



REPUBLIC OF KENYA



**KENYA LAW**  
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**Njau v Muiruri (Environment and Land Appeal 93 of 2019)  
[2023] KEELC 16847 (KLR) (18 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 16847 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL 93 OF 2019  
SO OKONG'O, J  
APRIL 18, 2023**

**BETWEEN**

**KARUKU NJAU ..... APPELLANT**

**AND**

**KABIRU MUIRURI ..... RESPONDENT**

*(Being Appeal from the Ruling and Order of Hon. G.A. Mmasi (Mrs.)  
SPM delivered on 22nd November 2018 in CMCCC NO. 22 OF 1985)*

**JUDGMENT**

**Background:**

1. The Respondent instituted a suit against the Appellant in the Resident Magistrate's Court at Sheria House in 1985 over a dispute concerning all that parcel of land known as Dagoretti/Muituini/95 measuring 2.9 acres (hereinafter referred to as "the suit property"). The Resident Magistrate's Court suit was registered as Civil Case No.1447 of 1985 which was later changed to ELC NO. 22 of 1985 (hereinafter referred to only as "the lower court suit" where the context so permits). On 8<sup>th</sup> July 1985, the lower court referred the dispute to the District Officer, Dagoretti for determination. The District Officer, Dagoretti, J.G.Makumi constituted a panel of 4 elders chaired by him to hear and determine the dispute. The panel heard the parties and made a decision on the dispute on 1<sup>st</sup> October 1985. The panel of elders directed that the suit property be subdivided and shared amongst the Appellant, one John Goro, deceased and the Respondent as follows;

Karuku Njau (Appellant) 1/6 undivided share,

John Goro 1/3 undivided share, and

Kabiru Muiruri (Respondent) 1/2 undivided share.



2. This translated to 0.48 acres, 0.97 acres and 1.45 acres for the Appellant, John Goro and the Respondent respectively. The District Officer, Western Division, Dagoretti-Nairobi filed the panel of elders' decision in court on 2<sup>nd</sup> November 1985. On 13<sup>th</sup> February 1986, the Respondent filed an application by way of Chamber Summons dated 10<sup>th</sup> February 1986 seeking the enforcement of the said decision by the panel of elders. In the application, the Respondent sought ½ undivided share of the suit property as ordered by the panel of elders and asked the court to order the Senior Executive Officer of the court to sign all necessary documents for the partitioning of the suit property as directed by the panel of elders. The Respondent's application was brought on the ground that the Appellant had failed to partition and transfer to the Respondent ½ undivided share of the suit property as was ordered by the panel of elders.
3. The Respondent's application was heard by C.K.Njai Ag. Resident Magistrate who issued the following orders on 21<sup>st</sup> March 1986;
  1. That the papers pertaining to sub-division and registration be prepared and signed.
  2. That the Senior Executive Officer do sign all documents pertaining to transfers of the suit parcel of land.
  3. That there be no orders as to costs.
4. The order was extracted on 20<sup>th</sup> July 1990. Following that order, the Senior Executive Officer of the lower court signed an application for the Land Control Board Consent on 12<sup>th</sup> September 1990 for the partitioning of the suit property into 3 portions of 1/6 share, 1/3 share and 1/2 share. Under unclear circumstances, another order said to have been made also on 21<sup>st</sup> March 1986 in the Respondent's Chamber Summons application filed in the lower court on 13<sup>th</sup> February 1986 was extracted and issued on 19<sup>th</sup> March 1991. The order was purportedly on the following terms;
  1. That the Appellant does sign the transfer of 50/290 shares out of land reference number Dagoretti/Mutuini/95 in favour of the Respondent Kabiru Muiruri and in default thereof, the Senior Executive Officer of the court to sign all relevant documents to effect such transfer.
  2. That the Appellant does sign all necessary documents pertaining to the subdivision and/or partitioning of the parcel of land reference number Dagoretti/Mutuini/95 and in default thereof, the Senior Executive Officer of the court to sign the same.
  3. That there be no orders as to the costs of the application.
5. In a letter dated 1<sup>st</sup> March 1991, the lower court confirmed to the Land Registrar, Nairobi that the correct order that had been issued by the court was the one that was issued on 20<sup>th</sup> July 1990 and that it was the one that was to be complied with by the Land Registrar. On 9<sup>th</sup> May 1991, the Senior Executive Officer of the lower court one, E.M.Njuguna forwarded to the Land Registrar, Nairobi, the second court order issued on 19<sup>th</sup> March 1991 aforesaid and directed the Land Registrar to transfer the suit property to the Respondent, John Goro Njau and the Appellant as follows;

