



REPUBLIC OF KENYA



**Kamau v Ndabi (Environment and Land Appeal E001 of 2023)
[2025] KEELC 4209 (KLR) (29 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 4209 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E001 OF 2023**

JA MOGENI, J

MAY 29, 2025

BETWEEN

MARY WAIRIMU KAMAU APPELLANT

AND

PETER KIROGO NDABI RESPONDENT

(Being an appeal against the Judgment and Decree of the Hon. M WANJALA Senior Resident Magistrate Thika Law Courts delivered on 15th December 2022 in Civil Suit No. 627 of 2014)

JUDGMENT

1. This is an Appeal against the Judgment of the Hon Senior Resident Magistrate Hon. M. Wanjala on 15/12/2022 in Thika ELC No. 627 of 2014. In the Judgment the learned trial Magistrate, upon considering the evidence before him found that the Plaintiff had failed to prove their suit to the required standards and dismissed the Plaintiff's suit.
2. The Appellant, Mary Wairimu Kamau, being dissatisfied with the said Judgment, filed the present Appeal on the grounds raised in her Memorandum to wit;
 1. The Learned trial Magistrate erred in law and the fact by not appreciated that the Plaintiff had practically proved her case on a balance of probability.
 2. The Learned trial Magistrate erred in Law and in fact in failing to appreciate that there was a fraudulent transfer document of the suit property Plot No. 1596 Kyanjau Farming Co-operative Society Ltd into the names of the Defendant
 3. The Learned trial Magistrate erred not consideration the Plaintiff had filing a Succession Cause 470 of 2010.
 4. The Learned trial Magistrate erred in Law and in fact in failing to consider and/or ever adequately the evidence of the Appellant.



3. The Appellant thus sought that the Judgment of the lower Court dated 15/12/2022 in MCL & E No. 627 of 2014 be set aside, the orders given on 15/12/2022 be stayed, and that the Appeal be allowed with cost to the Appellant. Any other or further order be granted as the Court deems just and expedient.
4. The backdrop to this Appeal is that; the Appellant with Peter Njuguna Gachuhi (deceased) instituted the suit vide a Plaint dated 8.08.2014 seeking against the Defendant/Respondent, a declaration that they were the bona fide owners of the suit parcel and they also sought order of eviction against the Defendant and costs of the suit.
5. It is the Plaintiff/Appellant's claim that the suit property belongs to her and Peter Njuguna Gachuhi (deceased). Her claim is based on the fact that they were issued with the Share Certificate by Kyanjau Housing Cooperative Society. That the original owner of that parcel, parcel No. 1596/B Kyanjau Housing Cooperative Society was Gachuhi Njuguna who was allocated the suit property by virtue of being a member of the Society. That upon the demise of Gachuhi Njuguna in the year 1984, his wife gave the Appellant herein and his son Peter Njuguna Gachuhi (deceased) the original Share Certificate to enable them get a new Share Certificate in order to inherit the portion of land. The new Share Certificate indicating them as the owners of the parcel No. 1596/B was issued after they had obtained Grant of Letters of Administration. Their names were also indicated in the Society's register, a fact that was confirmed by the Vice Chairperson of the Society during trial in the lower Court.
6. That in the year 1986, the brother to Gachuhi Njuguna, who is also the Respondent's father changed the shares at the society from Gachuhi Njuguna's name to read his own name and later moved into the land the same year without the consent or permission of the Plaintiff.
7. This dispute was also heard in the Land Dispute Tribunal in Case No. 18 of 1990 in which it found that the Late Gachuhi Njuguna was the owner of the Plot No. 1596/B.
8. Vide a Defence dated 20/05/2015 the Defendant denied all the allegations made in the Plaint and the Cause of Action and further put the Plaintiff to strict proof thereof. As already stated the 1st Plaintiff Peter Njuguna Gachuhi, passed away before the case was concluded and the Appellant herein obtained a Grant to represent his Estate.
9. During the hearing the Appellant called 3 witnesses and the Respondent also called three witnesses. Both the parties produced documents in support of their cases to proof ownership. It was the Defendant's testimony that his father has been in occupation of the suit parcel since 1986 and part of the documents produced to support their claim to the suit property were those issued in 1966 to 1983. On their part the Plaintiff produced documents issued in 2010.
10. The trial Court dismissed the Plaintiff's suit on 15/12/2022 giving rise to the instant Appeal.
11. On 24/10/2024, this Court issued directions that the Appeal be canvassed by way of written submissions, to be filed and exchanged. Both parties filed their respective submissions and authorities which I have read and taken into consideration in arriving at my decision.

