



**Mburu v Ng'ang'a (Environment and Land Appeal E021 of 2024)  
[2025] KEELC 1396 (KLR) (19 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1396 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL E021 OF 2024**

**BM EBOSO, J  
MARCH 19, 2025**

**BETWEEN**

**LEONARD KAMENWA MBURU ..... APPELLANT**

**AND**

**PETER NJUGUNA NG'ANG'A ..... RESPONDENT**

*(Being an Appeal against the Judgment of Hon L.L Gicheha, Chief Magistrate, delivered on 30/1/2024 in Kikuyu Chief Magistrate Court MCE & L Case No. E009 of 2021)*

**JUDGMENT**

**Introduction**

1. This appeal challenges the Judgment of the Kikuyu Chief Magistrate Court [Hon L.L Gicheha] rendered on 30/1/2024 in Kikuyu MCE&L Case No E009 of 2021. The appellant was the plaintiff in the primary claim in the said suit. The respondent was the defendant in the primary claim and a counterclaimant [plaintiff] in the counterclaim. One of the key issues that fell for determination in the suit was the question as to who between the appellant [Leonard Kamenwa Mburu] and the late Jane Murunga Njuguna was the legitimate owner of land parcel number Nachu/Ndacha/651. Invariably, that is one of the questions that fall for determination in this first appeal. Before I analyse the evidence and dispose the issues that fall for determination, I will briefly outline the background to the appeal and the parties' respective submissions on the appeal.

**Background**

2. The suit in the lower court was initiated by the appellant through a plaint dated 14/12/2020. The respondent was named as the 1st defendant while his wife, Jane Murunga Njuguna [who is now deceased] was sued as the 2nd defendant. The plaint was subsequently amended and Jane Murunga Njuguna who died subsequent to initiation of the suit was removed from the suit.



3. Through the amended plaint dated 16/1/2023, the appellant sought the following reliefs against the respondent: (i) a declaration that the appellant was the rightful registered owner of land parcel number Nachu/Ndacha/651 [hereinafter referred to as “the suit land”]; (ii) a declaration that the respondent was a trespasser on the suit land; (iii) an order of permanent injunction restraining the respondent against occupying, accessing, trespassing on or interfering with the suit land; (iv) an order decreeing eviction of the respondent and his agents/servants from the suit land; (v) an order decreeing the Officer Commanding Thogoto Police Station to assist in the execution of the decree; (vi) general damages and/or mesne profits for trespass and/or loss of income as a result of trespass on the suit land ; (vii) an order decreeing that bodies of the late Isaack Njau Njuguna and the late Jane Murunga Njuguna be exhumed from the suit land at the expense of the respondent; and (viii) an order awarding the appellant costs of the suit.
4. The case of the appellant was that, the respondent was a trespasser on the suit land. He contended that he [the appellant] purchased the suit land from one Perminus Kagunda Karanja in 2015 at a purchase price of Kshs. 4,700,000, adding that Perminus Kagunda Karanja had acquired the suit land from Lucy Nyambura Thuku who was registered as proprietor of the suit land following a transfer of the land to her by the defendant’s deceased wife, the late Jane Murunga Njuguna.
5. The appellant contended that, at the time of his purchase of the suit land, the land was unoccupied, adding that, subsequently, he found that the respondent and his late wife had been “jointly and severally cultivating crops” on the suit land without his authorization. He added that he tried to get the couple to cease their trespass but they failed to abide. He added that the defendant illegally interred the bodies of his late son and his late wife on the suit land.
6. The respondent opposed the plaintiff’s claim and made a counterclaim through a defence and counterclaim dated 4/7/2023. His case was that he was lawfully in occupation of the suit land, contending that the suit land was family property which was registered in the name of his late wife, Jane Murunga Njuguna [hereinafter referred to as “the deceased”]. He further contended that the deceased never transferred the suit land to any person, adding that he [ the respondent] held the original title relating to the suit land which was issued to the deceased.
7. By way of counterclaim, the respondent sought the following reliefs against the appellant: (i) a declaration that Jane Murunga Njuguna was the lawful owner of the suit land; (ii) an order decreeing cancellation of the appellant’s title; (iii) an order decreeing rectification of the land register to annul entry numbers 4, 5, 6, 7 and 8; and (iv) an order condemning the appellant to bear costs of the suit.
8. Upon conducting trial and upon receiving submissions, the trial court made the following verbatim finding in the suit:

