



**Gudka v Moruri & 6 others (Environment and Land Appeal
9 of 2020) [2025] KEELC 3192 (KLR) (8 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3192 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT AND LAND APPEAL 9 OF 2020**

M SILA, J

APRIL 8, 2025

BETWEEN

LAXMICHAND VIRCHAND GUDKA APPELLANT

AND

STANLEY MATAGARO MORURI 1ST RESPONDENT

PACIFICAHER KERUBO MATAGARO 2ND RESPONDENT

KEMUMA MAKARITA ISABOKE 3RD RESPONDENT

CHARLES OBWOCHA MATAGARO 4TH RESPONDENT

MUNICIPAL COUNCIL OF KISII 5TH RESPONDENT

DISTRICT LAND REGISTRAR – KISII CENTRAL 6TH RESPONDENT

HON. ATTORNEY GENERAL 7TH RESPONDENT

*(Being an appeal from the judgment of Hon. E.A Obina, Principal
Magistrate, delivered on 7 May 2020 in the suit Kisii CMCC No. 420 of 2012)*

JUDGMENT

1. The appellant herein is the registered proprietor of the land parcel West Kitutu/Bomatara/4447. In the judgment appealed from, the trial court ordered that his title be cancelled, and arising therefrom, he has preferred this appeal.
2. The suit before the lower court was commenced by the 1st and 2nd respondents who filed a plaint on 20 November 2012 as 1st and 2nd plaintiffs respectively. In the plaint, they respectively sued Kemuma Makarita Isaboke, Charles Obwocha Matagaro, Laxmichand Virchand Gudka, Municipal Council of Kisii, District Land Registrar – Kisii Central, and the Honourable Attorney General, as the 1st to



6th defendants. In the plaint, they pleaded that in 1978, they purchased from the 1st defendant (the 3rd respondent herein) a parcel of land which was then registered as Nyamaturo Isolated Plot No. B/26 measuring 25 x 100 feet whereupon there was a semi-permanent building. They pleaded that they took possession upon purchase and they lived on it as their matrimonial home, and that they were paying rates to the Municipal Council of Kisii (sued as 4th defendant and the 5th respondent herein). They pleaded that around 11 August 2011, the 1st and 2nd defendants, Kemuma Makarita Isaboke and Charles Obwocha Matagaro (3rd and 4th respondents herein) fraudulently registered the plot Nyamaturo Isolated Plot No. B/26 as LR No. West Kitutu/Bomatara/2501 in their two names. It was pleaded that on 20 April 2012, the 2nd respondent discovered the fraud and immediately lodged and registered a caution in her favour. It was pleaded that on 5 October 2012, the 1st and 2nd respondents discovered that the 1st – 4th defendants colluded to remove the caution and have the land parcel West Kitutu/Bomatara/4447 transferred to the name of the appellant. It was pleaded that the 1st and 2nd respondents were never given notice of removal of the caution. They contended that the title of the appellant was fraudulent upon the following particulars :

- a. Transferring the suit property without their consent and authority;
 - b. Selling , transferring and registering the suit property in the names of strangers without due process of the law;
 - c. Aiding in the removal of the caution without due process of the law;
 - d. Forging documents in favour of the defendants without the consent/authority of the plaintiffs;
 - e. Undervaluing the property to defeat the ends of justice without payment of sufficient stamp duty.
 - f. Obtaining consent irregularly without going through the local Land Control Board;
 - g. Offending the mandatory provisions of the *Land Registration Act*, 2012 and the *Matrimonial Property Act*.
3. They pleaded that on 12 November 2012, the appellant came with some people and threatened to demolish the semi-permanent house on the land and evict them. In the plaint, they asked for the following orders :
- a. A declaration that the transfer, sale, subdivision and registration of the suit property Nyamaturo/Isolated Plot No. B26 into West Kitutu/Bomatara/2501 and subsequently subdivided into LR No. West Kitutu/Bomatara/4447 without the consent/authority of the plaintiffs is unlawful and therefore null and void.
 - b. An order of cancellation and rectification of the register in favour of the 1st plaintiff in LR West Kitutu/Bomatara/4447.
 - c. An order of permanent injunction restraining the 1st, 2nd and 3rd defendants by their agents, servants, and/or employees from demolishing, evicting, trespassing and/or doing any other act over LR West Kitutu/Bomatara/4447.
 - d. Costs of the suit.
4. The appellant (as 3rd defendant) entered appearance and filed defence. He pleaded that he purchased the land parcel West Kitutu/Bomatara/4447(the suit land) from the 2nd defendant (4th respondent in this appeal) who was then the registered proprietor. He pleaded that this was done with full participation of the 1st plaintiff (1st respondent) who is his father as he was a witness to the agreement.