Bedan Kabiru Muiruri(Respondent) 1.95 acres,  
John Goro Njau 0.47 acres, and  
Karuku Njau (Appellant) 0.48 acres.
6. It is not clear as to where the Senior Executive Officer of the lower court got the shares that were contained in his letter dated 9<sup>th</sup> May 1991 that were neither in tandem with the award of the panel of



elders nor the court order issued on 20<sup>th</sup> July 1990 or the one issued on 19<sup>th</sup> March 1991 that he relied on as authority for his instructions. Following this letter dated 9<sup>th</sup> May 1991 from the Senior Executive Officer of the lower court, the Land Registrar purported to register a transfer of the suit property with the following as the shares of the Respondent, John Goro Njau and the Appellant;

Kabiru Muiruri (Respondent) 195/290 shares,

John Goro Njau 47/290 shares, and

Karuku Njau (Appellant) 48/290.

7. After the registration of the said transfer, a title deed was issued on 6<sup>th</sup> June 1991 in favour of the Appellant, the Respondent and John Goro Njau as the proprietors of the suit property in the said undivided shares. It is not clear why the suit property was not partitioned as ordered by the court on 21<sup>st</sup> March 1986 following the Respondent's application for the enforcement of the panel of elders' award. I believe that the Respondent may understand the purpose that this new title deed was supposed to serve.
8. On 9<sup>th</sup> July 2018; 27 years after the said title deed was issued, the Respondent moved the lower court with an application brought by way of a Notice of Motion dated 6<sup>th</sup> July 2018 seeking an order that the Senior Executive officer of the lower court do sign all documents necessary for the partitioning of the suit property and transfer to the three (3) registered owners thereof namely, the Respondent, the Appellant and John Goro Njau their shares in the property. The application was brought on the grounds that the Respondent was a joint registered owner of the suit property together with the Appellant and John Goro Njau and that the Respondent was desirous of having his share in the suit property separated from the shares owned by the Appellant and John Goro Njau. The Respondent averred that although he had had a mutation for the partitioning of the suit property prepared by a licensed land surveyor, the Appellant had refused to sign the mutation form so that the partitioning of the property could be completed. The Respondent averred that the Appellant was not willing to cooperate in the partitioning process and as such it was necessary for the court to intervene. In his affidavit in support of the application, the Respondent annexed a mutation form prepared by J.D. Obel, Licensed Surveyor. According to the mutation, the suit property was to be subdivided into 9 portions of which the Respondent was to own portions measuring a total of 0.684 hectares (1.690 acres) while the Appellant and John Goro Njau were to own portions measuring 0.152 hectares (0.376 acres) and 0.139 hectares (0.343 acres) respectively. This subdivision gave the Respondent, the Appellant and John Goro Njau 70%, 16% and 14% shares respectively in the suit property. According to the panel of elders' decision, the Respondent was to have 51.7% share of the property, the Appellant 15.5% share and John Goro Njau 32.8% share.
9. The Respondent's application in the lower court was opposed by the Appellant through a replying affidavit and further affidavit filed on 15<sup>th</sup> August 2018 and 1<sup>st</sup> October 2018 respectively. The Appellant averred that he declined to sign the mutation form that was presented to him by the Respondent because the Respondent had fraudulently obtained a new title deed for the suit property in which he was indicated to have a larger share in the suit property than what he was awarded by the panel of elders. The Appellant averred that signing the mutation form would have resulted in him being denied his rightful share in the suit property. The Appellant averred that his refusal to sign the said mutation was informed by a sound factual and legal basis. The Appellant urged the court to cancel the title deed of 6<sup>th</sup> June 1991 that gave the Respondent a larger share in the suit property than he was entitled to after which the suit property could be partitioned in accordance with the award of the panel of elders. The Appellant averred that he was the administrator of the estate of his brother John Goro Njau and that he had a duty to administer the deceased's estate in a prudent manner.