“I therefore find that the plaintiff’s title is not genuine as the issuance of title to Lucy Nyambura was unprocedural. It therefore means that defendants are the rightful owner of the suit land”. [sic]
9. The trial court further made the following observation and disposal orders:

“In this case the land had been allocated to the defendant’s wife and a title issued, this meant that she was the registered owner and thus she was only one who could confer title to another party by way of transfer. There is no evidence she transferred it to Lucy Nyambura who transferred it to Perminus Kagunda who sold it to the defendant.



The plaintiff has not proven his case on a balance of probability and the suit is dismissed with costs and I enter judgment for the defendant as prayed in their counterclaim.”

## Appeal

10. Aggrieved by the trial court’s decision, the appellant brought this appeal advancing the following 12 verbatim grounds of appeal:
- i. That the learned magistrate erred in law and fact in allowing the respondent’s counterclaim despite the said counterclaim being defective and legally untenable as the respondent did not have the requisite locus to institute a counterclaim in the matter on behalf of Jane Murunga Njuguna (deceased).
  - ii. That the learned magistrate erred in law and fact in holding that the purported title held by the deceased was conclusive evidence of ownership of the suit property contrary to Section 32 (2) of the Registered *Land Act* (now repealed).
  - iii. That the learned trial magistrate further misdirected herself in misapplying the provisions of Section 26 of the *Land Registration Act* to divest the appellant of his title without any pleading or finding of fraud against him. Besides, there was no finding of illegality or irregularity in the manner in which the appellant obtained his title.
  - iv. That the learned trial magistrate misdirected herself in her finding that no evidence was produced to show that the defendant’s wife ever transferred the suit property despite a green card produced by both the appellant and the respondent detailing the sequential transfer and unbroken chain of ownership of the suit property.
  - v. That the learned trial magistrate erred in law and in fact in invalidating the appellant’s title on account that he did not call one Lucy Nyambura to testify on how she got her title, a transaction that the appellant was not privy to. Besides, the obligation to enjoin the said Lucy Nyambura and prove fraud against her was on the deceased registered proprietor.
  - vi. That the trial magistrate erred in law and in fact in cancelling the appellant’s title despite the appellant having sufficiently proved that he was a bona fide purchaser of the suit property for value without any notice of any irregularity or illegality from the immediate registered owner.
  - vii. That the trial magistrate misdirected herself on both law and fact in imposing an obligation on the appellant to validate the preceding transactions on the suit property which has no basis in law whatsoever.
  - viii. That the trial magistrate misdirected herself on both law and fact in concluding that the dispute turned on double allocation hence misapplying the law thus divesting the appellant of his property.
  - ix. That the learned trial magistrate erred in law and in fact in holding that the respondent’s title was valid despite the fact that the respondent failed to produce the alleged original title for scrutiny and verification by the court.
  - x. That the learned trial magistrate erred in law and in fact in failing to have any regard whatsoever to the appellant’s submissions and the authorities cited therein.
  - xi. That the learned magistrate erred in law and in fact in failing to consider the evidence before her in totality hence arrived at an erroneous and unjust determination.



- xii. That the learned magistrate erred in law and in fact in her finding that the plaintiff had not proved his case on a balance of probability.
11. Through the memorandum of appeal dated 21/2/2024, the appellant urged this Court to allow the appeal and set aside the Judgment and Decree made on 30/1/2024 in ELC No E009 of 2021. The appellant further urged the Court to substitute the impugned Judgment with an order allowing the appellant's claim as prayed in his amended plaint dated 16/1/2023. The appellant also asked the Court to award him costs of this appeal and costs of the suit in the lower court.