Appellant's Submission

12. The Appellant filed submissions through the firm of Waweru Njuguna & Company Advocates dated 26/10/2024 and averred that the instant Appeal is merited because the Learned trial Magistrate failed to appreciate that the Appellant had practically proved her case on a balance of probability in that the parcel of land in contention was initially owned by Gachuhi Njuguna. This is because the Court did not consider the decision of the Tribunal.



13. She submitted that the Appellant's case was based on the findings of the Land Dispute Tribunal in Land Tribunal Case No. 18 of 1990, between the Respondent's father Ndambi Njuguna and Margaret Wambui Gachuhi, in which the Tribunal was of the opinion that the suit land belonged to the late Gachuhi Njuguna since upon his death, his brother Ndambi Njuguna grabbed the opportunity to mess up with his documents, which was evidenced by the cancellation of the receipts that had been produced as evidence by the late Margaret Wambui Gachuhi.
14. Further that the Society issued receipts while selling shares to its registered members, with each payment supported by corresponding receipts. That the late Gachuhi Njuguna was granted receipts Nos. 1126 and 1128 on April 18, 1966, but they were cancelled to read Waititu Njuguna and Ndambi Njuguna. The Tribunal also reviewed the documentation presented by officials from the Kyanjau Office and confirmed that the parcel of land belonged to the late Gachuhi Njuguna.
15. That though this matter was appealed a decision on the Appeal was not made.
16. It was her submission that the Court did not recognize that the Appellant had initiated Succession Cause No. 470 of 2010 to facilitate the inheritance of the suit property by herself and the late Peter Njuguna Gachuhi. The two petitioned for Grant of Letters of Administration which was subsequently issued in their favor. They then sought to have the suit land transmitted and registered in their names. The Society canceled the Share Certificate that was in favor of the deceased and issued a new one in their names after the Grant was issued. That this fact was supported by the presence of the Share Certificate used as evidence by the Appellant and furthermore, the same was also reiterated by the Vice Chairperson of Kyanjau Cooperative Housing Society in Court.
17. That the Appeal is also merited because the trial Court failed to appreciate that fraudulent transfer documents of the suit property were used to change ownership into the names of the Defendant, who used the receipts that were used as evidence in the Tribunal to support the case of the late Margaret Wambui Gachuhi's (deceased) in the current suit. However, the Tribunal, in their findings had held that the original owner of the suit parcel was the late Gachuhi Njuguna and that upon his demise, the late Ndambi Njuguna, the father to the Respondent had capitalized on that opportunity and gone ahead to alter those receipts by canceling Gachuhi Njuguna's names and replacing it with his names. She submits officials from Kyanjau Office also confirmed this information.
18. The Appellant further submitted that the lower Court did not adequately consider the existence of forged transfer documents concerning the suit property, yet these are the documents that were used to transfer to the Respondent's father and subsequently to the Respondent the suit property.
19. That despite the Appellant having clearly demonstrated that her title was acquired legally and passed on properly to her and the Respondent failing to demonstrate the same, the Court still went ahead and found in favor of the Respondent. The fact that the Respondent's title was acquired fraudulently, should thus persuade this Court to set aside the said Judgment. She relied in her submission to the High Court in the case of Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others [2016] eKLR, where the Court held as follows;

“A Court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it



for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder."