10. The Respondent filed a supplementary affidavit in which he averred that in addition to the portion of the suit property measuring 1 acre that he purchased from the Appellant, he purchased additional 0.45 acres from him and as such he was entitled to a portion of the suit property measuring a total of 1.95 acres. The Respondent contended further that the issues raised by the Appellant in opposition to the application had been raised by him in opposition to the Respondent's application for the removal of the caution that the Appellant had registered against the title of the suit property and that the same were determined in a ruling that was delivered by the lower court on 10<sup>th</sup> February 2014.
11. The Respondent's application was heard by way of submissions. In a short ruling delivered on 22<sup>nd</sup> November 2018, the court allowed the application. Although the lower court noted that the Appellant had alleged that the Respondent had falsified documents and obtained a title for the suit property fraudulently, the court did not investigate the allegation. The court merely stated that:

“This matter has been through Tribunal and even awards read and back to court. The matter touches on parcel Respondent inherited from his parents and later sold the same to the Plaintiff. There is an application for consent of the Land Control Board which is annexed as KN-7. It is apparent that all due procedure was followed and even title deed issued. The Respondent states that same was obtained through fraud. In the present application we are not dealing with whether or not the title deed was obtained fraudulently. The issue at stake is whether or not the mutation forms should be signed by the Court Executive Officer. The application as filed has merit same is allowed.”

**The appeal:**

12. The Appellant was aggrieved by the decision of the lower court and filed the present appeal on 28<sup>th</sup> November 2019. In his memorandum of appeal dated 28<sup>th</sup> November 2019, the Appellant challenged the decision of the lower court on the following grounds;
  1. That the trial magistrate erred in law and in fact by allowing an application that would perpetuate an illegality and that, by allowing the Senior Executive Officer to sign the partition and transfer documents, the trial magistrate allowed an application not in tandem with the award of the Dagoretti Land Tribunal as adopted by the court.
  2. That the trial magistrate erred in law by sitting on appeal when she granted prayers/orders that consequently were contrary to the District Land Tribunal award which was adopted by the court thereby offending section 8 of the Land Disputes Tribunal Act, 1990.
  3. That the trial magistrate erred in fact and law by conferring herself jurisdiction she did not have when she allowed the execution of the partition and transfer documents which illegally conferred upon the Respondent shares not awarded to him by the tribunal as subsequently adopted by the court.
  4. That the trial magistrate offended or contravened the principles of res judicata.
  5. That the trial Magistrate offended or contravened the ratio decidendi in the case of Macfoy v. United African Limited [1961] 3 All E.R and the constitutional principle of stare decisis.
  6. That the trial magistrate failed to appreciate and/or acknowledge that the decision(sic) of the Tribunal was functus officio.
  7. That the trial magistrate was out rightly biased in evaluating the facts before the court thus unfairly finding against the Appellant.



8. That the trial magistrate allowed evidence that was not adduced before the Land Tribunal thereby perpetuating a miscarriage of justice on the part of the Appellant.
9. That the trial magistrate ignored to consider the principles of equity when she granted to the Respondent prayers/orders while he had approached the court with unclean hands.
10. That the trial magistrate was out rightly biased in evaluating the facts before the court thus unfairly finding fault against the Appellant.

