



**Maina v Muiruru (Environment and Land Appeal E008 of 2024)
[2025] KEELC 3327 (KLR) (Environment and Land) (24 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3327 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA
ENVIRONMENT AND LAND
ENVIRONMENT AND LAND APPEAL E008 OF 2024**

MC OUNDO, J

APRIL 24, 2025

BETWEEN

PAUL MWAURA MAINA APPELLANT

AND

SAMSON KINYANJUI MUIRURU RESPONDENT

(Being an Appeal from the Judgement of the Hon. Y.M Barasa, Principal Magistrate in the Naivasha Chief Magistrate's ELC Case Number E004 of 2023 delivered on the 19th July 2024)

JUDGMENT

1. Before me for determination on Appeal is a matter which was heard and determined by Hon. Y.M Barasa, Principal Magistrate wherein upon considering the evidence of both parties, vide his Judgment dated 19th July, 2024, the learned Magistrate had found that the Plaintiff had proved his claim on a balance of probability as required wherein he had entered judgement for the Plaintiff as against the Defendant both in the main suit and in the counterclaim as follows:
 - i. An order of eviction is hereby issued against the Defendant by himself, his servants, agents and/or workmen from suit parcel No. Gilgil/Gilgil Block 1/57735 (Kekohey).
 - ii. An order of permanent injunction is issued against the Defendant by himself, his servants, agents and or workmen from entering, interfering, trespassing, constructing and/or in any other manner interfering with the Plaintiff's ownership and use of the suit property known as land parcel No. Gilgil/Gilgil Block 1/57735 (Kekohey).
 - iii. The Plaintiff is awarded general damages for trespass of Kshs. 100,000/=.
 - iv. The Plaintiff is awarded costs of the suit both in the main suit and in the counterclaim plus interest at court's rate.



2. The Appellant, being dissatisfied with the Judgement and Decree of the trial Magistrate has now filed the present Appeal based on the following grounds in his Memorandum of Appeal:
 - i. The Honorable Magistrate erred in both law and fact when he failed to make a finding whether there was indeed fraud and collusion in the Respondent acquiring land parcel No. Gilgil/Gilgil Block 1/57735(Kekohey).
 - ii. The Honorable Magistrate erred in law and fact in failing to consider that the suit property Gilgil/Gilgil Block 1/57735 (Kekohey) was a resultant title of subdivision of land parcel No. Gilgil/Gilgil 1/16155(Kekohey).
 - iii. The Honorable Magistrate erred gravely when he failed to address the issue of the existence of another suit (Naivasha (sic) ELC No. 89 of 2019 (sic) which was pending before the same court where the subject matter of the suit was land parcel No. Gilgil/Gilgil 1/16155(Kekohey) which resulted in Gilgil/Gilgil Block 1/57735(Kekohey) after subdivision.
 - iv. The Honorable Magistrate erred in failing to appreciate the pleadings and documents filed over the suit property in other matters despite sufficient pleadings and documents presented before the court.
 - v. The Honorable Magistrate erred both in law and fact when he failed to consider that there was an order in Naivasha (sic) ELC Case No. 89 of 2019 (sic) prohibiting any dealings in land parcel No. Gilgil/Gilgil 1/16155(Kekohey) which resulted in Gilgil/Gilgil Block 1/57735(Kekohey) after subdivision, pending the hearing and determination of the suit.
 - vi. The Honorable Magistrate failed to properly and/or at all evaluate the evidence on record cumulatively hence reaching a wrong conclusion by granting the orders.
 - vii. The Honorable Magistrate made a fundamental error in law by considering and taking into account various extraneous issues that were not before the Court.
3. The Appellant thus sought for the following orders:
 - i. The appeal be allowed.
 - ii. The judgement delivered on 19th July, 2024 and the decree issued pursuant thereto be set aside to await the hearing and determination of Naivasha Magistrates Court ELC No. 89 of 2019. (sic)
 - iii. The Respondent do pay the costs of the Appeal.
4. In response and in opposition to the Appeal, the Respondent, vide his Replying Affidavit dated 19th February, 2025, deponed that the Learned Trial Magistrate had properly appreciated the facts of the matter before him and properly applied the law hence his findings on the facts and the law had been correct. That indeed the Learned Trial Magistrate had correctly appreciated that the entire process of acquisition of the suit land No. Gilgil/Gilgil Block 1/57735(Kekohey) had been well explained, documented, lawful and that there had been no fraud or collusion pleaded or proved by the Appellant.
5. That it had not been an issue for determination or contest that Title Number Gilgil/Gilgil Block 1/57735(Kekohey) had been the resultant subdivision of Title Number Gilgil/Gilgil Block 1/16155(Kekohey), which fact had been pleaded in his Complaint. That the existence and import of Naivasha CMELC 89 of 2018 (incorrectly described as Naivasha CM ELC 89 of 2019) had been considered through the evidence that had been presented before the Honorable Magistrate and correctly appreciated as having no bearing to the proceedings before the Honorable Magistrate over



