



MGM'M v DMM'M & 2 others (Environment and Land Appeal E097 of 2022) [2023] KEELC 21957 (KLR) (29 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21957 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E097 OF 2022**

CK NZILI, J

NOVEMBER 29, 2023

BETWEEN

MGM'M APPELLANT

AND

DMM'M 1ST RESPONDENT

STEPHEN MWENDA MURAA 2ND RESPONDENT

ARTHUR KIRIINYA MBOGORI 3RD RESPONDENT

(Being an appeal from the Judgment of the senior principal magistrate at Githongo delivered on 25.11.2022 in Githongo PM Being an appeal from the Judgment of the senior principal magistrate at Githongo delivered on 25.11.2022 in Githongo PM ELC No. 19 of 2020)

JUDGMENT

1. The appellant, who was the plaintiff at the lower court, brought a suit against his stepbrother, the 1st respondent, on breach of trust and directives by the initial owner of L.R.No Abothuguchi/Kariene/xxxx, to transfer to her L.R No. Abothuguchi/Kariene/xxxx as a resultant subdivision of the ancestral or family land. The appellant averred her late father, M'MK, passed on in 2002 after subdividing the mother title into three portions in favor of Festus Mukunja, herself and children, and lastly to the 1st respondent, respectively.
2. The appellant averred that the 1st respondent processed his title deed and promised to assist her in acquiring her title. Instead, in October 2007, the appellant averred his brother, transferred her portion to himself, subdivided it into L.R. No xxxx – xxxx, and later L.R. No.xxxx into L.R. No xxxx – xxxx. Further, the appellant averred that the 1st respondent combined L.R. No. xxxx with L.R. No. xxxx to create L.R. No. xxxx and further subdivided into L.R. No's xxxx– xxxx (hereinafter the suit land).



3. In the alternative, the appellant alleged the subdivisions were fraudulent in that they were undertaken without letters of administration and in total disregard to her overriding rights. Additionally, the appellant averred the 1st respondent after the changes, the combined parcel was fraudulently sold, transferred, and registered L.R. No. xxxx, into the names of the 2nd and 3rd respondents, hence rendering her homeless, destitute and landless.
4. Therefore, the appellants prayed for the cancellation of the registration, subdivisions, combinations, and transfers of the initial Parcel No xxxx and its resultant subdivisions no L.R. No. Abothuguchi/Kariene/xxxx – xx; declaration that L.R. No. Abothuguchi/Kariene/xxxx, xxxx, xxxx and its resultant subdivisions No's xxxx – xx, were subject to her overriding interests: cancellation of registration thereof; issuance of new title over the suit parcels of land under her name and a permanent injunction restraining the respondents from claiming, entering, trespassing, cultivating and in any way whatsoever interfering with her quiet enjoyment, possession, occupation and development of L.R. No. Abothuguchi/Kariene/xxxx – xxxx.
5. By a statement of defense dated 11.1.2021, the 1st respondent denied the contents of paragraphs 4 – 22 of the plaint. In particular, the 1st respondent denied having received instructions and or promising to transfer L.R. No. Abothuguchi/Kariene/xxxx to the appellant. He averred that the said parcel of land was legally transmitted to him for consideration of Kshs.25,000/=, which he paid to his deceased father in 1992. Additionally, the 1st respondent denied L.R. No. Abothuguchi/Kariene/xxxx and its resultant subdivisions were subject to any overriding interests as particularized thereof. Further, the 1st respondent denied the particulars of the alleged trust and its breach thereof.
6. The 2nd respondent, by a written statement of defense dated 20.1.2021. the 2nd respondent admitted the contents of paragraphs 4 - 6 of the plaint but denied that L.R. No. Abothuguchi/Kariene/xxxx was given to the appellant and her children, or there was any intention of trust and breach thereof. Further, the 2nd respondent denied that the appellant and her family were residing on the suit land alleged or at all. In particular, the 2nd respondent denied the particulars of trust, its breach thereof, and the particulars of fraud since he was a bonafide purchaser for value without notice from the 1st respondent.
7. The 3rd respondent filed a statement of defense dated 22.1.2021. He denied the contents of the plaint and termed the acquisition and registration of L.R. No. Abothuguchi/Kariene/xxxx as legal and procedural, vesting in him absolute ownership subject to no overriding interests in favor of the appellant. Further, the 3rd respondent averred he was a bonafide purchaser for value without any proprietary interest in the land by the appellant. The 3rd respondent averred he followed the due process in acquiring the land.
8. The 3rd respondent denied the appellant was in occupation of the land or would be rendered landless. He averred he took vacant possession of the land after sale and transfer by the 1st respondent without any buildings or crops planted or belonging to the appellant. Further, the 3rd respondent averred that the 1st respondent was the legal owner of the land before he sold and transferred it to him, without any notice or knowledge of the appellant's interest in the land.
9. At the trial, the appellant testified as PW 1 and adopted her witness statement dated 25.11.2020 as her evidence in chief. Her testimony was that she had lived all her life in L.R. No. xxxx – xx, initially part of L.R. No.xxxx. PW 1 told the court that her late father passed on in 2002, but before then, he subdivided his land measuring 15 acres into L.R. No. xxxx, xxxx, and 2081 bequeathing her L.R. No's xxxx, whose size was 5 acres for the rest of her life. Further, PW 1 said all her stepbrothers, among