### **Appellant's Submissions**

12. The appeal was canvassed through written submissions dated 2/5/2024 and rejoinder submissions dated 1/7/2024, both filed by M/s Mbugua & Ng'ang'a & Company Advocates. Counsel for the appellant identified the following as the four issues that fall for determination in the appeal: (i) Whether the respondent instituted a valid counterclaim in ELC No E009 of 2021; (ii) Whether the title allegedly held by the respondent's deceased wife was conclusive evidence of ownership of the suit property; (iii) Whether the appellant holds an indefeasible title over the suit property, and (iv) Whether the trial court gave any regard to the appellant's submissions and the evidence before it.
13. On whether the respondent instituted a valid counterclaim in ELC No E009 of 2021, counsel for the appellant faulted the learned trial magistrate for allowing the respondent's counterclaim despite it being fatally defective, adding that: (i) the respondent failed to obtain letters of administration that would have enabled him to institute a valid counterclaim and assert ownership of the suit property on behalf of the estate of his deceased wife, the late Jane Murunga Njuguna; and (ii) in the absence of a grant, the respondent lacked the requisite locus to institute a valid counterclaim in the matter. Counsel contended that during cross-examination, the respondent confirmed that he had indeed not taken out a grant relating to the estate of the deceased. Counsel further contended that the trial court failed to appreciate that a counterclaim is a separate legal action which requires the requisite locus for its institution. Counsel added that the respondent's joinder in the suit as a trespasser did not confer upon him the right to file a counterclaim and assert ownership over the suit property.
14. On whether the title held by the respondent's deceased wife was conclusive evidence of ownership of the suit property, counsel faulted the trial court's finding that the green card produced as evidence by both the appellant and the respondent supported the respondent's claim that the deceased had never transferred the suit property to any person. Counsel contended that the finding contradicted the entries on the green card which documented the sequential transfers and unbroken chain of ownership of the suit property from the deceased all the way to the appellant. Counsel added that there was no basis for the trial court to hold that the respondent's deceased wife still held a valid title over the suit property despite the green card showing that she had transferred her proprietary interest in the suit property to one Lucy Nyambura Thuku on 12/9/2013, thereby relinquishing all her proprietary rights in the suit land.
15. Counsel submitted that the trial court erred in holding that the dispute revolved around double allocation and in cancelling the appellant's title on the ground that the suit property was already allocated to the deceased and was therefore not available for re-allocation. Counsel submitted that no parallel titles were issued in relation to the suit property at any given time, adding that no evidence of parallel titles was tendered. Counsel added that the appellant acquired the suit property pursuant to a purchase from one Perminus Kagunda Karanja and not through an allocation process. Counsel argued that no evidence was tendered before the trial court to support a finding of double allocation of the suit property.



