



REPUBLIC OF KENYA



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**Mwangi v Kariuki & 5 others (Environment and Land Appeal
E016 of 2021) [2022] KEELC 3533 (KLR) (3 August 2022) (Judgment)**

Neutral citation: [2022] KEELC 3533 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E016 OF 2021**

**LN GACHERU, J
AUGUST 3, 2022**

BETWEEN

KURIA MWANGI APPELLANT

AND

SAMUEL KIRUMBA KARIUKI 1ST RESPONDENT

PETER KIMANI KARIUKI 2ND RESPONDENT

FRANCIS GICHEHA KARIUKI 3RD RESPONDENT

MARY WANJIKU KARIUKI 4TH RESPONDENT

THERESIAH W. KARIUKI 5TH RESPONDENT

MARGARET WAITHERA KARIUKI 6TH RESPONDENT

*(Being an appeal from the Judgment and Decree delivered on 5th August, 2021, by
Hon. K. Sambu (S.P.M.) in Kigumo Chief Magistrates Court ELC No. 112 of 2018)*

JUDGMENT

- 1 The Appellant Kuria Mwangi, was the Defendant in Kigumo ELC Case NO. 112 of 2018, while the Respondents were the Plaintiffs in the said suit.
- 2 By a Plaint dated 23rd April 2018, the Plaintiffs (Respondents) had brought the above suit against the Defendant(Appellant) and sought for; -
 - a. An order of permanent injunction to restrain the Defendant, his family members, employees, servants, representatives, agents, whomsoever acting on his behalf from placing any caution, trespassing, entering, building any structures, staying, remaining, operating, placing restrictions and/ or any other encumbrances OR making any claims whatsoever against Land



title No. LOC. 2/ Mariira/3623, Or Continuing With Any Dealings Whatsoever On Land Title No. Loc. 2/ Mariira/3623.

- b. An Order directing the Land Registrar Murang'a County to remove any caution placed by the Defendant against Land title No. LOC. 2/ MARIIRA/3623.
 - c. An Order of injunction to restrain the Land Registrar Murang'a County from registering and/or maintaining any caution, restriction, inhibition and encumbrances whatsoever against Land title No. LOC. 2/ MARIIRA/3623 upon any Application by the Defendant herein
 - d. Costs and Interests of the suit.
- 3 The Plaintiffs (Respondents) had averred that they obtained the Land title No. LOC. 2/ MARIIRA/3623 (herein after referred to as the suit land), by way of transmission after it was carved out of Land Title No. LOC. 2/ MARIIRA/534, which was registered in the name of the late Murira Kimani alias Murira Manuthu, after Grant was Confirmed on 31st October 2017. That at all the material times, the Defendant was one of the beneficiaries of the estate of Murira Kimani alias Murira Manuthu, being his biological son and a cousin to the Plaintiffs. That the Plaintiffs are nephews of the late Murira Kimani alias Murira Manuthu, who held a section of Land title No. LOC. 2/ MARIIRA/534, in trust for the Plaintiffs' late father Kariuki Kimani alias Kariuki Manuthu.
- 4 That after transmission of the suit land to the Plaintiffs via succession, the Plaintiffs sold the suit land to Simon Irungu Karanja, the Interested Party. However, the Defendant placed a caution over the suit land claiming purchaser's interest. That the Defendant's caution was placed despite him having participated in Succession Cause No. 32 of 2017, concerning the estate of the late Murira Kimani alias Murira Manuthu, whereby he wilfully signed the consent to the Summons for Confirmation of Grant. That the Defendant also got his own share in the estate of Murira Kimani alias Murira Manuthu, which comprises of shares in Loc. 18/ Githima/1015, Loc. 18/marumi/186, And A Separate Share In Loc. 2/mariira/534. That the Defendant's actions were out of mere greed, and it was therefore paramount that the prayers sought in the Plaint be granted.
- 5 The suit was contested by the Defendant (Appellant) via a statement of Defence dated 18th May 2018. It was the Defendant's averment that the suit land originated from Land Title No. Loc. 2/ Mariira/534, That Was Registered In The Names Of Murira Kimani (deceased) As A Trustee For The Whole Family Including His Two Brothers Namely Njoroge Manuthu (deceased) And James Kariuki Manuthu (deceased).
- 6 That on 11th November, 1995, the Plaintiffs' late father (James Kariuki Manuthu) sold to him the whole of his share out of the family land Title No. Loc. 2/ Mariira/534, which portion was measuring 2.42 acres. That he purchased the said share of land for a consideration of Kshs. 200,000/= and a sale agreement to that effect was executed. That in accordance with the said sale agreement, the Defendant paid the entire purchase price and immediately took possession of the said portion. That he bought the said portion of land in the understanding and agreement that the said James Kariuki (deceased) would facilitate subdivision and transfer, but he died before the same could materialise.
- 7 That the Plaintiffs deceitfully misled the Court in Succession Cause No. 32 of 2017, and procured a Confirmation of Grant over the estate of the late James Kimani Manuthu, without informing and involving him. That the portion that he purchased from James Kimani Manuthu was included in the said Confirmation of Grant and therefore the distribution was not justified. That the Defendant was not involved in the Succession Cause, above mentioned and the Plaintiffs forged his signature to procure unfair distribution of the estate. That the Caution he placed on the suit land is legally and



