counsel for the Defendant has submitted that despite the execution of the Transfer Instrument, the ultimate transfer was never registered to and in favor of Nashon Kebwaro Omwenga and Marcella Omwenga. However, counsel has added that the said Nashon Kebwaro Omwenga and Marcella Omwenga, nevertheless, acquired lawful rights to the disputed portion of the suit property.
74. Based on the fact that Nashon Kebwaro Omwenga and Marcella Omwenga, respectively, had bought the disputed portion from Jashon Atinda Ouko, now deceased, Learned counsel for the Defendant has submitted that the said Nashon Kebwaro Omwenga and Marcella Omwenga, respectively; therefore had lawful rights to sell and transfer to the Defendant.
75. Secondly, Learned counsel for the Defendant has submitted that the Defendant herein was and is a bona fide purchaser for value over and in respect of the disputed portion of the suit property. Consequently and in this regard, Learned counsel has contended that the Defendant bought the disputed portion from persons who had the requisite rights thereto.
76. Thirdly, Learned counsel has submitted that the Plaintiffs herein do not have any lawful rights and/or interests over and in respect of the disputed portion of the suit property, either as claimed or at all.
77. It was the further submissions of Learned Counsel for the Defendant that the disputed portion of the suit property had been sold by Jashon Atinda Ouko, now deceased and that upon the sale thereof, the Estate of Jashon Atinda Ouko, now Deceased; ceased to have any lawful rights and/or interest thereto.
78. Based on the foregoing, Learned counsel for the Defendant has thus contended that the Plaintiff herein do not have any lawful rights to and in respect of the disputed portion of the suit property, to warrant a claim for re-entry and possession thereof.
79. Lastly, Learned counsel for the Defendant has submitted that the Defendant bought the disputed portion of the suit property in 1998 and thereafter same entered upon and took possession of the disputed portion of the suit property. Further and in any event, counsel has submitted that thereafter the Defendant constructed his matrimonial house on the suit property and same has enjoyed quite possession and occupation of the disputed portion of the suit property for more than 12 years.
80. Owing to the foregoing, Learned counsel for the Defendant has therefore contended that the Defendant has since acquired adverse possessory rights to and in respect of the disputed portion of land. In this regard, Counsel has submitted that the Honourable court therefore ought to proclaim that the Defendant is entitled to the disputed of the portion of land on account of adverse possession.
81. In support of the foregoing submissions, Learned counsel for the Defendant has cited and relied on various decisions, inter-alia, *Katende v haridar & Company Ltd* (2008) 2 EA 173, *Kenya Ports Authority versus Modern holding (EA) Ltd* (2017)eKLR, *Haron Onyancha versus National Police Service Commission & Another* (2017)eKLR, *Carol Construction Engineering Ltd & Another versus National Bank of Kenya Ltd* (2020)eKLR and *Mtana Lewa versus Kahindi Ngala Mwangandi* (2015)eKLR, respectively.

Issues for Determination:

82. Having reviewed the Plaint/amended Plaint filed by the Plaintiffs herein and having similarly reviewed the Statement of Defense; and upon taking into account the oral evidence which was tendered by



and on behalf of the respective Parties and upon consideration of the written submissions filed; the following issues do arise and are thus worthy of determination;

- i. Whether the Defendant herein acquired any Lawful and Legitimate rights to and in respect of the disputed portion of the suit property.
- ii. Whether the Defendant herein has acquired Adverse Possessory Rights to and in respect of the disputed portion of the suit property.
- iii. Whether the Defendant is a trespasser to the suit property and if so; whether same ought to be Evicted.
- iv. What Reliefs ought to be granted.

Analysis and Determination

Whether the Defendant herein acquired any Lawful and Legitimate Rights to and in respect of the disputed portion of the suit Property.