- them the 1st respondent, were present during the sharing, and the deceased directed them to assist her in processing the title as they processed theirs.
10. PW 1 told the court she had peacefully and continuously lived on the land from 2002 until 2007 when she learned of the changes to the suit land and registration in the name of the respondents. Further, PW 1 said the respondents have been harassing her and attempting to force her to vacate the land unless the court intervenes. PW 1 produced as exhibits No's. 1-4, the demand letter dated 2.11.2020, photographs, copy of death permit, copy of green cards for xxxx xxxx, xxxx, xxxx, xxxx, xxxx-xxxx. In cross-examination, PW 1 told the court she was born on the suit land in 1955 and got married in 1978 to Joseph Gikunda, who passed on in 2020. She said she was given the land in 1992 as the only daughter among her seven sisters and two brothers since the rest were all married.
 11. Additionally, PW 1 said she had no money at the time to subdivide and register her parcel of land, though she built a permanent house on the land in 1978. As to the land sold to the 2nd respondent, P.W. 1 said it was his brother who sold the land, yet he knew of the family meeting during which her late father bequeathed her the land. She said she had been on the land since 1978, together with all children. Further PW1 said that her late father left her occupying the land when he passed on in 2002. She said the 2nd and 3rd respondents' portions were all fenced off. PW1 said she had no claim against their portion since they were not cultivating or harassing her. PW 1 told the court that initially, she occupied a mud house from 1978 until she erected a permanent building on the Suitland in 1994 through the assistance of her late father.
 12. Lucy Nkanata and Patrick Mwendia testified as PW 2 and PW 3, respectively, and adopted as their evidence in chief witness statements dated 26.5.2021. PW 2, a sister to the appellant, told the court during a family meeting in 2000 that the 1st respondent was directed by the deceased father to help PW 1 acquire a title deed for the bequeathed L.R. No. xxxx. She confirmed that the appellant was still in occupation of the land despite harassment by the 1st respondent. She said the appellant was given the land among all the daughters since she had divorced and left her estranged husband in 1977.
 13. PW 3, on his part, told the court the appellant was his mother. He said he was born on the land in 1976, grew up there, and attended the family meeting in 2002, in the presence of his aunts and uncles, including the 1st respondent. He told the court that all his siblings lived on Parcel L.R. No.xxxx and confirmed his late father used to live in Nkubu and not on the suit land. PW 3 told the court that his mother had constructed a permanent building on the land. Similarly, he said he had also built a house on the land in 1998.
 14. Douglas Mbuene Murugu testified as D.W. 1 and adopted his witness statement dated 10.6.2021. He told the court he bought L.R. No.xxxx for Kshs.25,000/= from his late father, who later on transferred the land to him before the land control board on 17.12.1992, subsequent to which he commenced the transfer process in 1992, becoming an absolute proprietor of L.R. No.xxxx and xxxx. He said it was within his right to combine L.R. No.xxxx, with L.R. No.xxxx since they were adjacent to each other. D.W. 1 said the two parcels were combined to make L.R. No.xxxxx. His evidence was that the appellant was occupying L.R. xxxx as a licensee of Mukunja Kibori and not L.R. xxxx following the death of her late husband, Joseph Gikunda M'Muguongo. Further, D.W. 1 said the subdivisions of L.R. No.xxxx were openly done in the presence of and without objection by the appellant. He denied the alleged trust in favor of the appellant. He produced a copy of green card for L.R. No's.xxxx, application for consent dated 4.12.1992, copy of mutation for L.R. xxxx & xxxx copy of mutation form for L.R. No.xxxx and xxxx, requests to combine L.R. No.xxxx and xxxx, copy of title deed for L.R. No.xxxx, copy of map dated 12.12.1992 and eulogy for the late Joseph Gikunda M'Muguongo as D. Exh No's. 1-8, respectively.