lawfully in force to protect his interests on the suit land, as the Plaintiffs (Respondents) intended to dispose and transfer the suit land to defeat his interests.

- 8 Thereafter, the matter proceeded by way of viva voce evidence. The Plaintiffs called one witness and closed their case. The Defendant called 3 (three) witnesses and closed his case.

Plaintiffs' (respondents') Case

- 9 PW 1 Samuel Kirumba Kariuki, adopted his witness statement dated 20/4/2018 as his evidence in chief and produce as exhibits his list of documents dated 23rd April, 2018 and 23rd April 2019 respectively (Exhibits 1-9). He testified that Land title No. LOC. 2/ Mariira/534, Was The Mother Title That Gave Rise To Land Title No. Loc. 2/ Mariira/3623, after the Confirmation of Grant in respect of the estate of Murima Kimani (Deceased). That the Defendant participated in the said Succession Cause until a Confirmation of Grant was issued on 24th October 2017. That after the Grant was confirmed, he sold the suit land to Simon Irungu for Kshs. 3, 000,000/=.
- 10 On Cross examination PW 3, confirmed that Title No. LOC. 2/ MARIIRA/3623, was the share belonging to the first house. That the Defendant had trespassed on the suit land and had been in occupation of it since 1995. That his late father's name was Kariuki Manuthu alias Kariuki Kimani. That he was not aware that his father has sold his portion out of Title No. LOC. 2/ MARIIRA/534, to the Defendant.
- 11 Upon being referred to the Defendant's list of documents, to wit the sale agreement, he confirmed that he saw his signature and ID Card Number. He also confirmed that he saw the name of Peter Kimani and Mathew Kuria, his brother and cousin respectively indicated as in the said sale agreement.
- 12 On re-examination, he testified that Title No. LOC. 2/ MARIIRA/534, was being held in trust by Murira Kimani (the Defendant's father) for three households. That the late Kariuki Manuthu was living in Limuru and he was buried there upon his demise. That he was appointed as an administrator of the estate of his father, the Late Kariuki Manuthu. That the Defendant was involved in the Succession Cause, and he did not recall signing any sale agreement in 1995, or attending the Land Control Board for transfer of his father's land. That the Defendant was a beneficiary in the Succession Cause, as his family was given a share of Land Title No. LOC. 2/ MARIIRA/534.