He pleaded that there was no caution or any encumbrance that was registered in the register of the suit land. He invited strict proof of any caution being lodged. He contended that the purported caution lodged is non-existent and the certificate of official search relied on as evidence of the caution is a product of criminal acts perpetrated by the 2nd respondent with the assistance of her sister, one Ann, who works at the Kisii Lands Office. He pleaded that it was the 4th respondent who was then in possession and that he gave vacant possession to him in the presence of the 1st respondent. He averred that the plaintiffs resided on other land at a place called Kanunda. He pleaded that he transacted on the land parcel West Kitutu/Bomatara/4447 and not the so-called Nyamataro Isolated Plot No.B/26. He pleaded that the 1st and 2nd respondents were guilty of material non-disclosure by failing to disclose the participation of the 1st respondent in the sale, and lying that the suit land is matrimonial property which they have occupied since 1978.

5. The Municipal Council of Kisii, the 4th defendant (5th respondent herein) filed defence whereby she denied the existence of the Plot identified as Nyamataro Isolated Plot No. B 26. She pleaded that she has never acquired title to any land within Nyamataro Market or established a register of such plots as owned by itself. She pleaded that in 1978 or thereabout, its predecessor, the Town Council of Kisii, entered into a business partnership with certain land owners in Nyamataro Market to establish a market centre but this arrangement did not affect their ownership of the land and the land owners remained proprietors. She pleaded that the suit land was hitherto West Kitutu/Bomatara/2501 and the plaintiffs' assumption of the land as Nyamataro Isolated Plot No. B/26 was based on ignorance. She denied colluding to remove any caution from the land parcel West Kitutu/Bomatara/4447.
6. The 1st and 2nd defendants (3rd and 4th respondents herein) did not enter appearance nor file any defence. The Attorney General, for the 5th and 6th defendants, only filed a Memorandum of Appearance but no defence.
7. I need to mention that upon filing the suit, the 1st and 2nd respondents asked for an order of injunction to restrain the appellant from the suit property. The application was allowed in a ruling delivered on 20 December 2012.
8. Hearing of the suit commenced on 7 September 2015 before Hon. M. Nyaga when the 2nd respondent testified. She testified that she is married to the 1st respondent. She stated that she knows the 3rd respondent as she bought land from her in 1978. The land measured 25 x 100 feet. She stated that after the purchase the land was registered in name of her husband. She testified that he was issued with a Plot Card which showed the 1st respondent as owner of the land and they paid rates for it. She produced the Plot Card and Rates Statement. The land was identified as Nyamataro Isolated Plot No.B/26. She stated that they constructed a house and resided therein. She stated that in March 2011 she found that the land has been sold by the 2nd defendant (4th respondent herein) and that the 4th respondent had changed the names in the title and inserted his own name. She claimed that this was done fraudulently, and after this change, the 4th respondent was issued with a Plot Card in his name. She produced the Plot Card in name of the 4th respondent as an exhibit. She testified that subsequently the Plot's title number was changed to West Kitutu/Bomatara/2501 and was further subdivided to produce the suit land i.e West Kitutu/Bomatara/4447. She stated that she was not aware of the sale and subdivision of the land. She testified that she placed a caution on learning that the land had been sold. She stated that this caution was removed. She produced a copy of a caution instrument which she said was what she registered. She claimed that this caution was removed by the appellant and the 3rd and 4th respondents, who conspired with the Land Registrar. She stated that the appellant tried to evict them and they filed the case. She also produced various searches for the suit land and the green card. She testified that they never gave the land to the 4th respondent and neither did they sell it to the appellant. She also produced



a letter dated 26 November 2012 from the Lands office which letter attempts to impugn the title of the appellant.