15. D.W. 1 said the appellant was occupying L.R. No.xxxx, which belonged to his brother Festus. He denied any alleged family meeting resolution or agreement for him to surrender L.R. No.xxxx to the appellant. He admitted that it was his deceased father who subdivided the initial land into three portions in 1992. He admitted selling a portion of L.R. No. xxxx to the 2nd respondent and L.R. No. xxxx to the 3rd respondent. DW1 said he became the owner of L.R. No. xxxxx on 17.12.1992 while his father was still alive; therefore, the land did not require to go through any succession cause for the transfer to take place.
16. Stephen Mwenda and Kirimi Mbogori testified as D.W. 2 & 3, respectively. D.W. 3 relied entirely on his replying affidavit dated 2.1.2.2020. He confirmed he was the owner of L.R. No.xxxx, which he lawfully acquired from D.W. 1, obtained a title deed, and took vacant possession. D.W. 2 confirmed that PW 1 was living on land belonging to Festus.
17. D.W. 3 adopted his witness statement dated 27.1.2021. L.R. No.xxxx from the 1st respondent after conducting an official search and viewing the mutation form. He produced a copy of the mutation form official search, title deed and photographs as 3rd defendant Exh. No's.1 -4 respectively.
18. Following the conclusion of the evidence, the trial court rendered its judgment, the subject matter of this appeal. By a memorandum of appeal dated 20.12.2022, the appellant faults the trial court for:
 - i. Misconstruing the evidence and failing to properly analyze the weight to of her evidence correctly.
 - ii. Not finding that the subject matter was family land and that it was against the spirit of *the Constitution* to discriminate against her in land distribution.
 - iii. Failing to find the land was ancestral and the 1st respondent could not exclude her.
 - iv. Failing to find subdivisions and transfers were subject to trust.
 - v. Giving a narrow interpretation of the dispute and being biased or imbalanced in the burden of proof against the appellant.
 - vi. Failing to analyze the evidence and the history of the case.
19. As a first appeal, the role of the court is to re-appraise and rehearse the lower court record with an open mind and a fresh perspective, mindful that the trial court had the opportunity to hear and see the demeanor of the witnesses. In *Gitobu Imanyara & 2 others vs AG (2016) eKLR*, the court said a first appeal is by way of a pretrial where the appellate court must reconsider the evidence, evaluate and draw conclusions, bearing in mind that it has neither seen nor heard the witnesses, therefore, should grant due allowance for that.
20. In *Abok James Odera t/a AJ Odera & Associates vs. J.P Machira t/a Machira & Co Advocate (2013) eKLR*, the court said a first appellate court must re-evaluate, re-access, and re-analyze the extracts on the record and then determine whether the conclusion reached by the trial court is to stand or not and give reasons either. See *Oluoch Eric Gogo vs Universal Corporation Ltd (2015) eKLR*.
21. This appeal was canvassed by way of written submissions. The appellant relied on written submissions dated 27.10.2023, where she isolated four issues for the court's determination.
22. On whether the suit property was held in trust by the respondents, the appellant submitted that the suit land was ancestral or family land passed on from one generation to the other, where possession and occupation were clear. Relying on Sections 27 and 28 of the repealed Registered *Land Act*, now replaced by Sections 24, 25, 26, 28, and 107 of the *Land Registration Act*, the appellant submitted that