Defendndant's (appellant's) Case

- 13 DW 1 Kuria Mwangi, testified that the Plaintiffs are his cousins and the late James Kariuki was his Uncle. He adopted his witness statement dated 18th May 2018, as his evidence in chief and produced the documents in his list of Documents dated 18th May 2018 as Dexbts 1-9.
- 14 On cross examination, he testified that he was born in 1940, and his ID Number was No. xxxx. That his father was called Mwangi Kimani Alias Muriira. That a Succession Cause No. 32 of 2017, was filed in Muranga Law Courts, relating to the estate of his father, and he was never involved in the same. That he only came to learn about it only when he was summoned to Court where he only presented his ID Card and was not given an opportunity to talk. That he did not file any objection in the said Succession Cause, and he did not even apply for a revocation of grant. That he only came to learn about the content of the confirmed grant when they appeared before the Land Control Board chaired by the District Officer.
- 15 Further DW 1, testified that he purchased the suit land from one James Kariuki at a consideration of Kshs. 200,000/= in the year 1995. That he did not attend the Land Control Board in 1995 after he purchased the same, but he attended the Land Control Board after the demise of his father.



- 16 DW 2 Mathew Maina Kuria, testified that the Defendant was his father and he proceeded to adopt his witness statement dated 18th May 2018, as his evidence in chief.
- 17 On cross examination, he testified that Kuria Mwangi, the Defendant was his father and James Kariuki was his grandfather. That in 1995, his father gave money to James Kariuki towards the purchase of the suit land and an agreement of sale to that effect was written. That after the said purchase, his father took possession of the suit land and has been in occupation of it. That the said James Kariuki passed on in December 2014, before he could transfer the suit land to his father. That he was aware that the Plaintiffs had sold the suit land to one Samuel Irungu Karanja. That together with his father, they attended the Succession Cause in Murang'a Law Courts and they did not object to the Confirmation of Grant.
- 18 DW 3 Peter Mwangi Irungu, adopted his witness statement dated 18th May, 2018 as his evidence in chief.
- 19 On cross examination, he testified that the Defendant was his father-in-law. That he witnessed his father-in-law purchase the suit land and paid Kshs. 130,000/= being part of the consideration payable for the purchase. That the said payment was made to James Kariuki in Limuru in 1995. That the Defendant was in possession of the suit land, and he had planted tea on it.
- 20 After viva voce evidence, the parties filed their written submissions and on 5th August, 2021, the trial court entered judgment in favour of the Plaintiffs (Respondents) and stated as follows;
- “The Plaintiffs in total assessment and consideration of the evidence adduced on record have proved their case against the Defendant on a balance of probability as required by law. The Defendant in my considered finding on his defence has not proved bonafide proprietary right over the suit property which rights if they ever existed have since been extinguished by operation of law.”
- 21 The Appellant (Defendant) was aggrieved by the above determination of the trial Court in favour of the Respondents herein and has sought to challenge the said Judgment through the Memorandum of Appeal dated 30th August, 2021, and sought for orders that;
1. The Appeal by the Appellant herein be allowed and the judgment of the lower Court be set aside.
 2. The costs of be awarded to the Appellant.
- 22 The grounds in support of the Appeal are;
1. That the Learned Magistrate erred in law and in fact in failing to ascertain the value of the Subject matter nor ordering for valuation, thus the vital pecuniary jurisdiction to handle the matter was lacking
 2. That the Learned Magistrate erred in law and in fact in failing to address the issue of fraud and misrepresentation portrayed by the Respondents herein.
 3. That the learned Magistrate misdirected himself in declaring that all the Plaintiffs had locus standi to file the suit.
 4. That the Learned Magistrate erred in law and in fact in finding that the distribution of the estate of the deceased Murira Kimani (Deceased) by the Respondents on LOC. 2/MARIIRA/534, before Confirmation of Grant was proper.