9. Cross-examined by counsel for the appellant, she testified that it was the husband of the 3rd respondent who sold to her the suit land. She did not have the sale agreement. She claimed that she had put a caution before the land parcel West Kitutu/Bomatara/2501 was subdivided to bring forth the suit land. The Green Card was put to her and she could not see any caution registered. She could however see a caution in a search issued on 22 August 2012. She stated that she got the search from the Lands office. She did not have the receipt for this search.
10. With the above evidence, the 1st and 2nd respondents (as plaintiffs) closed their case.
11. Of the defendants sued, only the appellant (as 3rd defendant) testified. He testified that the 4th respondent came to him looking to sell the suit land. He saw the land and did a search. He also got a Green Card which he produced. He was satisfied with the land and they entered into a sale agreement. He bought the land at Kshs. 1.5 million. He obtained consent from the Land Control Board. The land was then registered in his name. He testified that there was no caution placed on the land. Cross-examined, he stated that the land was on the road and was empty. He saw no building on it. He testified that he obtained consent on 7 August 2012 and transfer was done on 20 September 2012. He did not have a search prior to the sale agreement.
12. After the appellant testified, there was issued an order for the Land Registrar and Surveyor to visit the land and do a report. I see a report dated 14 November 2018 on record. The Land Registrar and Surveyor did visit the land but they made no findings, as the contestants were not there, and there was also no security. No subsequent report was ever done. On 27 November 2019, Mr. Nyauma for the Attorney General stated that they would wish to produce a report dated 26 November 2012 as their exhibit. This was agreed by consent and the report produced as the exhibit of the 5th & 6th defendants. I note that it is the same document produced by the 1st and 2nd respondents as their exhibit No. 9.
13. With that evidence, the hearing of the matter was closed.
14. Counsel were invited to file submissions culminating in the impugned judgment which was delivered on 7 May 2020.
15. In his judgment the trial Magistrate framed 7 issues being :
 1. Whether the plaintiff (sic) purchased a portion of land measuring 25 feet by 100 feet out of West Kitutu/Bomatara/2501.
 2. Whether LR No. West Kitutu/Bomatara/2501 is synonymous with Isolated Plot No. B/26.
 3. Whether LR No. Nyamataro Isolated Plot No. B/26 is synonymous with LR No. West Kitutu/Bomatara/4447.
 4. Does the plaintiffs (sic) have any rights over the suit property.
 5. Whether the registration of the 3rd defendant was irregular null and void
 6. Whether the plaintiffs have proved their case on a balance of probabilities and whether they are entitled to the reliefs sought.
 7. What should be the order on costs.
16. In his analysis, the trial Magistrate held that reliance could not be placed on Section 3 (3) of the [*Law of Contract Act*](#) as it cannot apply retrospectively. He held that the 1st defendant had not challenged the



assertion that she sold the land to the plaintiffs and that a third party cannot come and say that there was no sale between the plaintiffs and the 1st defendant. He found that there was subdivision of the land parcel West Kitutu/Bomatara/2501 into the parcels No. 4446 and 4447 and that the 2nd respondent had placed a caution on 20 April 2012. He held that the register bearing the registration of the caution was fraudulently removed from the records and replaced with a forged one indicating that the land was clean without any caution. He placed reliance on the Land Registrar's letter dated 26 November 2012, wherein the Land Registrar stated that it was the 1st – 3rd defendants (appellant and 3rd and 4th respondents) who colluded with some staff in his office to remove the register with the caution and replace it with a forged one, and thereafter the land was transferred to the appellant. He also placed reliance on that letter on the part that the mutation subdividing the land parcel No. 2501 was missing and the whole process involving the parcel No. 4447 was fraudulent. On whether the Plot Nyamataro Isolated Plot No.26B is the same as the parcel No. 4447, he held that there were no minutes produced to assist court understand how land registered under the RLA regime was transformed into Municipal Council Plots. He stated that "it looks like this was a process stayed by the then Municipal officials but abandoned hence this huge confusion." Doing the best he could he made the following final orders :