The Appellant sought the following reliefs from the court;

- a. The Appeal be allowed and the ruling dated 22<sup>nd</sup> November 2018 be set aside in its entirety.
- b. The Respondent's lower court application that was brought by way of Notice of Motion dated 6<sup>th</sup> July 2018 be dismissed.
- c. The award by Dagoretti District Land Tribunal as subsequently adopted by the court be executed.
- d. That the title deed for the suit property be rectified to reflect the award of the Land Tribunal as adopted by the court.
- e. The costs of the appeal be awarded to the Appellant.
- f. Any further relief the court may deem fit and appropriate to grant.

The appeal was heard by way of written submissions:

**The Appellant's submissions:**

13. The Appellant filed submissions dated 28<sup>th</sup> March 2022. The Appellant submitted that the court was functus officio when it considered the Respondent's application and delivered the ruling the subject of the appeal. The Appellant averred that following the award by the panel of elders, the court issued orders for the subdivision/partitioning of the suit property on an application by the Respondent. The Appellant submitted that since there was no appeal or an application for review against the said orders, the same were final and rendered the court functus officio. The Appellant submitted that when the lower court granted the orders the subject of the appeal, there were already orders for the Senior Executive Officer of the court to sign the relevant documents for the partitioning/subdivision of the suit property. The Appellant submitted that the deliberate alteration of the shares of the parties by the Executive Officer on the basis of a non-existent order was a pointer to a fraudulent scheme to deprive the Appellant and his deceased brother of their shares in the suit property in favour of the Respondent.
14. The Appellant submitted that the lower court erred when it issued orders on the basis of the Senior Executive Officer's letter dated 9<sup>th</sup> May 1991 addressed to the Land Registrar which was a manifestation of fraud by the said Senior Executive Officer in favour of the Respondent. The Appellant submitted that any amendment to the court orders issued earlier without the sanction of the court was illegal, null and void. The Appellant relied on *Macfoy v. United Africa Limited* (supra) in support of this submission. The Appellant submitted that the Executive Officer had no power to amend the decision of the panel of elders as adopted by the court and as such the title that was issued on the strength of the said Senior Executive Officer's letter dated 9<sup>th</sup> May 1991 was issued illegally and unprocedurally and should be revoked and / or cancelled. The Appellant submitted that the lower court erred by granting the Respondent additional land that was not the subject of the dispute between the parties and whose claim was not supported by any valid agreement.



### **The Respondent's submissions:**

15. The Respondent filed submissions dated 17<sup>th</sup> July 2022. The Respondent submitted that the award of the panel of elders was adopted by the court on 10<sup>th</sup> February 1986 pursuant to which a title deed was issued on 16<sup>th</sup> June 1991 with the parties' undivided shares in the suit property indicated as:  
  
Karuku Njau(Appellant) 48/290 shares,  
  
John Goro Njau(deceased) 47/290 shares, and  
  
Kabiru Muiruri(Respondent) 195/290 shares.
16. The Respondent submitted that his application to the lower court was to have the suit property partitioned so that each of the registered owners could have his separate title. The Respondent submitted that his attempt to have the court order for the partitioning of the suit property executed was frustrated by the Appellant who had registered a restriction against the title of the property claiming that the Respondent was attempting to acquire a larger portion of the suit property. The Respondent submitted that on application by the Respondent, the said restriction was lifted by the court on 10<sup>th</sup> February 2014. The Respondent submitted that the Appellant took no steps to seek the cancellation of the title that was issued on 16<sup>th</sup> June 1991 or the ex-parte order pursuant to which it was issued. The Respondent submitted that the Appellant's appeal was frivolous and an abuse of the process of the court. The Respondent submitted that although the Appellant had repeatedly claimed that the title deed issued on 16<sup>th</sup> June 1991 was fraudulent, he never sought to revoke or have the said title deed cancelled. The Respondent submitted that in the absence of any legal challenge to the said title deed issued pursuant to the decision of the panel of elders, the trial magistrate acted correctly in allowing the Respondent's Notice of Motion application dated 6<sup>th</sup> July 2018.