5. That the Learned Magistrate erred in law and in fact in failing to consider the sale agreement between the Appellant who was a bonafide purchaser for value and one James Kariuki Manuthu (deceased) for 2 acres.
 6. That the Learned Magistrate erred in law and in fact in failing to consider that the Respondents held LOC.2/MARIIRA/3623, in trust for the Appellant.
 7. That the Learned Magistrate erred in law and in fact in finding that the dispute is an ELC Court matter whereas the same was subject to Succession Law, which extinguishes jurisdiction under Section 13 of the ELC Act and Sections 128 and 150 of the Land Act 2012.
 8. That the Learned Magistrate erred in law and in fact in finding that Land Parcel No. LOC. 2/ MARIIRA/3623 was part of the property to be distributed on the Certificate of Confirmation of Grant dated 2nd November 2017.
 9. That the Learned Magistrate erred in law and in fact in failing to interrogate how Land Parcel No. LOC. 2/MARIIRA/3623 was transferred by way of transmission to the Respondents
 10. That the Learned Magistrate erred in law in disregarding the Appellant's evidence.
- 23 Before the instant Appeal could be determined, the Appellant filed a Notice of Motion Application dated 11th May, 2022, seeking for Orders that;
1. That the Honourable Court be pleased to order an interim stay of proceedings of this Appeal pending the hearing and final outcome of the annulment /revocation of grant in Succession Cause No. 32 of 2017, in the Chief Magistrates Court at Muranga.
 2. That the Costs of this Application be provided for.
- 24 The Application was premised on grounds set out on the face of it and on the Supporting Affidavit of the Appellant sworn on 11th May 2022. It is the Appellant's disposition that before delivery of the trial Court Judgment, he had filed Summons for revocation of grant on 22nd June 2021, in Murang'a Chief Magistrates Court in Succession Cause No. 32 of 2017. That there is an Order by Hon. E.M.Nyaga dated 19/8/2021, which barred any proceedings including the matter leading to this Appeal from interfering or dealing in any way with Land Parcel No. LOC. 2/MARIIRA/3623, until the summons for revocation of grant were heard and determined.
- 25 That it is in the interest of justice that the summons for revocation of grant in Succession Cause No. 32 of 2017, be heard first in the Chief Magistrates Court. That Summons for revocation of grant in Succession Cause No. 32 of 2017, was filed on 22nd June 2021, way before the impugned Judgment was rendered. That the Outcome of the said Summons for revocation of grant in Succession Cause No. 32 of 2017, in the Chief Magistrates Court at Murang'a will substantially affect the outcome of this Appeal, as the same touches on the suit property which is the subject of this Appeal. That if the Appeal is determined in favour of the Respondents, and the Succession Court finds in favour of the Appellant, then the Judgement of this Court will be rendered nugatory and unenforceable.
- 26 In Response to the Notice of Motion dated 11th May, 2022, the Respondents filed a Notice of Preliminary Objection dated 16th May 2022. The Respondents sought the dismissal of the Application dated 11th May 2022, on grounds that;
1. The Appellant's Application offends the basic legal and constitutional provisions on the hierarchy of Courts