- customary trust was an overriding interest that need not be noted in the register, but were binding on the registered owner.
23. The appellant submitted that her evidence was sufficient to demonstrate such overriding rights, more so since she was in actual physical possession and occupation of the land. Further, the appellant submitted that it was the intent of the deceased father and the family members that she would be registered as owner of the subject land. Reliance was placed on *Isack Kiebia M'Inanga vs. Isaaya Theuri M'Lintari & another Scok* (2018) eKLR and *Peter Gitonga vs Francis Maingi M'Ikiara Meru H.C. No. 146 of 2000*.
 24. The appellant submitted that the evidence tendered showed the deceased father shared his land as per Kimeru customs and expressed his interest in retaining and reserving some land for his daughter as family trust land, who was in occupation then and had extensively developed it. The appellant submitted that the concept of customary trust was rampant in all African communities where property is owned by everybody, including the unborn and the living dead, facts that cannot be changed through a stroke of registration. The appellant submitted that the 1st respondent was a mere trustee and could not use that registration to kick her out from her entitlement, by virtue of Section 62 (1) of the [Land Registration Act](#), since customary trust is an encumbrance that runs with the land.
 25. The appellant submitted that the 1st respondent acted fraudulently and dishonestly by subdividing her land and transferring it to the 2nd and 3rd respondents in an untruthful, untrustworthy, and unfaithful means to steal the land, which behavior should not be tolerated by any court.
 26. On discrimination, the appellant submitted that the actions of the respondents offended Articles 27 and 60 (f) of [the Constitution](#) regarding discrimination based on gender by solely disinheriting her of the estate of their deceased father as held by Hon. Lady Justice Mary Kasongo in Succession Case No. 308 of 1994. The appellant urged the court to allow the appeal with costs. Reliance was placed on *Mumo vs Makau* (2003) 1 KLR 13, *Kanyi vs Muthiora* (1984) KLR 712, *Dominic Otieno Ogunyio & others vs Helida Akoth Walori* (2022) eKLR and *Justus Miana Muruku vs Jane Waithira Mwangi* (2018) eKLR.
 27. By written submissions dated 20.11.2023, the 1st respondent isolated three issues for the court's determination. On whether the concept of trust was proved, it was submitted that the land came into the name of the 1st respondent in 1992 and the appellant did not adduce evidence for the court to find any trust, more so on the alleged family meeting and the failure to move to actualize the alleged wishes for close to 30 years.
 28. The 1st respondent submitted the suit land was filed in 2020, shortly after the appellant's late husband died. Therefore, it was submitted that it was improbable that the appellant had been living on the suit premises prior to 2020; otherwise, she would have been aware that the suit premises were already subdivided and transferred to the 2nd and 3rd respondents. Reliance was placed on *Kiebia vs M'Lintari* (supra). Further, the 1st respondent submitted that he acquired the land from his late father for value in 1992, with no intention of an alleged trust. Additionally, the 1st respondent submitted that the appellant did not challenge the evidence of purchase or prove she had a beneficial interest in the land. Reliance was placed on *Peter Gitonga vs Francis Maingi M'Ikiara* (2007) eKLR.
 29. Similarly, the 1st respondent submitted that their late father, M'MK, had an indefeasible right to sell the subject parcel of land to him. Regarding fraud, the 1st respondent submitted that the appellant was unable to establish if there were any inhibitions or encumbrances, registered against the said title from anyone or table any evidence pointing at any fraudulent conduct, illegality, unprocedural, or corrupt