### **Analysis and Determination:**

17. I have considered the ruling of the lower court, the grounds of appeal put forward by the Appellant against the same and the submissions by the advocates for the parties. The Respondent's application in the lower court was brought under Order 49 Rule 1 of the Civil Procedure Rules which provides as follows:  
  
    “[Order 49, rule 1.] Registrar to be ministerial officer.  
  
    1. Wherever in these Rules it is provided that any ministerial act be or thing may be done by the court, that act or thing may be done by the registrar or by an executive officer generally or specially thereunto empowered by the Chief Justice by writing under his hand.”
18. Section 98 of the *Civil Procedure Act* provides as follows:

“PARA 98. Execution of instruments by order of court

Where any person neglects or refuses to comply with a decree or order directing him to execute any conveyance, contract or other document, or to endorse any negotiable instrument, the court may, on such terms and conditions, if any, as it may determine, order that the conveyance, contract or other document shall be executed or that the negotiable instrument shall be endorsed by such person as the court may nominate for that purpose, and a conveyance, contract, document or instrument so executed or endorsed shall operate



and be for all purposes available as if it had been executed or endorsed by the person originally directed to execute or endorse it.”

19. Section 98 of the *Civil Procedure Act* is the correct provision of the law under which the Respondent’s application before the lower court should have been brought. The Respondent’s complaint before the lower court was that the court had ordered for the partitioning of the suit property and that the Appellant had refused to sign the mutation form so that the surveyor could complete the subdivision process. The power given to the court under section 98 of the *Civil Procedure Act* is discretionary. An applicant under section 98 of the *Civil Procedure Act* has to satisfy the court that there is an existing decree or order directing the respondent “to execute any conveyance, contract or other document, or to endorse any negotiable instrument” and that the respondent has neglected or refused without any reasonable cause to comply with the said decree or order.
20. As mentioned earlier in the judgment, the Appellant filed an affidavit in opposition to the application in which he gave reasons why he had refused to sign the mutation form for the partitioning of the suit property. The Appellant’s main reason for refusing to sign the said mutation form was that the manner in which the Respondent had proposed to subdivide or partition the suit property was not in accord with the order for the subdivision that was made by the court. The Appellant contended that in the proposed subdivision scheme, the Respondent intended to get more share of the suit property than what was awarded to him by the court following the adoption of the panel of elders’ award by the court. The Appellant contended that the said subdivision scheme was based on a fraudulent title deed that the Respondent had procured contrary to the order of the court on the subdivision of the suit property.
21. I am of the view that the lower court had a duty to consider all these issues that had been raised by the Appellant while exercising its discretion on whether or not to allow the Respondent’s application. In *Patriotic Guards Ltd v. James Kipchirchir Sambu*, Nairobi CA No. 20 of 2016, [2018]eKLR the court stated as follows:

“It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge’s private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”
22. In *Mbogo v. Shah* [1968] E. A. 93 the court stated as follows at page 94:

“I think it is well settled that this Court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
23. I am persuaded that the lower court did not exercise its discretion properly. As I have mentioned earlier in the judgment, the mutation form that the Respondent wanted the Appellant to sign partitioned the suit property into 9 portions of various sizes of which the Respondent was to own a total of 7 portions measuring a total of 0.684 hectares (1.690 acres) while the Appellant and John Goro Njau were to own 1 portion each measuring 0.152 hectares (0.376 acres) and 0.139 hectares (0.343 acres) respectively. In the Respondent’s application before the lower court, the Respondent did not indicate or point out



to the court, the court order that allowed the partitioning of the suit property into 9 portions or one providing for a share of the suit property measuring 1.690 acres for the Respondent and 0.376 acres and 0.343 acres for the Appellant and John Goro Njau respectively. In the absence of such an order, there was no basis upon which the lower court could order the partitioning of the suit property in the manner that was proposed by the Respondent.