2. That the proceedings in this Superior Court cannot be stayed on the basis of proceedings over the same issues in the Magistrate's Court.
 3. That the Applicant/Appellant is abusing the Court process by forum shopping exhibited by his filing of multiple applications and moving various courts over the same matter.
 4. That the Summons for revocation of grant filed in Muranga Chief Magistrate's Succession Cause No.32/2017, was filed on 22nd June 2021, with the view of derailing and unduly arresting the delivery of the impugned Judgement at Kigumo Law Courts, an invitation that was rejected by Hon. K. Sambu in his impugned Judgement.
 5. That the proceedings in the Supplementary Record of Appeal filed in this Court will show that the Appellant herein appeared before Hon. A. K. Mwicigi on 24th October 2017, where he gave his ID Card and consented to the confirmation of grant which he now seeks be revoked.
 6. That this Appeal and the Instant Application is meant to mislead this Court and the Lower Court at Murang'a so as to frustrate the execution of the Court's Orders given by Hon. K. Sambu (SPM) on 5th March 2020 and 16th September 2021.
 7. That on 17th March 2022 Hon. E. Nyaga (SPM) stayed the interim orders obtained by the Appellant on 17th August 2021 when the Appellant misled him to the pertinent issues herein.
- 28 On 8th February, 2022, the Court directed that the Appeal and the Notice of Motion dated 11th May 2022, be canvassed together by way of written submissions.
- 29 The Appellant through the Law Firm of Kiroga Kuria & Co Advocates, filed his written submissions dated 3rd June 2022.
- 30 On whether this Court should stay its proceedings pending hearing of Succession Cause No. 32 of 2017, the Appellant relied on section 3A of the Civil Procedure Act and Section 13 (7) of the ELC Act. It is the Appellant's submissions that this Court should exercise its discretion to stay its proceedings pending the hearing of the Summons for Revocation of Grant in Succession Cause No. 32 of 2017. That the outcome of the summons for revocation of grant will have a direct bearing on the instant appeal, and therefore this Court should stay its proceedings. The Appellant relied on among others the case of Benson Mathu Wakaba & 2 Others vs. Doris Kigetu Maingi (2022) eKLR, where the Court found that it was in the interest of Justice to stay its proceedings until the Application for revocation of grant was heard and determined.
- 31 On the Preliminary Objection, the Appellant submitted that the same was not raised on a crisp point of law and that it was grounded on disputed facts and therefore it could not be sustained.
- 32 With regards to the instant Appeal, the Appellant urged this Court to find it merited and allow it based on its pleadings and evidence before the Court.
- 33 The Respondents on the other hand filed their written submissions dated 14th June, 2022 through the Law Firm of Njoroge Nganga & Company Advocates. The Respondents raised five issues for determination and relied on a litany of cases in support of their submissions.
- 34 The Respondents submitted that the Appellant herein had failed on a balance of probability to prove fraud and misrepresentation to prove his case and therefore the Notice of Motion Application and the instant Appeal should both be dismissed with costs.



35 The Court has considered the evidence adduced before the trial court as well as the submissions thereafter by parties. The Court recognizes that it neither saw nor heard the witnesses and must therefore give allowance to that.

36 The Court has also carefully considered the said findings of the trial Court, the Memorandum of Appeal and the grounds thereto, the rival Submissions of Counsels herein and finds as follows; -

37 This is a first Appeal, and it is the Court's duty to analyze and re-assess the evidence on record and reach its own independent decision in the matter as provided by Section 78 of the Civil Procedure Act. See also the case of *Kenya Ports Authority versus Kusthon (Kenya) Limited* (2009) 2EA 212 where the Court of Appeal held inter alia, that:-

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”

38 However, this court is under a duty to delve at some length into factual details and revisit the facts as presented before the trial court, analyze the same, evaluate it and arrive at its own independent conclusion but always remembering, and giving allowance for it as the trial court had the advantage of hearing the parties.

39 In the case of *Ephantus Mwangi and Another vs. Duncan Mwangi* Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278, the Court of Appeal held that:

“A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

40 The Court caution itself that it will only interfere with the discretion of the trial Court where it is shown that the said discretion was exercised contrary to the law or that the trial Magistrate misapprehended the applicable law and failed to take into account a relevant factor or took into account an irrelevant factor or that on the facts and law as known, the decision is plainly wrong. See the case of *Mbogo vs Shab* (1968) EA at Page 93, where the Court held that:

“I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior Court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted on because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

41 Having now carefully read and considered the Record of Appeal, the Grounds of Appeal, the rival written submissions by the parties, and the Judgment by the trial Court, this Court and finds the issues for determination are: -

- i. Whether the Appellant is a bonafide purchaser for value of the suit property and whether the whole of Loc.2/Mariira/534, was free and available property for distribution.
- ii. Whether the Notice of Motion Application dated 11th May 2022, by the appellant is merited



- iii. Whether the Notice of Preliminary Objection dated 16th May 2022 raised by the Respondents is merited
- iv. Whether the Appeal is merited

i. Whether the Appellant is an innocent bonafide purchaser for value of the suit property and whether the whole of Loc.2/Mariira/534 was available for distribution.