- scheme. Reliance was placed on *Elijah Makeri Nyagwara vs Stephen Mungai Njuguna & another Eldoret ELC No. 609B of 2012, Kinyanjui Kamau vs George Kamau (2015) eKLR*.
30. On the merits of the appeal, the 1st respondent submitted that the appellant did not prove customary trust to the standard set in the *Kiebia vs M'Lintari Case (supra)*. On the allegations of bias and imbalanced proof, the 1st respondent termed the allegations as baseless since the appellant's witnesses gave conflicting and contradictory evidence; hence, the trial court's findings were sound and based on the evidence before it.
 31. The 2nd and 3rd respondents relied on written submissions dated 25.10.2023, respectively. The 2nd respondent submitted that he was an innocent purchaser for value without notice and that the appellant brought no evidence to show otherwise against them. Reliance was placed on *Mbasa vs Mbasa (2020) eKLR*. On his part, the 3rd respondent submitted that the 1st respondent was a registered owner of L.R. No. 5273, which was a resultant subdivision of 3226, that had arisen from L.R. No. 2080 as a bonafide purchaser. The 3rd respondent relied on *Mohammed vs Duba & another (2022) KECA 442 (KLR) 18th March 2022* and *Katende vs Harindar and GLA (2008) 2 E.A 173*.
 32. On trust, the 3rd respondent submitted that none was proved against him by the appellant. Reliance was placed on *Juletabi African Adventure Ltd vs. Christopher Michael Lockley (2017) eKLR*, *Muthuita vs Muthuita (1982 - 1988) 1 KLR 42*, *Kiebia vs M'Lintari (supra) eKLR*, *Alice Wairimu Macharia vs Kirigo Philip Macharia (2019) eKLR* and *Peter Ndungu Njenga vs Sophia Watiri Ndungu (2000) eKLR*.
 33. The court has carefully reviewed the lower court record, grounds of appeal, the written submissions, and the law. The issues calling for the court's determination are:
 - i. What was the nature of trust did the appellant plead?
 - ii. If the appellant proved the trust to the required standards.
 - iii. If the 1st respondent lawfully acquired and dwelt with L.R No.xxxx.
 - iv. If the 1st respondent held and dwelt with L.R. No 2080 and its resultant subdivisions subject to any overriding interests in favor of the appellant
 - v. If the 2nd and 3rd respondents were bonafide purchasers for the value of the resultant subdivisions of L.R. No xxxx,
 - vi. If the appellant's appeal has merits.
 34. The appellant's claim was captured in paragraphs 3 -14 of the plaint dated 2.12.2020. She laid out the nexus between her late father, the suit land, and herself that the suit land was family land; hence, there were overriding interests or rights based on customary trust. In paragraphs 15-20, the appellant pleaded how L.R. No. xxxx, which she believed to be a gift and her entitlement, was subdivided by the 1st respondent and later transferred and registered in the names of the 2nd and 3rd respondent. She averred that the circumstances leading to the subdivisions, transfer, and registration in the names of the 1st, 2nd, and 3rd respondents were subject to another trust.
 35. In *Twalib Hatayan & another vs Saggat Ahmed Al-Heidy and others (2015) eKLR*, the court cited *Black Laws Dictionary 9th Edition* that trust was a right enforceable solely in equity to the beneficial enjoyment of property to which another holds legal title, a property interest held by one person (trustee) at the request of another (settlor), for the benefit of a third party (beneficiary). The court said that under the *Trustee Act*, the expressions "trust" and "trustee" extend to implied and constructive trust and cases where the trustee has a beneficial interest in the trust property. The court said trusts



could either be express or by operation of law. In the absence of an express trust, the court said there were two trusts created by operation of law, namely constructive and resulting trusts.