- the suit land considering that it had not been demonstrated that the Appellant herein had been a party to the said suit or that there had existed any order flowing therefrom touching on the property subject of the appeal herein or the proceedings before the Magistrate, that is, Title Number Gilgil/Gilgil Block 1/57735(Kekopey).
6. He deponed that the Learned Magistrate had properly evaluated all the evidence before him before arriving at correct findings. That there had been no extraneous issue (s) that had been considered by the trial Court in arriving at its judgment which issues, the Appellant had not pointed out in his Memorandum of Appeal and Submissions.
 7. He thus deponed that the Appellant had not set out any cogent grounds to warrant the interference with the findings of facts and the law by the Trial Magistrate wherein the Appeal should be dismissed.
 8. The Appeal was disposed of by way of written submissions wherein the Appellant vide his submissions dated 8th February, 2024 framed three (3) issues for determination as follows:
 - i. Whether the outcome in (sic) ELC 89 of 2018 will affect the judgement issued in (sic) ELC No. E004 of 2023.
 - ii. Whether there were irregularities in issuance of Title Deed No. Gilgil/Gilgi/ Block 1/57735.
 - iii. Whether the Appellant is bonafide member or shareholder to Land Parcel No. Gilgil/Gilgil Block 1/16155.
 9. On the first issue for determination as to whether the outcome in (sic) ELC 89 of 2018 would affect the judgement that had been issued in (sic) ELC No. E004 of 2023, he submitted in the affirmative to the effect that the setting and existence of (sic) ELC 89 of 2018 challenged the processes that had taken place on land parcel No. Gilgil/Gilgil Block 1/16155. That the title deed in question being Gilgil/Gilgil Block 1/57735 having been a subdivision of land parcel No. Gilgil/Gilgil Block 1/16155, was a confirmation that the instant matter could not proceed without the mention of (sic) ELC Case No. 89 of 2018 which was still pending for determination. It was thus his submission that the decision therein would collide with the decision in the impugned judgement herein if the same was not in favour of the Defendant.
 10. That further, the prohibitory order that had been issued in (sic) ELC Case No. 89 of 2018 was still in force, had not been challenged and could not be altered to fit specific purpose hence the instant matter and the title deed that had been issued by the Naivasha Land Registry dated 12th October, 2022 had been an irregularity for which the Court should not allow. He thus submitted that the impugned judgement herein be stayed or set aside to await the outcome of (sic) ELC Case No. 89 of 2018.
 11. On the second issue for determination as to whether there had been irregularities in the issuance of title deed No. Gilgil/Gilgil Block 1/57735, the Appellant submitted in the affirmative stating that he had demonstrated an irregularity of not obeying an existing order.
 12. As to whether the Appellant was a bonafide member or shareholder to Land Parcel No. Gilgil/Gilgil Block 1/16155(Kekopey), reference was made to page 37 of the Agreement dated 16th October 2013 in the Supplementary Record of Appeal, to submit that there had been a notable discrepancy because whereas at paragraph 6 of the said Agreement there had been quoted 3 acres, the title deed in question depicted 2 acres. It was his submission that he had sold plot No. 189 as shown at page 37 of the Supplementary Record of Appeal and later bought plot No. 136 from another member as shown in the record of Appeal at page 51, wherein he had been issued with a new ballot No.136.



13. That indeed, at page 53 of the Record of Appeal, the agreement dated 1st October 2013 had indicated how he had bought the new land from one Boniface Kanyiri wherein he had been granted permission to build and construct by the same people who had falsely witnessed before the lower court that he had no land and was not a member of the group. It was thus his submission that whereas he did not hold any title deed, he was a bonafide purchaser and was residing on the said land. He placed reliance in the decided case of *Weston Gitonga & 10 Others v Peter Rugu Gikanga & another* [2017] eKLR.
14. Reliance was placed on the provisions of Section 107 (1) and 109 of the *Evidence Act* to submit that the Appellant had proven beyond reasonable doubt that he had presented fair and just facts in his appeal for the court to set aside the order of the lower court dated 19th July, 2024 and maintain status quo pending determination of the (sic) ELC Case No. 89 of 2018.
15. In response to and in opposition to the Appellant's Appeal, the Respondent first clarified that the subject matter of the appeal and the lower court was ownership of land Title Number Gilgil/Gilgil Block 1/57735(Kekopey). That the said land was registered and owned by the Respondent as per the land ownership documents in pages 20-24 of his supplementary record of Appeal which documents had been submitted in evidence before the lower court. That subsequently, the learned trial magistrate had correctly interpreted the facts of the matter, the evidence and the law as had been tabled before him thus he had been correct in reaching the finding that the property had been lawfully acquired, that it belonged to the Respondent, for which the Appellant had been a trespasser thereon.
16. The Respondent founded his submission on the Court of Appeal case of *Selle v Associated Motor Boat Co.* (1968) E.A 123 to the effect that this being a first appeal, the court should analyze and re-assess the evidence on record while carefully bearing in mind that it did not have the chance of hearing or seeing the witnesses who had testified in the lower court.
17. On Ground 1 of Appeal as to whether the Learned Magistrate had erred both in law and fact when he failed to make a finding whether there had been fraud and collusion in the acquisition of land parcel No. Gilgil/Gilgil Block 1/57735 by the Respondent, it was submitted that indeed the Respondent had legally acquired the suit property as per the documents that had been filed in the lower court which had narrated the history and the process of the acquisition of the same in a clear and consistent manner.
18. That he was a member of Kinangop Farmers Self Help Group which owned the mother parcel No. Gilgil/Gilgil Block 1/15155. That through its subdivision and balloting by members, he had acquired the suit property which had previously been plot No. 271 prior to registration and according to the records held and maintained by the Kinangop Farmers Self Help Group. That he had produced the following documents in support of his assertion:
 - i. A Share Certificate No. 266 issued on 8th July, 2017 found at page 26 of his Supplementary Record of Appeal.
 - ii. Payment receipt from Kinangop Farmers Self Help Group issued on 8th July 2017, at page 27 of his supplementary record of Appeal.
 - iii. A plot ballot for Plot No. 271 found at pages 28 and 29 of his supplementary record of Appeal.
 - iv. A letter dated 26th August 2022 from the Kinangop Farmers Self Help Group to the Chief Eburu Location seeking his intervention to evict the Appellant from the suit property asserting Respondent's ownership over the same found at pages 30-31 of his supplementary record of Appeal.