- a. That the transfer, sale and registration of LR No. West Kitutu/Bomatara/4447 to the 3rd defendant be and his hereby nullified;
 - b. That the register be rectified so that the land reverts to the previous owner before the 3rd defendant (appellant).
 - c. The caution that the then Land Registrar says was irregularly removed be restored.
 - d. It is the Land Registrar who is the custodian of all land records, parties to appear before the Land Registrar and be heard.
 - e. Until a decision on the removal of the caution is made by the Land Registrar, the defendants are hereby restrained from demolishing, evicting, trespassing on LR No. West Kitutu/Bomatara/4447. Everything should fall in place after the Land Registrar renders his verdict on the caution.
 - f. Considering the nature of the claim, each party shall bear their own costs.
17. Aggrieved by this decision, the appellant has preferred this appeal. There are 17 grounds listed, covering 3 pages, and I see no need of setting them all out. Inter alia however, it is contended that the trial court erred in finding that the Plot Nyamataro Isolated Plot No. 26/B was synonymous with the land parcel West Kitutu/Bomatara/4447; that the trial court erred in finding that fraud was proved; that the trial court erred in ordering the retransfer of the land back to the 4th respondent in absence of any pleadings to that effect; that the trial court erred in finding that there was a caution that was fraudulently removed; that the trial court erred in invalidating the sale to the appellant while he was a bona fide purchaser for value in the title that was registered in name of the 4th respondent.
18. The appeal was argued by way of written submissions and I have taken note of the submissions filed by counsel for the appellant and counsel for the 1st and 2nd respondents.
19. In a nutshell, the 1st and 2nd respondents (as plaintiffs) contended to be owners of the Plot Nyamataro Isolated Plot No. 26/B which they alleged to have purchased in 1978 from the 3rd respondent. They claimed that around 11 August 2011, the 3rd and 4th respondents fraudulently registered this plot as LR No. West Kitutu/Bomatara/2501 and subsequently subdivided it to bring forth the suit land, i.e West Kitutu/Bomatara/4447. They contended that on 20 April 2012 the 2nd respondent placed a caution,



which was fraudulently removed, leading to the land being transferred to the appellant. That is why they asked for cancellation of the title of the appellant.

20. I think the trial court laid down the issues for determination fairly well save that I would add that there was an important issue as to whether there was a caution registered at all in the register of the suit land. This ought to have been one of the key issues for determination. I will therefore analyse the issues as set down by the trial Magistrate with the addition of the issue regarding the caution.
21. I can combine the first three issues as set down by the trial Magistrate, i.e whether there was proof of purchase by the 1st and 2nd respondents and whether the Plot Nyamataro Isolated Plot No. 26/B was synonymous with the land parcel West Kitutu/Bomatara/2501 and/or West Kitutu/Bomatara/1447. In his judgment, the trial court was of opinion that since the 3rd respondent (who was the alleged seller of the plot to the plaintiffs) did not dispute the sale, then the same was uncontested. I see that he was at pains to point to any evidence that settled the issue whether the alleged Plot Nyamataro Isolated Plot No. 26/B was the same as West Kitutu/Bomatara/2501 or 1447, but I would assume that given the nature of his final orders, he held that these were the same parcels of land.
22. I am persuaded that the trial Magistrate fell into error.
23. On the issue of the alleged sale by the 3rd respondent, it could not be held that because the 3rd respondent never contested it, then it was proved. Indeed the 3rd respondent neither entered appearance nor filed any defence. But it cannot be said that because he failed to enter appearance, file defence, and challenge the allegation in the plaint, then by default that allegation was proved. A person does not prove a fact because the other has not said anything about it. There was a burden on the 1st and 2nd respondents, as the persons alleging, to prove their averments, as required by Sections 107 and 109 of the [Evidence Act](#), which provide as follows :