83. The Defendant herein tendered evidence before the Honorable court and produced a copy of the sale agreement entered into between himself as trustee on behalf of Ivy Karegi Mworira and Nicholas Mayara Mworira (Minors) on one hand; and Nashon Kebwaro Omwenga and Marcella Omwenga, respectively, on the other hand.
84. Furthermore, the sale agreement which was tendered before the court indicated that what was being sold was a portion measuring 0.5 acres out of L.R No. 3589/51, but which parcel of land was still indicated to be registered in the name of Jashon Atinda Ouko, now deceased.
85. To the extent that the portion of land which was being sold to and in favor of the Defendant herein was still indicated to be registered in the name of Jashon Atinda Ouko, now Deceased; there is no gainsaying that the disputed portion could not have been sold and/or alienated without the involvement and participation of Jashon Atinda Ouko, now deceased or his Legal administrators.
86. Notably, the vendors who were selling the disputed portion of land had themselves not acquired or obtained any title to and in respect of the disputed portion of land. In this regard, if the vendors themselves had not acquired any title to and rights over the disputed portion of land then a question does arise as to what rights same were selling and/or transferring to the Defendant herein.
87. Be that as it may, it is also important to recall the evidence of the Defendant whilst under cross examination by Learned counsel for the Plaintiff.
88. For good measure, the Defendant testified as hereunder;

“The land in question belongs to the late Jashon Atinda Ouko, deceased. I purchased the land from Nashom Omwenga. The said vendor did not have any title to the land. At the time of purchase of the portion of land, the said Nashon Omwenga had not acquired title”.
89. From the testimony of the Defendant, it is crystal clear that the Defendant knew and had reasons to know that the vendors who were selling the disputed portion of land did not have the requisite title to and in respect of the disputed portion of land.
90. Nevertheless and despite the foregoing explicit position, the Defendant herein went ahead and entered into and executed a sale agreement, albeit with persons whom same knew did not have any lawful rights to sell over and in respect of the disputed portion of land.



91. To my mind, if the vendors did not have any title to and in respect of the disputed portion of land, then same could not confer and/or convey upon the Defendant herein any legitimate title or otherwise.
92. Clearly, one who has no title cannot purport to pass and/or convey a title better than what he has. In this respect, it is imperative to take cognizance of the Doctrine of nemo dat quod non habet.
93. For good measure, the Doctrine of nemo dat quod non habet underscores the legal position that he who does not have any Legal title to or Interests over and in respect of an item, cannot (sic) pass any title thereto.
94. Consequently and to the extent that the Defendant herein acknowledged and confirmed that the portion of land which was being sold to him still belonged to and was registered in the name of Jashon Atinda Ouko, now deceased; then the Defendant herein cannot be heard to say that same acquired lawful rights and/or title to the disputed portion of land.
95. Furthermore and for good measure, the Defendant herein has also contended that same is a bona fide purchaser for value over and in respect of the disputed portion of the suit property.
96. However, it is not lost on this Honourable court that prior to and/or before invoking the doctrine of a bona fide purchaser for value, one must show and establish that the person from whom he bought the disputed property had an apparent valid title thereto.
97. Nevertheless, in respect of the subject matter, there is no gainsaying that the Defendant himself conceded and acknowledged that the disputed portion of land which was being sold to and in his favor belonged to Jashon Atinda Ouko, now deceased; and not to the vendors.
98. Clearly and from the Defendant's own testimony, it is evident and apparent that the Defendant was not buying the disputed portion of land from someone who held a valid title or better still; an apparent valid title thereto.
99. To my mind, where the person who was selling the land did not have any apparent valid title, then the Doctrine of bona fide purchaser for value without notice of any defect, does not arise and/or ensue.
100. In respect of the foregoing exposition of the law, it is appropriate to adopt and reiterate the holding of the Court of Appeal in the case of *Ardhi Highway Developers Ltd versus Westend Butchery Ltd & Others* (2015)eKLR, where the court stated and observed as hereunder;

“62. That, in our view, is not the conduct of a “bona fide purchaser” defined in Black’s law Dictionary 8th Edition 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.”

101. Furthermore, the scope and extent of the Doctrine of bona fide Purchaser for value was highlighted and amplified in the case of *Mwangi James Njehia versus Janeta Wanjiru & Another* (2021)eKLR, where the Court of Appeal stated and underscored as hereunder;
37. In Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v. Attorney General & 4 Others, Nairobi Civil Appeal No. 146 of 2014 this Court cited with approval the case of



Katende v. Haridar & Company Ltd (2008) 2 EA 173, where the Court of Appeal in Uganda held that:-

“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 as was held in the case of Hannington Njuki v William Nyanzi High Court civil suit number 434 of 1996, 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.”

We nonetheless wish to state that the law, including case law is not static and the above requirements which were crafted over twenty years ago cannot be said to have been cast in stone. We hold the view that (5) above will need to be revisited and the word “apparent” be done away with altogether.