36. The court observed that constructive trust arises when a person who is already a trustee takes advantage of his position for his benefit, in which case the proof of intention is immaterial, since the trust is imposed by the law to guard against unjust enrichment. As to resulting trust, the court said it was a remedy imposed by equity where the property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee. The court said such a trust arises either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. The court said that with resulting trust, the court readily looks at the circumstances of the case and presumes or infers the transferor's intention.
37. Looking at the appellant's pleadings, I do not doubt in my mind that, in the two circumstances alluded to above, the pleaded trust in the plaint was not restricted solely to customary trust. The nature of trusts pleaded fell in three phases, namely customary constructive and resultant trust.
38. There is no dispute that the 1st respondent and the appellant had one parent, the owner of L.R. No. xxxx. He passed on in 2002. It is not in dispute that before he passed on, he had subdivided family or ancestral land into three portions, L.R. No's xxxx, xxxx, and xxxx, among his children.
39. The point of departure by the 1st respondent and the appellant is whether the L.R. No. xxxx, the subject matter in this appeal, was intended for the benefit of appellant or was solely in favor of the 1st respondent.
40. The 1st respondent pleaded in his defense dated 11.1.2021 that there was no intention by the deceased to create a trust in favor of the appellant. On the contrary, the 1st respondent averred that he acquired the suit land as a purchaser for value and, therefore, he was entitled to deal with it the way it pleased him, including subdividing, consolidating, selling, and transferring portions of it as he did to the 2nd and 3rd respondents. He, therefore, denied any intention to create a trust in favor of the appellant. He further averred and testified that the appellant was never in occupation of the suit land or its resultant subdivisions but was housed on L.R. No.xxxx by his brother Festus Mukunja.
41. In *Mukindia Kimuru and another vs Margaret Kanario* (2000) eKLR, the court said that the customary trust was a matter of fact, which must be proved by the person invoking it. The court held it was a matter of general notoriety that inheritance under Kimeru customary law was patrilineal and that the property of an unmarried girl was inherited by her father, who was expected to share an unspecified amount with her other full brothers. The court cited *Contran; Restatement of African Law Vol. II* page 8, that.

“Daughters are normally excluded but may also receive a share if they remain unmarried.” The court cited Section 82 (1) of the retired Constitution as then sanctioning the exclusion of daughters from inheritance of land. The court said the existence of trust is proved through evidence.”
42. In *Kanyi Muthiora vs Maritha Nyokabi Muthiora* (1984) eKLR, the court said "houses" never die, and if there were no heir in the other house, the other would have inherited the whole property. The court said an unmarried daughter would inherit a share of her late father just like a son would have done in absolute ownership but not as a life share. In *Julius Mbuba Kanga and another vs M'Nairobi Njeru* (2018) eKLR, the court said *the Constitution* under Article 27 commands all persons to be treated equally unless by renunciation or consent under Rule 26 (2) of the Probate and Administration Rules.