- 42 DW 1 testified that he purchased the suit land from one James Kariuki at a consideration of Kshs. 200,000/= in the year 1995. DW 2 Mathew Maina Kuria, upon being cross examined, reiterated that DW1 had purchased the suit property from James Kariuki, and an agreement to that effect was drawn. The same sentiments were echoed by DW3 in his testimony. The trial court on page 21 paragraph (f) held that the Appellant had not proved bonafide proprietary rights over the suit property, which rights if they ever existed, had since been extinguished by operation of the law.
- 43 From the two sale agreements dated 19th November 1995, and another dated 1st November 1998, produced before the trial Court, it is clear that both sale agreements satisfied the conditions of section 3(3) of the *Law of Contract Act*, the issue of sale agreements was not disputed during the hearing before the trial court and neither was there any contrary evidence to dispute the fact that there were two sale agreements in favour of the appellant.
- 44 The Court finds that there was nothing that would have alerted the Appellant as to the illegality of the title of the suit property. This is so as the appellant’s allegations regarding purchase of the suit land had not been disputed by the Respondents.
- 45 The Court of Appeal in *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* [2015] eKLR, pronounced itself on the doctrine of bonafide purchaser for value without notice, it commenced off by definition as outlined in Black’s law Dictionary 8th Edition as:

“One who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller’s title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”

- 46 Further in Uganda case of *Katende Vs Haridar & Company Limited* [2008] 2 E.A.173, as quoted by the Court of Appeal in Nakuru CoA App No. 291 of 2013 *Weston Gitonga & 10 others vs Peter Rugu Gikanga & another* [2017] eKLR where the former held:

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that:

- (a) He holds a certificate of title;
- (b) He purchased the property in good faith;
- (c) He had no knowledge of the fraud;*
- (d) He purchased for valuable consideration;
- (e) The vendors had apparent valid title;
- (f) He purchased without notice of any fraud;(



(g) He was not party to any fraud.”

47 From the above explanation, noting that the Appellant had purchased a share of title No.Loc.2/
Mariira/534, was not the said whole suit property free for distribution?

48 Section 3 of Law of Succession Act Cap 160 describes the estate of the deceased as;

“means the free property of a deceased person”.

49 Further, the Court of Appeal sitting at Nyeri in the case of Waruingi Kamau V Karuga Kamau [2008]
eKLR defined free property as

“Free property on the other hand is defined in the same section as the property of which that
person was legally competent freely to dispose during his lifetime and in respect of which
his interest has not been terminated by his death.”

50 In filing for Letter of Administration intestate for the estate of the late Murira Kimani Alias Murira
Manuthu, the Respondents mentioned that Loc.2/Mariira/534, formed part of the deceased estate
and therefore available for distribution. This court now finds that the Respondents misled and failed to
disclose to the Succession court that the whole of Loc.2/Mariira/534, was not free for distribution and
they had the knowledge that the Appellant had bought a share of the property. There was no iota of
evidence adduced by the Respondents who were the Plaintiffs in the trial court and bearing evidentiary
burden of proof to show that the whole of Loc.2/Mariira/534, was free property and available for
exclusive distribution. The same sentiments were strenuously opposed by the Appellant in the trial
court, having armed himself with sale agreements and stating that he had planted tea bushes on the
suit property.

51 It is this Court’s considered view that the Appellant was a bonafide purchaser for value of a share of
Loc.2/Mariira/534. Further, the Respondents concealed material evidence and never disclosed to the
Succession court the fact that the whole of Loc.2/Mariira/534, was not available for distribution and
did not form part of the free property of the late Murira Kimani Alias Murira Manuthu.

ii. Whether the Notice of Motion Application dated 11th May 2022, by the appellant is merited