16. Counsel faulted the trial court's holding that no evidence was produced to show that the deceased ever transferred the suit property. Counsel contended that the green card produced by both parties attested to the fact that on 12/9/2013, the deceased transferred the suit property to Lucy Nyambura Thuku.
17. On whether the appellant holds an indefeasible title over the suit property, counsel submitted that the appellant bought the suit property from Perminus Kagunda Karanja through an agreement for sale dated 5/5/2015 at a consideration of Kshs 4,700,000. Counsel added that the appellant conducted due diligence before the purchase, which confirmed that the seller was the registered proprietor of the suit land. Counsel argued that despite the overwhelming evidence of the appellant's acquisition of the suit property, the trial court still cancelled his title and disregarded Section 26 of the Land Registration Act which provides that a certificate of title issued to a person is prima facie evidence that the person is the absolute and indefeasible owner of that property. Counsel faulted the trial court for disregarding the Court of Appeal decision in Embakasi Properties Limited & Another v Commissioner of Lands & Another [2019] eKLR that affirmed this principle
18. Counsel submitted that the learned trial magistrate erred in failing to recognize the appellant as a bona fide purchaser of the suit property despite the appellant having sufficiently proved that: (i) he held a certificate of title of the suit property; (ii) before purchasing the suit property, he conducted due diligence and confirmed that the seller was the registered proprietor; (iii) he paid valuable consideration for the suit property [Kshs 4,700,000]; (iv) he purchased the suit property in good faith and without any notice of any fraud or irregularity; (v) there was no pleading of fraud against the appellant in the acquisition of his title; and (vi) no evidence was tendered by the respondent to demonstrate that the appellant was a party to any fraud and/or acquired the suit property through fraudulent means. Counsel argued that the trial court misapplied the provisions of Section 26 of the Land Registration Act to justify the cancellation of the appellant's title without any pleading nor finding of fraud against him.
19. On whether the trial court gave any regard to the appellant's submissions and the evidence before it, counsel submitted that the trial's court failure to consider the authorities cited by the appellant in its entire judgment or apply relevant land laws indicated a complete disregard of the appellant's submissions. Counsel added that the trial court erred in failing to give sufficient regard to the evidence placed before it, especially the green card produced by both parties, which demonstrated the sequential transfer of the suit property. Counsel argued that the trial court's disregard of the respondent's admission of failure to obtain a grant over his deceased wife's estate and the effect on his counterclaim further highlighted the unfairness of the appellant's title cancellation. Counsel argued that the trial court's failure to consider and give due regard to the evidence adduced led to the erroneous conclusion that the appellant had not sufficiently proved his case on a balance of probabilities. Counsel further argued that the trial court concluded that the appellant had not proved his case to the required standard and cancelled his title despite the respondent's failure to present any evidence suggesting illegalities or irregularities in the appellant's title acquisition process. Counsel urged the Court to set aside the trial court's Judgment and allow the appeal.

### **Respondent's Submissions**

20. The respondent filed submissions dated 6/6/2024 through M/s Chimei & Malenya Company Advocates. Counsel for the respondent identified the following as the five issues that fall for determination in the appeal: (i) Whether the respondent had the locus standi to institute the counterclaim; (ii) Whether the appellant is the rightful owner/ registered proprietor of land parcel number Nachu/Ndacha/651; (iii) Whether the title of land parcel number Nachu/Ndachu/651 was



- acquired by the appellant fraudulently; (iv) Whether the appellant proved their case on the balance of probabilities; and (v) Whether the appeal is merited.
21. On whether the respondent had the locus standi to institute the counterclaim, counsel for the respondent submitted that the suit was initially instituted against both the respondent and the late Jane Murunga Njuguna [the deceased] as a claim for trespass onto the suit property. Counsel added that the appellant was prompted into amending the plaint to delete the name of the deceased upon her death in accordance with Order 24 of the Civil Procedure Rules. Counsel added that the respondent subsequently defended the amended plaint and filed a counterclaim through which he sought to safeguard his interest as the occupant of the suit property and also sought to safeguard the ownership by his late wife, Jane Nyambura Thuku. Counsel contended that it was only through the affirmation of the ownership by his late wife that the respondent's position as a lawful occupant of the suit property would be upheld. Counsel argued that it was on that basis that the respondent filed a counterclaim, adding that the respondent did not file the counterclaim as a representative of the estate of the deceased.
  22. On whether the appellant is the rightful owner of land parcel number Nachu/Ndacha/651, counsel relied on Section 26 and the decision in the case of Augustine Thuo v James Maina Thuita & Another [2020] eKLR. Counsel contended that the late Jane Murunga Njuguna was allocated the suit property in 1988 by the County Council of Kiambu vide an allotment letter Ref No. KCC/TC/6/1/2B/VOL.VII/182 which culminated in her registration as the proprietor of the suit property and a title deed was issued to her on 8/4/1993 under the Registered *Land Act* (Repealed). Counsel added that the respondent was still in possession of the original title deed issued to the deceased which would have been submitted to the Land Registrar upon the alleged transfer to Lucy Nyambura Thuku.
  23. Counsel faulted the appellant for failing to call Lucy Nyambura Thuku as a witness and for failing to demonstrate, on a balance of probabilities, how the suit property was transferred from the deceased to Lucy Nyambura Thuku and subsequently to Perminus Kagunda Karanja and ultimately to the appellant. Counsel added that it was the appellant's title deed that was in question. Counsel for the respondent submitted that the deceased held the title to the suit property from the 1990's when the land was allocated to her by the County Council. Counsel further submitted that the validity of the deceased's title was not in dispute. Counsel argued that the existence of a second title is what was in dispute, adding that the title that was first in time ought to prevail.
  24. On whether the appellant proved their case on the balance of probabilities, counsel relied on Sections 107, 108 and 109 of the *Evidence Act* and the decisions in the cases of Evans Nyakwana v Cleophas Bwana Ongaro [2015] eKLR, William Kabogo Gitau v George Thuo & 2 Others [2010] 1KLR 526, Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another [2015] eKLR and Antony Francis Wareham t/a Wareham & 2 Others v Kenya Post Office Savings Bank [2004] eKLR and submitted that the appellant failed to prove their case on a balance of probabilities. Counsel emphasized that: (i) the appellant failed to prove why the respondent still held the original title to the suit property; (ii) the appellant failed to sue whoever sold him the land for the alleged Kshs 4,700,000 or call Lucy Nyambura Thuku as a witness; (iii) the appellant failed to provide cogent evidence explaining why he only filed the suit for trespass in 2021 when the respondent had all along been in occupation of the suit property; (iv) the respondent had been in quiet possession of the suit property where he had built a semi-permanent house and on which he had buried his beloved wife and son; and (v) the nemo dat quod non habet rule was applicable in the matter given that it was the respondent's wife who possessed the title to the suit property and that she was the only one who could confer a better title.