102. From the foregoing, two critical issues do arise which merits mention and a short discussion thereon. Firstly, the Defendant himself admitted and acknowledged that the disputed portion of land which was being sold unto him belonged to Jashon Atinda Ouko, now deceased and not otherwise.
103. Arising from the foregoing, there is no dispute that the person whom the Defendant dealt with over and in respect of the disputed portion of land did not have any apparent valid title to and in respect of the disputed portion of land.
104. Secondly and for the avoidance of doubt, the Defendant herein cannot feign ignorance as pertains to knowledge of who was the owner of the disputed portion of land.
105. Notably, in the body of the sale agreement, which was entered into, the name of Jashon Atinda Ouko, now deceased has been captured as the owner of the land and yet neither the said Jashon Atinda Ouko or his Legal administrators, were consulted and/or engaged prior to and or before entry into or execution of the impugned sale agreement.
106. Having made the foregoing observations, I come to the conclusion that the Defendant herein did not acquire and/or accrue any lawful and legitimate rights to and in respect of the disputed portion of land to warrant a claim thereto.
107. Simply put, I am not persuaded that the Defendant herein was a Bona fide Purchaser for value without notice of any Defect in the Title over and in respect of the portion of Land, which same was purchasing.



Whether the Defendant herein has Acquired Adverse possessory rights to and in respect of the disputed portion of the suit Property.

108. Other than the claim by the Defendant that same is a bona fide purchaser for value without notice, which has been discussed in the preceding paragraphs; the Defendant has also contended that same has acquired adverse possessory rights to and in respect of the disputed portion of land.
109. To anchor his claim for acquisition for adverse possessory rights, the Defendant herein has contended that same entered upon and executed a lawful sale agreement with Nashon Kebwaro Omenga and Marcella Omwenga, respectively, on the 15th December 1998.
110. It was the further testimony of the Defendant that thereafter same entered upon and commenced construction on the disputed portion of land in the year 1999 or thereabouts.
111. Premised on the foregoing, the Defendant has thus contended that having entered onto the disputed portion of the suit property shortly after purchase and acquisition thereof and that having remained in possession thereof without any interruption; same has therefore acquired adverse possessory rights.
112. However, it is worthy to note that on the 14th May 2008; the Defendant herein wrote a Letter which was produced as D13 and which states as hereunder;

“Procurement of Title 0.5 Acres 3589/51

The above matter refers

As you may recall, this matter has been pending for a long time now. However, I am told by Scott that the Estate of Jashon Atinda Ouko is about to get Letters of administration as well as the original title of land which I hope that we shall jumpstart the process of issuance of title”

113. Other than the foregoing Letter; it is also worthy to recall that upon receipt of a Demand letter from the Plaintiff’s previous counsel, which letter was dated 22nd August 2011, the Defendant herein respondent thereto as hereunder;

RE: L.R No. 3589/51 Purchase of Half Acre 1989

Vendors; Mr. & Mrs Nashon Omwenga

Purchaser John Kimathi Mworio

The above matter refers,

I the undersigned attach herein a letter which speaks for itself from M/s Ahmed Nasir Abdulkadir & Co, Advocates. Therefore kindly as a matter of urgency furnish me with your proprietary documents of the above parcel to enable me regularize my status with the estate of the late Jashon Atinda Ouko, time being of essence.

114. My understanding of the contents of the two letters, which were authored by the Defendant himself drives me to the conclusion that the Defendant was acknowledging and confirming that the disputed portion of land belonged to the Estate of Jashon Atinda Ouko. For good measure, the acknowledgement that the land belonged to the estate of Jshaon Atinda Ouko negates and vitiates the ingredients of a claim for adverse possession or at all.



115. In this respect, it is worthy to note that for as long as one acknowledges that the land on which same is in occupation and possession belongs to a Third Party; such a person, the Defendant herein not excepted, cannot maintain a claim for adverse possession or otherwise.
116. To this end, the ratio decidendi in the case of *Mwangi Gitbu versus Livingstone Ndeete* [1980] eKLR, is apt and succinct.
117. For good measure, the court of Appeal held thus;
- Time ceases to run under the *Limitation of Actions Act* either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land; see Cheshire's Modern Law of Real Property, 11th edition at p 894. In my view the giving of notice to quit cannot be an effective assertion of right for the purpose of stopping the running of time under the *Limitation of Actions Act*. The appellant did not assert his right to the whole suit plot until he commenced suit No 1056 of 1976 on April 30, 1976.
118. Consequently and in view of the foregoing, having admitted and acknowledged that the disputed portion of land belonged to the Estate of Jashon Atinda Ouko, deceased the Defendant herein cannot be heard to lay a claim based and or founded on adverse possession.
119. On the other hand, it is also important to point out that even though the Defendant had alluded to the doctrine of adverse possession in his statement of defense, same however did not highlight the claim during his testimony before the court. In this respect, I am of the view that the claim for adverse possession was similarly neither established nor demonstrated.