- v. A letter dated 20th August 2022 from Kinangop Farmers Self Help Group to the Appellant demanding that he stops developing the property as it belonged to the Respondent found at page 32 of the Respondent's supplementary record of Appeal.
19. That the Development that had been referred to in the letter dated 20th August 2022 had been the Appellant's construction of a temporary house on the suit land as had been shown in the photograph appearing at page 33 of the Respondent's Supplementary Record of Appeal which had also been the subject of the Demand letter dated 8th September 2022 found at page 34 of the Respondent's Supplementary Record of Appeal. That the Respondent's trail and proof of ownership of the property had been well laid out before the trial court as could be evidenced from the lower court proceedings and the Respondent's submissions that had been duly considered by the trial Magistrate in his judgement, wherein he, at paragraphs 75 and 76 had found as follows:
- “75. The Plaintiff has shown all the processes he used to acquire the suit parcels as indicated in his documents. I therefore do not think that the same was acquired illegally.
76. My finding is that the plaintiff is the legal and lawful owner of Land Title Number Gilgil/Gilgil Block 1/57735(Kekopey).”
20. That whereas the Appellant had challenged the Respondent's ownership of the suit parcel on the basis that it had been fraudulently and illegally acquired, no evidence to that effect had been tabled before the Honorable trial Court as had been noted by the Learned Magistrate at paragraph 73 of the judgement where he had held as follows:
- “In the present case, the Defendant did not produce any evidence to show that the plaintiff acquired his title fraudulently. The only evidence he is relying on is the oral evidence of DW2 and 3 who stated that the Plaintiff and officials of Self-Help Group colluded and illegally subdivided the land. Nothing was produced in court to prove that allegation.”
21. That further, there had been no evidence of fraud presented to the trial court that ought to have been specifically pleaded and proven. He placed reliance in a combination of decisions in the case of Kuria Kiarie & 2 Others v Sammy Magera 2018 KECA 467 (KLR) and Gichinga Kibutha v Caroline Nduku 2018 KE ELC 398 (KLR).
22. His submission was that his evidence of ownership had been backed by documents and oral evidence of PW2 and PW3 and which evidence had not been shaken by the Appellant. That he was thus entitled to protection of title as envisaged under the law as no evidence of fraud or illegality had been pleaded or proved to the acceptable standards to impeach his title. That it could therefore not be said that the Learned Trial Magistrate had fallen in error of fact or law in his decision.
23. On Ground 2 of appeal as to whether the Honorable Magistrate had erred in law and fact in failing to consider that the suit property had been a resultant title of the subdivision of the land parcel No. Gilgil/Gilgil Block 1/16155(Kekopey), The Respondent's submission was to the effect that he had actually pleaded the same in the Plaint, thus the Learned Magistrate could not be faulted for not making a finding on an issue that had not been contested and which fact had also been evident from his Title Deed.
24. On Ground 3 of Appeal, the Respondent submitted that Naivasha CM ELC Case No. 89 of 2018 had nothing to do with the current suit land herein and neither had the Appellant been a party to the said suit. That the Appellant having been a stranger to the said matter, there had been no nexus between the



proceedings therein and the proceedings in the Trial Court which had resulted to the Appeal herein. That subsequently, the Appellant had not benefitted from any orders flowing therefrom thus his attempts to keep referring to Naivasha (sic) ELC Case No. 89 of 2018 was aimed at raising unnecessary dust and confusion in the present proceedings.