43. In *Lucy Wangui Mwangi vs Bernard Githii Mwangi* (2019) eKLR, the court cited with approval *Kiebia vs M'Lintari* (supra), that trusts could take many forms and may emerge through evidence that the land was always reserved for family. The court cited with approval *Kiarie vs Kinuthia* that what was essential was the nature of the holding of the land and the intention of the parties. Further, the court cited *Peter Ndungu Njenga vs Sophia Watiri Ndungu* (2000) eKLR that the intention of the parties to create a trust must be clearly determined before a trust was implied or whether there was absolute necessity.
44. Trust is a question of fact as held in *Muthuita vs Muthuita* (supra). Furthermore, in *James Kiarie vs Geoffrey Kinuthia & another* (2012) eKLR, the court said that while occupation may be relevant and has been found to be relevant in some cases in raising the inference of a trust, it was not a necessary ingredient for a trust to be established as to a married daughter.
45. In *Njeru Kuru vs Beatrice Waithera & others* (2004) eKLR, the court said it would not make any distinction between a daughter who was married and one who was not, since a daughter was a daughter while married or not since rights are not defeated on account of marriage. See *Re-Estate of M'Muthaunia Mwendwa (deceased)* (2018) eKLR.
46. In *Phillicery Nduku Mumo vs Nzuki Makau* (2002) eKLR and in *Francis Muthui Muthangani vs Alice Gathigia Menja* (2021) eKLR, the court implied trust in circumstances where the land belonged to the deceased, who was the plaintiff's father and defendant's father-in-law, which had been secretly and fraudulently obtained, registration thereof without following the due process of the law. The court cited with approval *Heartbeat Ltd vs Ngambwa Heartbeat* (2018) eKLR, that the court could impose constructive trust against one who had acquired the property by wrongdoing, especially where the intention of the parties cannot be ascertained or where a trustee takes advantage of his position for his benefit.
47. In this appeal, the appellant availed as an exhibit a copy of the records for L.R. No.xxxx. It shows the register was opened on 2.6.1992 for land measuring xxxx ha, which was a subdivision of Parcel No.xxxx. The registered owner was the late M'MK. The title was closed for subdivisions on 26.11.1992 into parcel L.R.No's xxxx – xxxx. The copy of records for L.R. No.xxxx shows it was opened on 26.11.1992, measuring 2.05 ha in the name of M'MK, who acquired the title in 1992. Going to the copy of the records for L.R. No.xxxx produced by the 1st respondent, it has entries number 3, 4, and 5. They show that the 1st respondent became the registered owner on 2.3.2007 and obtained a title deed on 23.3.2007. Entry No. 5 shows that the title was closed on the combination on 23.10.2007.
48. Other than an application for land control board dated 4.12.1992, the 1st respondent did not produce a transfer form duly signed, executed, and registered at the land's office showing that a transfer for L.R. No xxxx was lodged, registered and or effected in 1992 as pleaded in his statement of defense. Further, the 1st respondent did not produce any registration receipts and payment of stamp duty forms accompanying the transfer forms in 1992. Above all, the 1st respondent did not produce any land sale agreement with his late father and a land control board consent accompanying the transfer forms. The mutation form produced by the appellant related to the combination of L.R. No.xxxx and xxxx dated 22.8.2006, yet from the copy of records, the 1st respondent only became a registered owner of L.R. No.xxxx, a year later on 2.3.2007. It was, therefore, not possible in law for the 1st respondent to purport to combine L.R. No.xxxx with L.R. No.xxxx, before he became its registered owner.
49. The letter dated 4.8.2006 to the land registrar seeking a combination of the two portions was a misrepresentation of facts, and it was used to unjustly obtain L.R. No xxxx, which was not in the name of the 1st respondent then. Going by the burial permit attached to the supporting affidavit of the appellant sworn on 2.12.2020, it clearly shows that their father passed on 27.5.2002. So, if the 1st



respondent acquired a title deed for L.R. No. xxxx on 23.10.2007 after he became a registered owner on 2.3.2007, as per his copy of the record listed in the list of documents dated 10.6.2021, the question remains how did the transfer or registration occur five years after the initial owner M'MK passed? The deceased had died intestate, and therefore, any transfer of the land would only have happened through the required letters of administration.