Whether the Defendant is a trespasser to the suit property and if so; whether same ought to be Evicted.

120. From the totality of the Evidence that was tendered before the Honourable court it is apparent that the suit property belongs to and is registered in the name of Jashon Atinda Ouko, now deceased.
121. Furthermore, the fact that the suit property belongs to and is registered in the name of Jashon Atinda Ouko, now Deceased, has been confirmed and vindicated by the testimony of the Defendant herein. For good measure, the relevant excerpts were reproduced herein before.
122. Other than the foregoing, it is also worthy to recall that the sale agreement that was (sic) entered into and executed by the Defendant on one hand and Nashon Kebwaro Omwenga and Marcella Omwenga, respectively, on the other hand; also confirm that the suit property was still registered in the name of Jashon Atinda Ouko.
123. First forward, it is also imperative to point out and underscore that PW1 tendered and produced before the Honourable court a copy of the Certificate of title relating to the suit property and which confirm that same was still registered in the name of Jashon Atinda Ouko, now deceased.
124. Instructively, the Defendant herein did not enter into and/or execute any lawful sale agreement with Jashon Atinda Ouko, now deceased or his Legal administrators.
125. To the contrary, the Defendant herein executed and entered into a sale agreement with Third Parties, who did not have any lawful rights and/or interests over and in respect of the disputed portion of the suit property.



126. Arising from the foregoing, the question that must now be answered relates to whether or not the Third Parties with whom the Defendant entered into and executed a sale agreement with, could confer any legitimate rights to and over the disputed portion of the suit property.
127. In this respect, it is worthy to recall that whilst discussing issue number one, the court came to the conclusion that the Defendant herein did not acquire any valid rights to and in respect of the suit property, either as a Bona Fide Purchaser, or otherwise.
128. To the extent that the Defendant did not acquire any lawful rights to and in respect of the suit property, the question that does arise is whether or not the impugned actions by the Defendant constitutes and/or amounts to trespass.
129. First and foremost, it is imperative to take cognizance of Section 3 of the *Trespass Act* which defines trespass thus;
3. Trespass upon private land
- (1) Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.
- (2) Where any person is charged with an offence under subsection (1) of this section the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him.
130. Furthermore, the meaning and tenor of what constitutes trespass was also discussed and highlighted in the case of *Joseph Kipchirchir Koech versus Philip Cheruiyot Sang* (2018)eKLR, where the court held thus;
52. A continuing trespass is defined as:-
 “A trespass in the nature of a permanent invasion on another’s rights, such as a sign that overhangs another’s property”
131. Consequently and in my humble view, the Defendant entered onto and constructed on the disputed portion of the suit property without the permission, consent and/or sanction of the legitimate owners thereof.
132. Having entered upon and constructed on the disputed portion of the suit property, albeit without the consent of the registered owner, there is no gainsaying that the impugned activities by and at the instance of the Defendant constitutes trespass.
133. Premised on the foregoing, it is therefore my finding and holding that the Defendant is a trespasser onto the disputed portion of the suit property and thus same ought to vacate and hand over vacant possession of the Disputed portion of the Suit Property to and in favor of the Plaintiffs herein.

What Reliefs ought to be granted.

134. The Plaintiffs herein had sought for a plethora of reliefs at the foot of the amended Plaint. However, some of the reliefs sought at the foot of the amended Plaint are curious and constitute a misapprehension of when a temporary injunction can be sought for and/or procured.
135. Clearly and to my mind, the Plaintiffs herein cannot be heard to seek for an order of Temporary Injunction at the foot of the Amended Plaint or at all.