25. That indeed, whereas the Appellant's claim was that the subdivision of land parcel No. 16155 had been done contrary to a court order, no such order had been produced before the trial court in evidence as had been confirmed by the Appellant in cross examination. That the Appellant had indeed also confirmed in cross examination that he had not been aware that the court in CMELC No. 89 of 2018 had sanctioned the survey and subdivision of the parcels, but had now, at page 63 of his Record of Appeal, included the order that he purported to have been violated, for which he sought to impeach the Respondent's title by arguing that the same had been issued unlawfully and contrary to a court order.
26. That nonetheless, from the reading of the said order, it could be deduced that the Appellant was not one of the Plaintiffs in the matter wherein the Plaintiffs in that matter had been litigating in their individual grievances. That the order of interlocutory injunction that had been issued therein had restrained the Respondent from disposing or interfering with the Plaintiffs' interest in the suit land therein. This meant the specific Plaintiffs who had been parties to the said suit. That there had been no reference to any land parcel number (s) such that the Appellant would have argued that 'his' parcel of land had been the subject of litigation in the said suit. It was thus the Respondent's submission that there had been no nexus between the suit land herein, the Appellant and the proceedings in Naivasha (sic) ELC Case No. 89 of 2018.
27. That further, from a Ruling in Naivasha CMELC No. 89 of 2018 at pages 77 to 79 of his supplementary record of Appeal, it had been clear that the 1st to 5th Plaintiffs therein had laid claims to different parcels of land that did not include the suit land herein. That indeed, in allowing the application for the transfer of the title deeds to the Plaintiffs in the said suit, the Magistrate had observed that it had indeed been their prayer in the Plaint to have the said parcels of the land excised and transferred to them.
28. That subsequently, the Appellant's reference to Naivasha CMELC No. 89 of 2018 had been of no value to the proceedings herein since he had been a stranger in the said suit, which suit had nothing to do with the suit land herein, being Gilgil/Gilgil Block 1/57735(Kekohey).
29. The Respondent's submission on Grounds 4 and 6 of the Appeal was to the effect that the same had been unsubstantiated and misleading since a reading of the trial court's record of proceedings and judgement revealed that the Learned Magistrate had indeed taken his time to analyze the evidence that had been placed before him before he reached the impugned decision.
30. On Ground 7 of the appeal as to whether the Honorable Magistrate had made a fundamental error in law by considering and taking into account various extraneous issues that had not been before the court, the Respondent submitted that this assumption had not been substantiated and ought to be dismissed. That the Appellant had not pointed out to the court any extraneous issue that had been considered by the trial court. It was his submission that the matter had been decided purely on the evidence that had been placed before the court as per the revelation in the record of appeal and the supplementary record of appeal.
31. The Respondent submitted that the grounds of appeal herein raised did not warrant interference of the trial court's judgement since the evidence of the Respondent's ownership of the suit land had been cogent and had not been shaken by any iota of evidence by the Appellant. That the Appellant's attempt to challenge the Respondent's title on the basis of fraud and illegality had not been particularized, backed by any evidence nor proved.



32. He placed reliance in the decided case of *Dikianga Distributors (K) Ltd v Kenya Seed Company Limited* 2015 870 (KLR) to submit that parties were bound by their pleadings, that his claim and title to the suit land had been solid, that the Appellant’s challenge of the same had been general and unsubstantiated wherein he had not denied having trespassed into the suit premises. That his title was clean and should be protected by the Honorable Court. That the Appellant’s Appeal be dismissed to pave way for the enforcement of the lower court’s judgement.

Summary of evidence tendered before the trial court;

33. I have considered the record of Appeal, the holding by the trial Magistrate, the written submissions by learned Counsel and the applicable law. Conscious of my duty as the first Appellate Court in this matter, I have to reconsider the decision Appealed against, assess it and make my own conclusions as was stated by the Court of Appeal in *Paramount Bank Limited vs. First National Bank Limited & 2 Others* (Civil Appeal 468 of 2018) [2023] KECA 1424 (KLR) where the court held as follows;

“A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. A first Appellate Court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. While considering the scope of section 78 of the *Civil Procedure Act*, a first Appellate Court can appreciate the entire evidence and come to a different conclusion.”

34. According to the proceedings, the Respondent herein instituted the suit against the Appellant herein vide CMCELC No. E004 of 2023 through a Complaint dated 16th March, 2023 wherein he had sought for the following orders;

- i. An order evicting the Defendant by himself, his servants, agents and/or workmen from suit property known as Land Title Number Gilgil/Gilgil Block 1/57735(Kekopey).
- ii. An order of permanent injunction restraining the Defendant by himself, his servants, agents and/or workmen from entering, trespassing, constructing and/or in any other manner interfering with the Plaintiff’s ownership and user of the suit property known as Land Title Number Gilgil/Gilgil Block 1/57735(Kekopey).
- iii. General damages for trespass.
- iv. Cost of the suit and interest.