## Analysis and Determination

25. The court has considered the entire original record of the trial court; the record filed in this appeal; the grounds of appeal; and the parties' respective submissions. The appellant itemized twelve (12) grounds of appeal. In his subsequent submissions on the appeal, he identified and submitted on only four (4) issues. On his part, the respondent identified and submitted on five issues.
26. Taking into account the grounds of appeal and the parties' respective submissions, the following are the three key issues that fall for determination in the appeal: (i) Whether the respondent had the locus standi to sustain a claim for the key reliefs that he sought in the counterclaim; (ii) Who between the appellant [Leonard Kamenwa Mburu] and the late Jane Murunga Njuguna was the legitimate owner of land parcel number Nachu/Ndacha/651; and (iii) Whether the respondent was a trespasser on land parcel number Nachu/Ndacha/651. I will dispose the issues sequentially in the above order. Before I do that, I will briefly outline the principle that guides this court when exercising appellate jurisdiction.
27. This is a first appeal. The task of a first appellate court was summarized by the Court of Appeal in the case of *Susan Munyi v Keshar Shiani* (2013) eKLR as follows:

“As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”
28. The principle was similarly outlined in *Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”
29. Did the respondent have the locus standi to sustain a claim for the key reliefs that he sought in the counterclaim? The appellant contends that the counterclaim was fatally unsustainable because the respondent did not have a grant relating to the estate of the deceased. The respondent's case is that he instituted the counterclaim in his own right as an occupant of the suit land and adds that, it is through the affirmation of the deceased's ownership that his lawful occupation of the suit land would be upheld.
30. The suit in the trial court was initiated by the appellant through a plaint dated 14/12/2020. The two defendants were Peter Njuguna Ng'ang'a [the respondent] and Jane Murunga Njuguna [the respondent's now deceased wife]. Through the original plaint, the appellant sought: (i) a declaration that he was the rightful registered owner of the suit land; (ii) an order decreeing exhumation of the body of the late Isaac Njau Njuguna [son to the two defendants] from the suit land at the expense of the two defendants; and (iii) an order awarding the appellant costs of the suit.
31. Upon the death of the 2nd defendant [ the late Jane Murunga Njuguna], the appellant elected not to pursue her estate for the effectual and complete determination of the issue relating to the question as to whether the deceased transferred her interest in the suit land to Lucy Nyambura Thuku. At that point, the two defendants who were waving an original title relating to the suit land had asserted the deceased's ownership of the suit land and had buried their son on it.