S.107

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

24. The 1st and 2nd respondents thus had the burden of proving that indeed they had a sale agreement vide which they purchased the suit land. Save for the word of mouth that there was a sale of the suit land in 1978, nothing was presented. The trial court held that Section 3 (3) of the [Law of Contract Act](#) could not apply retrospectively, but the court failed to set down what the law was, so that its requirements could be seen. As at 1978, the [Law of Contract Act](#) at Section 3 (3) stipulated as follows :

- (3) No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it:

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of the contract –



- I. has in part performance of the contract taken possession of the property or any part thereof; or
 - II. being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.
25. From the above, it will be seen that there still needed an agreement, or a memorandum or note in writing signed by the other party. The proviso is on part performance, so that where the agreement is disputed by the one party to it, the other could attempt to prove it through part performance. The proviso could not apply to the case herein as it was not one pitting seller and buyer regarding the existence and performance of a contract. The 1st and 2nd respondents were alleging to have purchased the suit land and they needed to provide the agreement or a memorandum in writing regarding the alleged agreement. None was produced. Without producing a sale agreement or availing a witness, it could not be held that there was an actual sale of the suit land as claimed. In any case, what was sold? Was it land described as Nyamataro Isolated Plot No. 26/B or was it a land parcel West Kitutu/Bomatara/2501 or 1447? Without anything in writing, one cannot tell what was sold, if ever there was such a sale. It could not in the circumstances be found that there was proof of any sale of land by the 3rd respondent to the 1st and/or 2nd respondents. My holding is that there was never proved any sale agreement between the 1st and 2nd respondents and the 3rd respondent.
26. Let me now turn to the issue whether it was proved that the alleged Nyamataro Isolated Plot No.26/B was the same as the land parcel West Kitutu/Bomatara/2501 or 1447.
27. On my part, it is as clear as day that there was no evidence whatsoever upon which one could find that the suit land was ever the Plot Nyamataro Isolated Plot No. 26/B as alleged. The only way that the 1st and 2nd respondents could prove that the alleged Nyamataro Isolated Plot No.26/B was the same as the land parcel West Kitutu/Bomatara/2501 and/or No. 1447, would have been through some sort of documentation, preferably through a report of a surveyor or such other expert in land. There was no document provided that the alleged Nyamataro Isolated Plot No. 26/B was the same as West Kitutu/Bomatara/2501 or 4447. There was no survey report nor any report of an expert. In her defence, the 5th respondent had contended that there is no such plot that exists in their records. I have seen that the 1st and 2nd respondents produced some plot cards and rate payment documents to prove that the said plot exists. To me, it is immaterial whether Nyamataro Isolated Plot No. 26/B exists or not. What is material is whether there was proof that the alleged Nyamataro Isolated Plot No. 26/B was the same as the land parcels West Kitutu/Bomatara/2501 and/or 4447, and the fact of the matter is that there was absolutely no proof tendered. That being the case, it was wrong to transpose any issues regarding the so called Nyamataro Isolated Plot No. 26/B to the land parcels West Kitutu/Bomatara/2501 and/or 4447.
28. In fact, my own view of the issue is that there is no way that a plot described as Nyamataro Isolated Plot No. 26/B would be the same land as West Kitutu/Bomatara/2501 and/or 4447. The former would be a market plot held under a lease from the Municipal or County Council. The latter would be freehold land derived from a process of adjudication and it could not be subject of payment of land rates and/or land rents to the Municipal or County Council. Thus, if the 1st and 2nd respondents claim the same land that they assert they were paying rates for, such land cannot be the same as West Kitutu/Bomatara/2501 and/or 4447, for the simple reason that these are freehold titles that emanate from adjudication. That is in fact what the evidence shows.
29. I have seen the green card to the parcel West Kitutu/Bomatara/2501. It shows that this title was opened on 1 July 1996 as measuring 0.09 Ha and it was derived after subdivision of the parcel No. 1779 that