35. Subsequent to the filing of the suit, the Defendant had filed his Statement of Defence and Counterclaim dated 4th May, 2023 wherein he had denied the allegations contained in the Complaint putting the Plaintiff to strict proof while stating that the subject title had been fraudulent as he had been the legal and proper owner of the suit land. That the balloting had illegally been done there having been a court order dated 18th September, 2019 emanating from Naivasha (sic) ELC Case No. 89 of 2018 prohibiting the same. That the subsequent balloting had thus changed the parcel of land which he had balloted as Ballot No. 136 to 271 thereby leading to double allocation of his parcel of land which he had bought from a person who had balloted in the year 1984.

36. That the Plaintiff had taken no vacant possession as he had had constructed a home in November 2013 wherein he had been living on the said parcel of land, with his family, for 9 years (to date). That he had not constructed any other structure in August 2022. That the Plaintiff had been deceived by the



officials of Kinangop Farmers Self-help Group who had fraudulently changed its name from Kinangop Farmers Company Limited from whom he had bought his parcel of land, wherein they had subdivided the parcels of land despite there having been a restriction placed vide Naivasha (sic) ELC Case No. 89 of 2018. That he had all the legal documents of ownership of the suit land.

37. In his Counterclaim, the Defendant (now Plaintiff) had prayed for judgement against the Plaintiff (now Defendant) and for the following orders:
- i. Cancellation of any title deed to the Plaintiff or any third party in respect to Gilgil/Gilgil Block 1/57735(Kekohey).
 - ii. That the subject suit be declared as owned by the Defendant.
 - iii. That the Plaintiff's suit be dismissed with costs.
38. In response to the said Defence and Counterclaim, the Plaintiff had reiterated the contents of his Plaint categorically denying that the Defendant had resided on the suit land or in any other manner been in possession thereof for a period of 9 years. That on the contrary, the Defendant's unlawful occupation of the suit land had commenced in the month of August 2022. He denied that the Defendant had any documents capable of supporting his claim to ownership of the suit land because he (Plaintiff) was the bonafide proprietor for which the Defendant was a malicious trespasser without any colour of right.
39. In his Defence to the Defendant's Counterclaim, the Plaintiff (now Defendant) denied the allegations contained in the Counterclaim stating that the Defendant (now Plaintiff) lacked any legal basis to lay claim over the suit land No. Gilgil/Gilgil Block 1/57735(Kekohey) and that the Plaintiff's (now Defendant) registration as the proprietor of the same had not been influenced by any irregularity, fraud or illegality the particulars of which had not been pleaded. The Plaintiff thus prayed for judgement against the Defendant in terms of the Plaint and that the Defendant's Counterclaim and Defence be dismissed with costs.
40. The case had proceeded for hearing wherein Samson Kinyanjui Muiruri, the Plaintiff herein who while testifying as PW1 confirmed that he was in court pursuant to his land being Plot No. 271 now Gilgil/Gilgil Block 1/57735(Kekohey). He then sought to adopt his witness statement as his evidence in chief and to produce the documents filed as his evidence. He then proceeded to pray for an eviction order against the Defendant who had entered thereon in the year 2022 denying that the Defendant had been living on the suit land for a long time. The Plaintiff's Witness statement dated the 16th March 2023 and filed on 28th March 2023 was in this regard.

“That he was the Registered proprietor of Land Title Number Gilgil/Gilgil Block 1/57735 (Kekohey) measuring approximately 0.7889 Hectares hereinafter “The Suit Land” which he had acquired through Kinangop Farmers Self Help Group where he was a paid up member since the year 2017. That subsequently members of the group had acquired land i.e Gilgil/Gilgil Block 1/16155 and subdivided it wherein upon balloting, they had eventually been issued title deeds.

That he was allocated parcel/plot number 271 which was, upon registration of the subdivision, assigned Land Title Number Gilgil Gilgil Block 1 57735 (Kekohey). That he upon allocation, he took possession of the then vacant plot and marked it distinctively in accordance to the surveyor's beacons in readiness for development and farming. That around the Month of August 2022, the Defendant without any colour of right and interest trespassed into the Suit Land and erected some temporary structures thereon wherein he forcefully took possession of the land and had on various instances threatened to use violence whenever he was approached to vacate from the parcel of land. That efforts to evict



him therefrom through the Chief, the Police and the Village Elders had failed and despite demand and notice of intention to sue having been given the Defendant had refused to comply hence the institution of the suit.’