24. It is common ground that the panel of elders that determined the dispute between the parties had in its award dated 1<sup>st</sup> October 1985 directed that the suit property be shared between the Appellant, his deceased brother; John Goro and the Respondent in the ratios of 1/6, 1/3 and 1/2 respectively. It is common ground that this award by the panel of elders was adopted by the court. There are only two court orders on record regarding the partitioning or subdivision of the suit property following the adoption of the said award. The first order is the amended order that was made on 21<sup>st</sup> March 1986 and issued on 20<sup>th</sup> July 1990. The order was made on the Respondent's application for the enforcement of the award of the panel of elders. In this order, the court ordered the Senior Executive Officer of the court to sign the documents necessary for the subdivision of the suit property and transfer of portions thereof to the parties in accordance with the award of the panel of elders that had been adopted by the court. The other order that I also mentioned earlier was issued on 19<sup>th</sup> March 1991, the order is also said to have been made on 21<sup>st</sup> March 1986 by the same magistrate who made the earlier order. In this order, the Appellant is said to have been ordered by the court to transfer to the Respondent 50/290 shares in the suit property in default of which the Senior Executive Officer of the court was authorized to sign all necessary documents to effect the transfer. The Respondent was also ordered to sign all the documents necessary for the partitioning of the suit property in default of which the Senior Executive Officer was to sign the same. In none of these two orders did the court order the partitioning of the suit property into 9 portions with the Respondent having a portion measuring 1.690 acres and the Appellant and John Goro Njau having portions measuring 0.376 acres and 0.343 acres respectively even if it is assumed that the second order was also valid. Again, in none of these orders did the court order that the Appellant, his deceased brother John Goro and the Respondent were to share the suit property in the ratios of 48/290, 47/290 and 195/290 respectively. It follows therefore that both the title deed and the mutation form on which the Respondent's application in the lower court was anchored had no basis on the orders that had been issued by the lower court. The Respondent having presented to the Appellant, a partition application, a mutation form and a title deed which were not prepared in accordance with the order of the court, the Appellant was not obliged to sign the same. The lower court in the exercise of its jurisdiction under section 98 of the [Civil Procedure Act](#) could only authorize the Senior Executive Officer to do what the Appellant had been ordered to do but had refused to comply. That was clearly not the case here. As already mentioned, the manner in which the Respondent set out to partition the suit property was not backed by any order from the court. As contended by the Appellant before the lower court, the entire exercise was illegal in that the partition spearheaded by the Respondent was going to bestow upon the Respondent ownership of more land than he was awarded by the court. The Respondent who was entitled to a portion of the suit property measuring 1.5 acres only was going to end up with a portion in excess of 1.6 acres. The subdivision scheme that the Respondent presented to the Appellant and the lower court was based on the title deed of 16<sup>th</sup> June 1991. The Appellant protested against this title deed and pointed out to the court that it was fraudulently and illegally issued in that it was not issued in accordance with the orders that had been issued by the court. As I have mentioned, none of the orders issued by the court directed the sharing of the suit property in the manner contained in the said title deed. The Appellant having raised the issue before the lower court, a court properly directing itself and being seized of the record of the previous proceedings ought to have interrogated the origin and the basis of the said title deed. The court erred by telling the Appellant that he should have made an application for the cancellation of the title deed. The issue of fraud having been raised before the court,



the court could not just wish it away in that manner. The title was illegal having been issued contrary to the terms of a court order. By allowing the subdivision of the suit property to continue, the court in effect aided the Respondent to benefit from the illegal title. Even if the title had not been cancelled, it was illegal and in law null and void. The fact that the title had not been cancelled did not cloth it with any validity. This position of the law was well explained in the case of *Macfoy v. United Africa Limited* (supra) in which the court stated that:

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

25. In *Kenya Pipeline Company Ltd. v. Glencore Energy(UK)Ltd.* [2015] eKLR, the Court of Appeal cited with approval the statement that was made in the case of *Holman v. Johnsons(1775-1802)* All ER 98 concerning an illegal act as follows:

“The principle of public policy is this:

Ex dolo malo non oritur actio. No court will lend its aid to a man who found his cause of action on an immoral or an illegal act. If from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is on that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.”