136. Without belaboring the point, it is common knowledge that an order of temporary injunction can only be sought for and be procured on the basis of Order 40 of the Civil Procedure Rules, 2010, albeit pending the hearing and determination of the suit.
137. To the contrary, the order of injunction that can be sought for in the body of the substantive suit is one of Permanent injunction which is perpetual in nature and which has final implications, following the determination of a suit.
138. To underscore the dichotomy between a Temporary and Permanent injunction, as well as the implications attendant thereto, it is appropriate to adopt and reiterate the holding of the Court in the case of *Bandari Investments & Co. Ltd versus Martin Chiponda & 139 others*[2022] eKLR, where the court stated and observed thus;

38. Whether the 1st and 18th Defendants are entitled to be granted the Permanent Injunction restraining the Plaintiff on the suit property. Unlike Temporary Injunction which are granted only to be in force for a specified time or until the issuance of further orders from Court, Permanent Injunction are rather different, in that they are perpetual and issued after a Suit has been heard and finally determined.

Permanent Injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the Plaintiff in order for the rights of the Plaintiff to be protected. This Court has the powers to grant the Permanent Injunction under Sections 1A, 3 & 3 A of the Civil Procedure Code, 2010 if it feels the right of a Party has been fringed, violated and/or threatened as the Court cannot just seat, wait and watch under these given circumstances.

139. Other than the foregoing, the Plaintiffs' herein have sought for various declaratory orders pertaining their rights of re-entry onto the disputed portion of the suit property. In this respect, there is no gainsaying that the Plaintiffs are lawfully entitled to exclusive and absolute use, occupation and possession of the suit property, which lawfully belongs to the Estate of the deceased.
140. Further and in addition, the Plaintiffs have also sought an order of ejection (which I understand to mean eviction) of the Defendant from the disputed portion of the suit property. To this end, I have found and held that the Plaintiffs have lawful rights to the suit property.
141. To the contrary, I have also found and held that the Defendant herein has no lawful right to and in respect of the disputed portions of the suit property. For good measure, even the Defendant acknowledged the suit property belonged to and was registered in the name of Jashon Atinda Ouko, now deceased.
142. In view of the foregoing, I come to the conclusion that in the absence of any legitimate rights to and in respect of the suit property, the Defendant herein must no doubt be evicted.

Final Disposition

143. Having addressed and discussed the various issues that were enumerated in the body of the Judgment, it must have become evident, nay apparent that the Plaintiffs suit is meritorious.



144. To the contrary, I have also calibrated upon the claims and interests that were propagated by and on behalf of the Defendant herein. However, I have come to the conclusion that the Defendant does not have any scintilla or Iota of rights and interests over the suit property.

145. Consequently and in the premises, I am minded to and do hereby enter Judgment in favor of the Plaintiffs as hereunder;

- i. Declaration be and is hereby issued that the Plaintiffs are entitled re-entry and take possession of all the piece of land previously known as L.R No. 3589/6 (Now known as L.R No. 3589/51).
- ii. Declaration be and is hereby issued that the Defendant wrongfully dispossessed the Plaintiffs their property that is the piece of land previously known as L.R No. 3589/6 (Now known as L.R No. 3589/51).
- iii. A mandatory injunction be and is hereby issued compelling the Defendant to vacate and hand over that piece of land L.R No. 3589/51 being part of L.R No. 3589/6 (now subdivided) in which he is in possession.
- iv. The Defendant herein be and is hereby directed to vacate and hand over vacant possession of the suit property or the portion thereof to the Plaintiffs within six (6) months from the date herein.
- v. In default to vacate and hand over vacant possession within the stipulated six (6) months duration, the Plaintiffs shall be at liberty to evict the Defendant from the suit property without any reference.
- vi. For good measure, an Eviction order shall issue automatically upon lapse of the six (6) months duration, being the timeline within which the Defendant is required to vacate.
- vii. In the event of eviction being carried out and undertaken by the Plaintiffs; the costs/charges incurred in undertaking the impugned eviction shall be certified by the Deputy Registrar and thereafter be recoverable from the Defendant as part of costs.
- viii. A permanent injunction be and is hereby issued to restrain the Defendant either by himself, agents, servants and/or employees from entering, re-entering, dealing with and/or in any other way interfering with the Plaintiffs entitlement to and in respect of the suit property, namely L.R No. 3589/51 being part of L.R No. 3589/6 (now subdivided).
- ix. Costs of the suit shall be borne by the Defendant.

146. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF JULY 2023.

OGUTTU MBOYA

JUDGE

In the Presence of;

Benson Court Assistant.



Ms Lukoye h/b for Dr. Ken Nyaundi for the Plaintiffs’.

Mr. Wokabi Mathenge for the Defendant.