41. The Plaintiff’s list of documents and Further List of Documents dated 16th March, 2023 and 28th August, 2023 comprised of the following;
- i. A copy of the Plaintiff’s National Identity Card.
 - ii. Title Deed in respect of Gilgil/Gilgil Block 1/57735(Kekopey).
 - iii. Certificate of Official Search in respect of Gilgil/Gilgil Block 1/57735(Kekopey).
 - iv. A surveyor’s report from Gil-Map Plan Surveyors dated 24th February 2023.
 - v. Share Certificate number 266 issued by Kinangop Farmers Self Group dated 8th July, 2017.
 - vi. A receipt Number 266 dated 8th July, 2017 issued by Kinangop Farmers Self Help Group-being payment for a share certificate.
 - vii. Kinangop Farmers self-help group ballot card.
 - viii. A letter dated 26th August 2022 from Kinangop Self Help Group to the chief Eburu Location over the suit land.
 - ix. A letter dated 20th August 2022 from Kinangop Farmers Self Help Group to the Defendant (Paul Mwaura Maina).
 - x. A photograph showing the Defendant’s structure under construction.
 - xi. A demand letter to the Defendant dated 8th September 2022.
 - xii. An agreement for sale dated 16th September 2013 between Paul Mwaura and Jackson Kimani Mwangi.
 - xiii. An extract page from the Records of Kinangop Farmers Register evidencing change of ownership giving effect to the agreement for sale.
42. In cross examination by the Defendant, the Plaintiff had confirmed that when they balloted on 5th January, 2018, he had gone to the land and found that it had been vacant. That the Defendant had found him on the land and that he was not aware of any case.
43. In re-examination, he confirmed that he had not been involved in any case concerning the suit land and that he had not been shown any order. He reiterated that the Defendant had entered on the suit land in September, 2022 before which, the land had been vacant.
44. PW2, one James Ndungu Muchina testified that he knew both the Plaintiff and the Defendant who were his neighbors. That whereas the Plaintiff was still his neighbor, the Defendant had sold his parcel of land and moved away. He then adopted his witness statement as his evidence in chief.
45. In cross examination by the Defendant, he confirmed that they had been living in a community land wherein the Defendant had sold his land. He denied having visited the DCT’s office stating that it had been the Defendant and the Plaintiff who had gone to the said office.
46. In re-examination, he confirmed that the land that the Defendant had sold was different from the one to which the Plaintiff lay claim.



47. Peter Kamau Kamanga, the Chairman of Kinangop Self Help Group testified as PW3 to the effect that Kinangop Self Help Group had allocated the land to its members. He then adopted his witness statement as his evidence in chief and then proceeded to testify that when they had been told that the Defendant had entered into the Plaintiff's land, they had written a letter to him informing him that he was not the owner of the land. He denied there having been a case stopping the subdivision of the land. He also confirmed that the Defendant had sold his land.
48. In cross examination the witness confirmed that after the Defendant had sold his land, he had left the said group. He reiterated that he had not been aware of the existence of any case and neither had he found the Defendant's house on the land. He explained that the court's order had been vacated hence they had continued with the subdivision of the land. He also confirmed that the said case had been finalized.

The Plaintiff had thus closed his case

49. The defense opened its case by calling Paul Mwaura Maina, the Defendant herein who adopted his undated witness statement filed on 5th May 2023 as his evidence in chief, and which statement had been in this regard;

'That he was the legal owner of land parcel ballot number 136 number measuring approximately 3 acres whose one part had been issued with title No, Gilgil/Gilgil Block 1/57735 in the name of SAMSON KINYANJUI MUIRURI. That he had bought the parcel number balloted as No 136 from one Boniface Kanyiri in the year 2013 who was a member of Kinangop farmers company limited and who had been issued with a ballot paper, transfer documents receipts and permission to construct to that effect.

That on or about the year 2014 the officials of Kinangop farmers company limited fraudulently changed the name of the company and registered it as a self-help group naming it Kinangop farmers self-help group without the consent of the members wherein they had started subdividing the parcels of land afresh.

That they then went to court through Naivasha ELC 89 of 2018 seeking to block the illegal acts of the officials of the new group where they had been issued with an order restricting the same dated 18th September 2019.

That the Tittle number Gilgil/Gilgil block 1/57735 emanated from Tittle number Gilgil/Gilgil block 1/16155 whose interference had been restricted via an Order in Naivasha ELC 89 OF 2018. That the order notwithstanding, the officials had continued to fraudulently subdivide the land and sell to innocent citizens of which the plaintiff in this matter was a victim. That ELC case number 89 of 2018 was still pending in court and the Tittle number Gilgil/Gilgil Block 1/57735 should be canceled pending the determination of ELC 89 of 2018 and the plaintiff advised to get a refund from the officials of the said group.'

50. On cross examination by Counsel for the Plaintiff, the Defendants confirmed that he did not have a title deed, was a Plaintiff in ELC 29/2015 and that he had not filed any documents in relation to the said case. That he had sold one share to the Self-Help Group and bought. (sic). That whilst he had stayed on the suit land for 10 years, he did not have any documents to prove the same. That the construction he had done in August 2022 had been an expansion of his house. He had however admitted that he had not produced any other photograph other than the one that had been in court.
51. He also confirmed that whereas he had been summoned to the Self-Help Group Offices, he had not complied because previously they had been summoned wherein his documents had been forcefully



taken. He however admitted that he did not have any document to prove the said allegation. That whilst he had documents referring to plot No. 271, he did not have any documents relating to land parcel number 577/35(sic). That although the chairman of the self-help group had testified that the suit land belonged to the Plaintiff, he had evidence to show that the land was his, which evidence was his witness statement.