must have been in existence prior. That parcel No. 1779 was either the adjudicated parcel or there could have been an earlier parcel that was subdivided to produce it. Whatever the case, it is not true, as alleged by the 1st and 2nd respondents, that the land West Kitutu/Bomatara/2501 was fraudulently created in the year 2011. This land existed in 1996. There was absolutely no evidence led to claim that the creation of the parcel No. 2501 was fraudulent. Neither was there any evidence led, and there is nothing to suggest, that the suit land i.e parcel No. 4447, was fraudulently created. The record shows that it was created after the parcel No. 2501 was subdivided into two to create the parcel No. 4446 and 4447. If indeed the 1st and 2nd respondents had land in 1978, that would have to have been the land parcel No. 2501, but why are they not also suing in respect of the other resultant subdivision No. 4446 ? The reality of the matter is that this parcel No. 2501 was registered in name of the 3rd respondent and she subdivided it into two on 11 August 2011. I have seen the consent for subdivision issued on 4 May 2011 and it cannot be heard for one to allege that this subdivision was fraudulent. Upon subdivision, the parcel No. 4447 was transferred to the 4th respondent and he got registered as proprietor on 11 August 2011. There is nothing on record to suggest that this transfer to the 4th respondent was done fraudulently. Having title, there was nothing stopping the 4th respondent from selling his interest to the appellant, which is what happened, for the appellant produced a sale agreement dated 26 September 2012.

30. The 1st and 2nd respondents of course alleged that the suit land could not be transferred to the appellant because there was registered a caution. This now brings me to the discussion regarding the existence or otherwise of the caution. The starting point has to be the extract of the register (Green Card) of the land parcel West Kitutu/Bomatara/ 4447. It does not show any caution registered in the said title. Entry No. 1 is in name of the 3rd respondent as she was the one who subdivided the land. Entry No. 2 is transfer to the 4th respondent. Entry No. 3 is issue of title deed to the 4th respondent. These first three entries were entered on 1 November 2011. The fourth entry is registration of the appellant as proprietor on 27 September 2012. The fifth entry dated 3 October 2012 is the issue of title deed to him. There is no record of any caution registered against the title of the suit land. If there was any, then it ought to have reflected in the register.
31. The 1st and 2nd respondents allege that this register is fraudulent. I see nothing to suggest that this register is fraudulent. The 1st and 2nd respondents went further to produce what they purported to be the caution that they registered. I have looked at it, and in my view, the same is doubtful at best. If you look at the purported caution instrument, it shows the date 2 April 2012. It then shows that it was paid vide receipt No. 2078663. No receipt was produced to show that indeed the alleged caution was paid for. Without demonstrating that there was actual payment for the caution and producing the said receipt No.2078663, it cannot be alleged that this caution was indeed lodged, paid for, and entered in the register. Without proving this, it cannot be said that there was ever a caution registered which was not captured in the extract of the register.
32. On 20 April 2012, it was the Registered *Land Act* (now repealed by the *Land Registration Act*, 2012) which was operative. Section 15 thereof provided as follows :
 15. Registration shall be effected by an entry in the land register in such form as the Chief Land Registrar may from time to time direct, and by the cancellation of the entry, if any, which it replaces.
33. Thus, one cannot purport to have registered an instrument when no entry has been made in the register.



34. There was reliance by the trial Magistrate on a letter dated 26 November 2012 produced by the 1st and 2nd respondents as P-exhibit No. 9, which in part states that :

“6. That after the opening of the new registre (sic), parcel W.Kitutu/Bomatara/4447 was cautioned by pacifica (sic) Kerubo Matagaro on 20th April, 2012. The registered (sic) bearing the registration of the caution was fraudently (sic) removed from the records and replaced with a forged one indicating that the land was clean without any caution.

7. That it's the 1st, 2nd and 3rd defendants who colluded with some staff in the office to removed (sic) the said register without my knowledge and replaced with a forged one and then a transfer of land was presented in the office on 27th September 2012 and the land was transferred to 3rd defendant.”

35. This letter cannot be taken seriously. First, the author was never presented to be cross-examined on the contents of the said letter. Secondly, and most importantly, no evidence whatsoever was presented by the author of that letter to substantiate the allegation that there was a tampering with the register and that it was the appellant and the 3rd and 4th respondents who were responsible for such tampering. Moreover, that letter alleges that a caution was registered on 20 April 2012. The caution that was produced has no entry (at the bottom of the caution instrument) indicating any date of registration and neither is it signed and sealed by the Land Registrar to show that it was duly registered as claimed. The fact of the matter is that there is no receipt produced to evidence any payment for a caution, no indication in the caution instrument that it was duly registered by the Land Registrar, and no record or extract of a register to show that it was duly registered. I am fully persuaded that the purported caution instrument is a fraud.