26. In the same case, the Court of Appeal stated further that:

“There is a consistent line of decisions of this court where it has set its face firmly and resolutely against those who would breach, violate or defeat the law then turn to the courts to seek their aid. The court has refused to lend aid or succour and has refused to be an instrument of validation for such persons. We still refuse...it must also follow that the respondent's plea that a rejection of its claim would be tantamount to an unconstitutional deprivation of property is also untenable. *The Constitution* cannot possibly protect rights supposedly acquired through violation of the law.”

27. I have said enough to show that the Appellant's appeal has merit. It is not necessary to consider all the grounds of appeal. I only wish to add that it is not clear why the Respondent filed yet another application for the Senior Executive Officer to be ordered to sign the mutation form for the partitioning of the suit property and the instruments of transfer of the subdivisions of the suit property to the Respondent and the other interested parties. The court had already granted such order at the instance of the Respondent. I have referred to two orders herein earlier both of which authorized the Senior Executive Officer of the court to do just what the Respondent sought in the application the subject of this appeal. The Respondent's application was in the circumstances res judicata and in my view, the same was filed in bad faith to circumvent compliance with the said earlier orders.

### **Conclusion:**

28. In the final analysis and for the foregoing reasons, I allow the Appellant's appeal and make the following orders;



1. The orders issued by Hon. G.a.mmasi(mrs) SPM on 22<sup>nd</sup> November 2018 in Senior Resident Magistrate's Court at Nairobi (milimani Commercial Court) ELC No. 22 of 1985, Kabiru Muiruri V. Karuku Njau are set aside and in place thereof an order is issued dismissing the Respondent's Notice of Motion application dated 6<sup>th</sup> July 2018 in that matter with costs to the Appellant.
2. The partitioning of Title No. Dagoretti/Mutuini/95 and transfer of the portions thereof to the Respondent, the Appellant and John Goro Njau and any other persons pursuant to the said order of 22<sup>nd</sup> November 2018 are set aside and all the titles issued following the said partition exercise are cancelled and the status of Title No. Dagoretti/Mutuini/95 reverted to the position prior to the said partition. For the avoidance of doubt, any subdivision carried out and transfers effected subsequent to the initial partition and the titles issued pursuant thereto are similarly cancelled.
3. The Director of Surveys shall amend the relevant Registry Index Map (RIM) for Dagoretti Mutuini to cancel therefrom the land parcels whose titles have been cancelled pursuant to this judgment.
4. Title No. Dagoretti/Mutuini/95 shall be partitioned afresh in accordance with the award of the panel of elders that was adopted by the court in which the property was to be shared in this manner;  
Karuku Njau(Respondent)-1/6 undivided share,  
John Goro Njau-1/3 undivided share, and  
Kabiru Muiruri-1/2 undivided share.
5. Title No. Dagoretti/Mutuini/95 shall be partitioned into 3 portions save where the parties consent to have more partitions and allowance shall be given for the roads as may be advised by the surveyor.
6. The Appellant shall have the costs of the Appeal.

**DELIVERED AND DATED AT KISUMU THIS 18<sup>TH</sup> DAY OF APRIL 2023**

**S. OKONG'O**

**JUDGE**

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform.

**In the presence of:**

Mr. Audi for the Appellant

Mr. Nyaga for the Respondent

Ms. J. Omondi-Court Assistant