52. He confirmed that the ballot that he had produced (sic) did not bear his name, that the receipt that he had filed had a cancellation on top and that the letter dated 1st October, 2013 had not indicated the plot number.
53. DW2, one James Machia Mwatha adopted his witness statement as his evidence in chief wherein on cross examination by the Counsel for the Plaintiff, he had confirmed that he had been a party in ELC Case No. 89 of 2018 which was still pending in court as the judgement in the matter had not been delivered. That he however had not been aware of a ruling that had restricted the sub division of the land therein.
54. DW4, one Charles Kamau Muchai also adopted his witness statement as his evidence in chief wherein on cross examination by the Counsel for the Plaintiff, he confirmed that he had not been aware that the Court in (sic) ELC Case No. 18 of 2018 had ordered that the land be subdivided. He also admitted that he had not produced his title deed.

The Defendant had thus closed its case.

Analyses and Determination.

55. Having summarized what transpired during the hearing at the trial Court, as herein above captioned, and before I make a determination therein, I wish to point out that it is trite that a document either filed or marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. Admissibility and proof of a document are to be determined only at the time of production of the document as an exhibit and not at the point of filing or marking it for identification. Until such a document is formally produced, it is of very little, if any, evidential value. I am guided by the holdings in *Des Raj Sharma -v- Reginam* (1953) 19 EACA 310, and the court of Appeal decision in *Kenneth Nyaga Mwigie v Austin Kiguta & 2 others* [2015] KECA 334 (KLR)
56. In this regard and in the present case, whereas the Respondent (Plaintiff) had sought to rely on his list of documents as his evidence, there had been no such application made by the Appellant (Defendant) at the trial and therefore the documents he had filed on the 4th May 2023 were of no evidential value in this case which was fatal to his case.
57. Secondly, the parties herein have consistently referred to a Naivasha CM ELC No. 89 of 2018 which was part of the Defendant's filed documents, where interim orders had allegedly been issued restraining the Respondents therein from interfering with the Plaintiffs' interest on the suit land therein, pending hearing and determination of the suit, I have perused the said court order herein issued on the 18th September 2019 which in essence was issued in a case between *Nicholas Wachira Mutungi and 4 others vs Kinagop Farmers Self-help group* (Through its officials). Of interest to note is that neither of the parties in the current suit had been parties in that suit, and secondly, there had been no mention of the registration number in reference to which the interim orders had been issued. It has to be noted that it is trite that parties shall be bound by their pleadings. The said order, like the unproduced documents herein above referred to was of no value to the Defendant's case.



58. In his Appeal the Appellant herein has faulted the Honorable trial Magistrate's final decision on a claim that he had erred both in law and fact for failing to make a finding that there had been fraud and collusion in the Respondent's acquisition of land parcel No. Gilgil/Gilgil Block 1/57735(Kekopey).
59. That indeed the Honorable trial Magistrate had erred in law and fact in failing to consider that the suit property Gilgil/Gilgil Block 1/57735 (Kekopey) was a resultant title of subdivision of land parcel No. Gilgil/Gilgil Block 1/16155(Kekopey) in a matter that was pending in Naivasha CM ELC No. 89 of 2018 where interim orders had been issued pending the hearing and determination of the suit.
60. That said and done, I find the issues arising herein for determination, being as follows: -
- i. Whether the Plaintiff had established his case on a balance of probabilities that he the proprietor of Land Title Number Gilgil/Gilgil Block 1/57735(Kekopey).
 - ii. Whether the Defendant had established his case in the counterclaim on a balance of probabilities.
 - iii. Whether the Honorable trial Magistrate failed to properly and/or at all evaluate the evidence on record cumulatively hence reaching a wrong conclusion by granting the orders.
61. On the first issue for determination, indeed there had been no dispute that the Respondent herein was a member of Kinangop Farmers Self Help Group vide a share certificate No 266 issued on the 8th July 2017. Through the evidence adduced in court, it is not disputed that Kinangop Farmers Self Help Group owned parcel No. Gilgil/Gilgil Block 1/15155 and that through its subdivision and balloting by members, they had acquired individual titles. The Respondent's evidence was cognate to the effect that after he had balloted for land vide ballot no 271, he had subsequently been issued a title deed herein dated the 12th October 2022 to land parcel No. Gilgil/Gilgil Block 1/57735 (Kikopey) whose position on the ground had been confirmed by a surveyor vide a letter dated the 24th February 2023.
62. The provision of Section 24(a) of the *Land Registration Act* No. 3 of 2012 outlines the interests and rights of a registered proprietor of land as follows;
- ‘the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.....’
63. Section 25(1) of the *Land Registration Act* also stipulates that ;
- ‘The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever...’
64. The law is very clear on the position of a holder of a title deed in respect of land. Indeed, Section 26(1) of the *Land Registration Act* provides as follows:
- “the Certificate of Title issued by the Registrar upon registration, to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all counts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of the proprietor shall not be subject to challenge, except –