32. Instead of pursuing joinder of the estate of the late Jane Murunga Njuguna to facilitate the complete and effectual settlement of the question as to whether the deceased transferred his interest in the suit land, the appellant decided not to pursue joinder of the estate yet both in the trial court and in this appeal, one of the key issues [as framed by the appellant] is/was whether the title held in the name of the deceased was conclusive evidence of her ownership of the suit land. Besides that, one of the reliefs sought in the amended plaint was exhumation of the body of Jane Murunga Njuguna who had been buried on the land. The respondent too did not see the need for joinder of the estate for the purpose of effectual and complete adjudication of the question as to who between the appellant and the deceased was the legitimate owner of the suit land.
33. Without a grant duly issued under the *Law of Succession Act*, the respondent, besides filing a defence, initiated a counterclaim against the appellant. In both the defence and the counterclaim, the respondent contended that the suit land was family land where they lived, adding that the land was originally registered in the name of his late wife [Jane Murunga Njuguna] who had neither sold nor transferred it to any other person. Through the counterclaim, he sought: (i) a declaration that Jane Murunga Njuguna was the lawful owner of the suit land; (ii) an order cancelling the appellant's title; and (iii) an order rectifying the land register to annul the entry that transferred the land from his deceased wife to Lucy Nyambura Thuku and all the subsequent entries.
34. It is clear from the counterclaim and from the above reliefs that the respondent was mounting a claim for himself as an occupant of the suit land and was at the same time mounting a claim on behalf of the estate of the late Jane Murunga Njuguna. He was mounting a claim on behalf of the said estate without first obtaining a grant under the *Law of Succession Act*. While the court appreciates that the respondent was entitled to ventilate his own claim through a counterclaim, without a grant duly issued under the *Law of Succession Act*, the respondent could not sustain a claim on behalf of the estate. That is my finding on the first issue. For reasons that will emerge in the subsequent parts of this Judgment, the Court will not pronounce itself on whether, on his own, the respondent proved his counterclaim.
35. Failure of the respondent to obtain the necessary grant is not the only serious omission which the trial court overlooked and failed to pronounce itself on. The trial court annulled registrations relating to Lucy Nyambura Thuku and Perminus Kagunda Karanja without giving the duo the opportunity to be heard and defend their registrations. Given the nature of the orders that were sought in the primary suit and in the counterclaim, the duo together with the estate of the late Jane Murunga Njuguna were necessary parties to the primary suit and to the counterclaim.
36. As to who, between the appellant and the late Jane Murunga Njuguna, is the legitimate owner of the suit land, this is an issue that requires joinder of the estate of Jane Murunga Njuguna and all the other necessary parties. This is a case in which the trial court was entitled to invoke the provisions of Order 1 rule 10 (2) of the Civil Procedure Rules and effect necessary joinder.
37. For the above reasons, the court takes the view that the Judgment of the lower court stands to be set aside to facilitate joinder of necessary parties and fresh trial. The necessary parties are: (i) the duly appointed personal representative(s) of the late Jane Murunga Njuguna; (ii) Lucy Nyambura Thuku; (iii) Perminus Kagunda Karanja; and (iv) the relevant Land Registrar. Because there is need for joinder and fresh trial, this court will not make merit pronouncements on the second and third issues.
38. Given that both parties omitted to join the above necessary parties to their respective claims, they will bear their respective costs of this appeal.
39. In the end, this appeal succeeds in the following terms-;



- a. The Judgment in Kikuyu CMC Environment & Land Case No E009 of 2021 is set aside wholly.
- b. The respondent shall join the personal representative(s) of the estate of the late Jane Murunga Njuguna as a co-plaintiff in the counterclaim and further join Lucy Nyambura Thuku; Perminus Kagunda Karanja; and the Land Registrar as defendants in the counterclaim within six (6) months to facilitate fresh trial. In default, his defence and counterclaim shall stand struck out and the appellant's suit shall proceed to hearing as an undefended cause.
- c. Parties shall bear their respective costs of this appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 19TH DAY OF MARCH 2025.**

**B M EBOSO [MR]**

**JUDGE**

In the Presence of

Mr Shamah for the Appellant

Mr Chimei for the Respondent

Mr Tupet – Court Assistant