50. In paragraph 14 of the plaint, the appellant specifically pleaded the particulars of fraud on the part of the 1st respondent as failing to file a succession cause over the estate of the deceased in order to acquire the title, acting deceitfully, unprocedurally and fraudulently causing the combination of the original title.
51. With these glaring inconsistencies, illegalities, irregularities, and noncompliance with due process, my finding is that the appellant had adduced enough evidence to impeach the registration of L.R. No. xxxx and the resultant subdivisions from the name of the deceased. Anything else that happened to the title after the deceased passed on 23.5.2002 was a nullity ab initio. Therefore, in the eyes of the law, the 1st respondent was holding an illegally obtained title to the land, and any subsequent combination of the said title with any other title and subsequent subdivisions and transfers to the 2nd and 3rd respondents was a perpetuation of fraud, illegalities, and forgeries.
52. Consequently, the 2nd and 3rd respondents could not and did not obtain clean titles from the 1st respondent and could not be heard to plead and testify that they were bonafide purchasers for value without notice since title No. L.R. xxxx had been illegally and fraudulently obtained. Moreover, neither the 2nd respondent nor the 3rd respondent disclosed or produced any sale agreement or paper trail showing the value they paid, transfer forms they signed, and evidence of payment of considerations which they paid to acquire their title deeds since it is trite law that when a title is under challenge every paper trail towards its acquisition becomes an issue.
53. The 3rd respondent relied on Mohamed vs Duba & another (2022) KECA 442 KLR 18th March (2022), which cited with approval Katende vs Haridar & Co. Ltd (2008) 2 E.A 13. The case was of no use to the 3rd respondent since he never tendered evidence on the critical elements in that authority, as alluded to above. Submissions, however forceful or detailed, do not amount to evidence or pleadings. There was no specific pleading on good faith, valuable consideration paid, and compliance with essential steps of land purchase and payment of statutory charges.
54. Coming to the aspects of trust, I think going by the caselaw cited above, the circumstances leading to the subdivisions of the initial land to the portions while the appellant was in occupation left no doubt that the deceased intended all his children and in particular the appellant to have a share in his family land. The 1st respondent did not call his other brother Festus Makunja, who was to acquire L.R. No. xxxx, to deny that the appellant was not beneficially entitled to a share out of L.R. No. xxxx. The circumstances under which the appellant came to occupy the land have not been disputed. It does not matter if the appellant was married or not. It was not for the 1st respondent to dictate what his late father should have done with his land while subdividing it. Between 1992 and 2007, when the 1st respondent affected the transfer to his name, he did not explain what delayed the transfer to his name and why he was in a hurry to do so and in total disregard for the estate of the deceased, yet he had no letters of administration. The only inference is that the 1st respondent was out to unjustly enrich himself, take advantage of the appellant, and steal a match against the beneficiaries of the estate of the deceased. He acquired the title through wrongdoing.
55. The upshot is that I find merit in the appeal. The same is allowed. The suit in the lower court is allowed by canceling the transfer of L.R. No. xxxx to the 1st respondent and its combination with L.R. No. xxxx and the subsequent subdivisions to L.R No's xxxx – xxxx. The transfers of and registration of



L.R. No.xxxx and xxxx in favor of the 2nd and 3rd respondents are hereby canceled and or invalidated. The suit land shall revert to the name of the late M'MK as at the date of his death, to be dealt with in accordance with the law of succession in favor of the appellant.

56. A permanent injunction shall issue barring and restraining the respondents with their family members, representatives, employees, servants, agents, or anybody else acting or claiming from interfering with the appellant's quiet, peaceful, actual, and exclusive possession, cultivation, user development and enjoyment of L.R. No.xxxx and its resultant subdivisions.
57. Costs of this appeal and the lower court suit to the appellant are to be met by the 1st respondent.

Orders accordingly.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 29TH DAY OF NOVEMBER 2023

In presence of

C.A Kananu/Mukam

Miss Otieno for appellant

Mugendi for the 1st respondent

Basilio for the 3rd respondent

HON. CK NZILI

JUDGE