- a. On the ground of fraud or misrepresentation to which the person is proved to be a party
 - b. Where the Certificate of Title has been acquired illegally un-procedurally or through a corrupt scheme
65. It will be seen from the above, that title to land is protected, but the protection can be removed and title impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, un-procedurally, or through a corrupt scheme.
66. The Appellant's claim on the other hand is that there had been fraud and collusion in the Respondent's acquisition of land parcel No. Gilgil/Gilgil Block 1/57735 (Kikopey)
67. Having pleaded fraud and illegality on the part of the Respondent herein, the onus was on the Appellant to prove those allegations. Fraud is a serious matter which must be proved to the required standard. In *R.G Patel vs Lalji Makanji* 1957 E.A 314, the Court of Appeal stated as follows:
- “Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required”.
68. In the case of *Arthi Highway Developers Ltd vs West End Buthery Ltd & Others* [2015] eKLR, the Court of Appeal cited the following passage from *Bullen & Leake precedents pleadings* 13th edition at Page 427:
- “The statement of the claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice”.
69. In the present matter apart from pleading that the Respondent had obtained title to the suit land illegally and fraudulently, the next step however was for him to prove those allegations to the required standard which was to a standard above the balance of probabilities but not beyond reasonable doubt. In this case, apart from the allegations of fraud and illegality herein leveled against the Respondent, no oral or documentary evidence was adduced in support of the said allegation.
70. His evidence that he had bought the parcel of land from one Boniface Kanyiri who was a member of Kinangop farmers company limited in the year 2013 and who had balloted for the same as No 136, was not supported by any evidence, there had been no title produced to confirm that indeed Boniface Kanyiri was the proprietor of the parcel of land in relation to ballot No. 136 and therefore had a good title to pass. Secondly his allegation that in the year 2014 the officials of Kinangop farmers company limited fraudulently changed the name of the company and registered it as Kinangop farmer's self-help group without the consent of the members thereby illegally subdividing the mother title No. Gilgil/Gilgil block 1/16155 afresh was also not supported by any evidence.
71. The Respondent, having been registered as the proprietor of parcel No. Gilgil/Gilgil Block 1/57735 (Kikopey) and a title having been issued on the 12th October 2022, the same could only be impeached in one of the two scenarios envisaged under Section 26(1) (a) of the *Land Registration Act*.



72. There was no evidence adduced to the effect that the Respondent acquired the suit land through fraud or misrepresentation or that its certificate of lease had been acquired illegally, un-procedurally or through a corrupt scheme. That said and while relying on Section 26(1) of the [Land Registration Act](#), we cannot run away from the fact that the Respondent had indeed satisfied the legal provision that he is the proprietor of the suit land parcel No. Gilgil/Gilgil Block 1/57735 (Kikohey) hence has absolute ownership including all rights and privileges appurtenant to it and therefore the Appellant's action of forcefully invading the Respondent's parcel of land and constructing a temporal house therein without the Respondent's authorization and/or consent, constituted forceful and/or trespass to land.
73. Trespass has been defined by the 10th Edition of Black's Law Dictionary as;
- “an unlawful act committed against the person or property of another; especially wrongful entry on another's real property.”
74. Section 3 (1) of the [Trespass Act](#), also defines trespass as follows;
- “Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”
75. The Court in John Kiragu Kimani vs Rural Electrification Authority [2018] eKLR also in defining trespass relied on Clark & Lindsell on Torts, 18th Edition on page 923 which defines trespass as;
- ‘any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the Plaintiff to prove that the Defendant invaded his land without any justifiable reason’.
76. Indeed it is trite that an act of trespass is actionable per se by an award of general damages once it is established. See the case of Park Towers Ltd vs. John Mithamo Njika & 7 others (2014) eKLR where J.M Mutungi J., stated:-
- ‘I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case...’
77. In the case of Duncan Nderitu Ndegwa v. K P & LC Limited & Another (2013) eKLR P. Nyamweya J (as she then was) held: -
- “...once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff's right to use and enjoy the suit property occasioned by the 1st and 2nd Defendants' trespass.’
78. In this case although the Respondent did not adduce any evidence as to the state or the value of its property before and after the trespass, I find that by awarding him Ksh 1,000,000/=, the trial learned Magistrate had used his discretion in so awarding which I shall not fault. This notwithstanding, I find that the Respondent was entitled to vacant possession, occupation and use of the suit parcel of land upon affording the Appellant reasonable Notice to vacate and handover vacant possession and a permanent order of injunction restraining the Appellant from dealing with the suit property being No. Gilgil/Gilgil Block 1/57735 (Kikohey).



79. It is clear that the Appellant's claim to the suit land was not supported by any credible evidence. Accordingly, I agree with the learned trial Magistrate's holding that there is no basis for cancelling the title in the name of the Respondent. None of the grounds cited have met the threshold for this court to interfere with the learned trial Magistrate's findings of fact as well as the law.

80. In the end I find that the Appeal herein lacks merit, and the same is dismissed with costs.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT NAIVASHA THIS 24TH DAY OF APRIL 2025.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