52 The Appellant vide his Notice of Motion Application dated 11th May 2022, urged this Court to stay
this Appeal proceedings pending hearing of Succession Cause No. 32 of 2017, in the lower court. The
court has in the instant found that the whole of Loc.2/Mariira/534, was not available for distribution
as the Appellant had a share by way of purchase. It will be retrogressive to stay the Appeal proceedings
awaiting the outcome of Succession Cause No. 32 of 2017, in the lower court. In the ultimate, the
application for stay of proceedings is declined.

iii. Whether the Notice of Preliminary Objection dated 16th May 2022, is merited

53 In Response to the Notice of Motion dated 11th May, 2022, by the Appellant, the Respondents filed a
Notice of Preliminary Objection, dated 16th May 2022, contending that the Appellant’s Application
offends the basic legal and constitutional provisions on the hierarchy of Courts amongst other
preliminary points.



54 Do the Grounds of Objections raised by the Respondents Objectors qualify to be a Preliminary Objection, as was described in the case of *Mukisa Biscuit Manufacturing Co. Ltd ... Vs... West End Distributors Ltd* (1969) EA 696, where Law J A stated that;

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which objection point may dispose the suit”.

Further the Court stated;

A preliminary objection raises a pure point to law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

55 The Respondents/Objectors contended that the Summons for Revocation of Grant filed in Murang’a Chief Magistrate’s in Succession Cause No. 32/2017, was filed on 22nd June 2021, with the view of derailing and unduly arresting the delivery of the impugned Judgement at Kigumo Law Courts, an invitation that was rejected by the trial Magistrate in his impugned Judgement.

56 It is not in doubt that for the Court to ascertain whether what has been raised by the Respondents/Objectors raises pure points of law, the Court will have to ascertain and probe evidence. Therefore, the Court finds and holds that the grounds raised by the Respondents/Objectors are not pure points of law. The Preliminary Objection herein is therefore found not merited.

iv. Whether the Appeal is merited

57 The Appellant has also raised other issues to justify his Appeal. It was his contention that the learned Magistrate erred in failing to analyse evidence. PW1 testified that after the Grant was issued on 24th October 2017, he sold the suit land to Simon Irungu for Kshs. 3, 000,000/=. This court has held that Land Title No. Loc. 2/ Mariira/534, which gave rise to Land title No. Loc. 2/ Mariira/3623, was not a fully free property as the Appellant had made a purchase of part of it.

58 The learned magistrate also pointed out that the purchase of the suit property by the Appellant was caught by operation of law. It is to be noted that the Respondents were the ones who brought an action for consideration by the court. It is this court’s considered view that by 1995, no cause of action had arisen as against the Appellant. Therefore, no limitation had accrued as against the Appellant regarding the suit property.

59 Having now carefully re-evaluated and re-assessed the available evidence before the trial court and the Memorandum of Appeal together with the written submissions, the Court finds that the trial Magistrate erred in law and in fact by allowing the Respondents’ claim in the trial court.

60 The upshot of the foregoing is that the Appellant’s Appeal is found merited and consequently the said Appeal is allowed entirely in the following disposal orders;

- i. The Judgment and Decree of the trial court Hon. K. Sambu (SPM) delivered on 5th August 2021, and 16th September 2021, is hereby set aside and the suit at Kigumo Law Courts being Kigumo MELC No.112 of 2018, is disallowed and dismissed entirely with costs to the Defendant thereon who is the Applicant herein.
- ii. Further the Notice of Motion Application dated 11th May 2022 brought by the Appellant herein is found not merited and is dismissed entirely with costs to the Respondents.



- iii. The Notice of Preliminary Objection dated 16th May, 2022 brought by the Respondents is dismissed entirely.
- iv. On costs of this Appeal, given the circumstances of the case and taking into account that the parties herein are related, each party to bear their own costs of this Appeal.

61 It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 3RD OF AUGUST, 2022.

L. GACHERU

JUDGE

Delivered virtually in the presence of;

Mr Kuiyaki - Court Assistant

Mr Mwangi H/B Kirogo Kuria for the Appellant/Applicant

M/s Mwaura H/B Mr Nganga for the Respondents/Objectors