36. In any event, if the Land Registrar was truly convinced that there was a forged register, you would expect him to take steps pursuant to Section 33 (5) of the *Land Registration Act*, to reconstruct the register. That law provides as follows :

33

(5). The Registrar shall have powers to reconstruct any lost or destroyed land register after making such enquiries as may be necessary and after giving due notice of sixty days in the Gazette.

37. There is no evidence of any steps taken to reconstruct the register if the Land Registrar thought that what was presented was a forged one.

38. There was of course produced a search purportedly dated 22 August 2012 by the 1st and 2nd respondents, to contend that the caution was indeed registered. A search can only provide information that is in the register. Given that there was no entry in the register of registration of the caution, a search showing such caution would be a fraudulent one. This search bears the date 22 August 2012 at which time it was the *Land Registration Act* that was the operative law. Section 34 allows for issue of searches and it provides as follows :

34. Searches and copies

A person who requires an official search in respect of any parcel, shall be entitled to receive particulars of the subsisting entries in the register, certified copies of any document, the cadastral map, or plan filed in the registry upon payment of the prescribed fee.



39. Thus, when one conducts a search, the Land Registrar is to provide one containing the subsisting entries in the register, not anything else that does not subsist in the register. This search is clearly making an addition of a caution that was never entered in the register.
40. Nonetheless, let us take a closer look at this search. It is dated 22 August 2012 and it has a caution as entry 4 purportedly registered on 20 April 2012. I am convinced that this is a fraudulent search. Indeed, the fraud is visible by looking at the purported signature and stamp of the Land Registrar on the document. That stamp is a strange one which is not in any of the other searches produced. Further, there is no indication of who signed it together with his personal number as is the norm with all other documents including the other searches produced in the case. You would expect the Land Registrar issuing it to sign and stamp with his official stamp bearing his personal number. This is not the case here. There was also no receipt produced to show that this search was paid for at the Kisii Land Registrar.
41. From the foregoing, it will be seen that I am not persuaded that there was ever registered any caution in favour of the 1st and/or 2nd respondents as they alleged. I am also not persuaded that there was any tampering with the register to remove such caution for none had been registered. I am also persuaded that the green card that was produced is a true reflection of what is contained in the register. I am further persuaded that the search dated 22 August 2012 is a fraudulent one.
42. The other issues set down by the trial Magistrate were general on proof of the suit.
43. My analysis of the evidence is that the land was wholly owned by the 4th respondent who obtained registration on 11 August 2011. He sold his interest through the sale agreement dated 20 September 2012. Pursuant to that sale, the suit land was transferred to the appellant. It is now the appellant who is the registered proprietor of the suit land and the person entitled to enjoy all rights that are appurtenant thereto. I have not seen any right to the suit land demonstrated by the 1st and 2nd respondents.
44. Given the foregoing this appeal must succeed. I therefore proceed to set aside the judgment of the trial Magistrate. I substitute that judgment with an order that the case of the 1st and 2nd respondents is dismissed with costs. It will be recalled that the 1st and 2nd respondents benefited from an order of injunction issued in the matter restraining the appellant from maintaining possession pending hearing and determination of the suit. With the dismissal of suit, that order lapses.
45. The final issue is on costs. The case of the 1st and 2nd respondents at the lower court is dismissed with costs to the defendants in the plaint. The appellant will have the costs of this appeal as against the 1st and 2nd respondents.
46. Judgment accordingly.

DATED AND DELIVERED THIS 8 DAY OF APRIL 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of:

Mr. Otieno for the appellant

Mr. Nyambati for the 1st and 2nd respondents

N/A for the 3rd & 4th respondents



N/A on part of M/s Nyachae & Ashitiva for the 4th respondent

Mr. Wabwire for the 5th & 6th respondents

Court Assistant – Michael Oyuko