20. She also observed and submitted that finally, the trial Court also failed to consider the fact that the Respondents did not bring in any evidence to show that the said Waititu Njuguna, who is alleged by the Respondent to be the original owner, was indeed involved in an accident or produce a Share Certificate to prove ownership of the parcel. Also, the Court failed to consider the fact that the late Peter Njuguna Gachuhi, who was the son to the deceased Gachuhi Njuguna, was the one receiving dividends through the suit property until he met his demise in the year 2018. Further, the Respondents failed to also call a witness from the Society to confirm their ownership like the Appellant did.
21. It was her submissions in conclusion, that the evidence presented clearly demonstrates that the Share Certificate issued by Kyanjau Housing Cooperative Society to the Appellant and the deceased, Peter Njuguna Gachuhi, serves as proof of their ownership of Parcel No. 1596/B. Thus that the Appellant and Peter Njuguna Gachuhi lawfully inherited the land through the proper issuance of a new Share Certificate and subsequent registration in the Ssociety's register, a fact that was confirmed by the Vice Chairperson of the Society.
22. Again she observed and submitted that the finding of the Land Dispute Tribunal's in 1990, recognized Gachuhi Njuguna as the original owner and this was validated by the continued receiving of dividends by his son which fact affirms the Appellant's claim. Whereas the actions of the Respondent's father in changing the shares to his own name and occupying the land without consent were unauthorized and do not override the legal inheritance and ownership established by the Share Certificate and administrative processes. Therefore, it is evident that the Appellant's claim to Parcel No. 1596/B is legitimate and should be upheld.

Respondent's Submissions

23. On grounds i, ii, iii and iv; it was the Respondent's submission that the Trial Magistrate went into great heights to analyze each and every testimony by the Plaintiff's witnesses and each and every document produced by the Appellant and applied the relevant authorities. After analyzing the evidence from both parties, the trial Court found that both parties had produced documents indicating ownership of the property and it warned itself that neither of the parties held a title deed over the disputed parcel of land.
24. According to the Respondent's submissions, the trial Court proceeded with caution, considered the law and detailed its reasoning before reaching to the conclusion that the Respondent's evidence bore truth.
25. It is the Respondent's submission that the Appellant produced documents obtained after the year 2021 and was not able to explain why the Respondent had been in possession since the year 1994 and yet she had not laid any claim earlier. The gap from 1966 to 2021 was not explained by the Appellant yet during all those years the Respondent and his family were in possession of the land and had even developed the same.
26. According to the Respondent, he submitted that despite the Plaintiff not being able to explain himself on the wherewithal on the suit property, the Respondent was however able to give an unbroken chain of ownership which traced the property back to its roots. The Respondent even recalled the initial owner of the property, Waititu Njuguna, whose name appears on the receipts produced and he was able to explain that he transferred the plot to his brother Ndabi Njuguna, the Respondent's father.



27. The Appellant was not able to prove how she acquired the suit property beyond having her name on the Share Certificate. The Respondent relied on the case of Munyu Maina ..Vs..Hiram Gathiha Maina Civil Appeal No.239 of 2009 where the Court of Appeal held that:-

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

28. On the second ground (ii) the Respondent averred that the Appellant referred to the transfer document with regard to the suit property. It is the submission of the Respondent that the Appellant did not in her Plaint refer to any fraud and there are no particulars of fraud in her pleadings. That all through the hearing, she did not refer to any fraudulent transfer of any document and therefore it is not clear how the fraud was committed by the Respondent if at all. To support this submission the Respondent is relying on the Court of Appeal case of: Kuria Kiarie & 2 Others -vs- Sammy Magera [2018] eKLR where it was held:-

“The next and only other issue is fraud. The law is clear and we take it from the case of Vijay Morjaria -vs- Nansingh Madhusingh Darbar & Another [2000] eKLR, where Tunoi, JA (as he then was) states as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

29. That the Appellant ought to have raised the issue of fraudulent transfer before the trial Court and it was upon her to strictly prove the fraud. In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.

30. On the issue of the standard of proof, the Respondent referred to this Court’s decision in the case of Kinyanjui Kamau -vs George Kamau [2015]eKLR where the Court expressed itself as follows;-

“... It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo -vs- Ndolo [2008]1 KLR (G & F) 742 wherein the Court stated that: “... we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in Criminal Cases ... ”

31. On the third ground it was the Respondent’s submission that whereas the Appellant states that the Learned trial Court did not consider that the Plaintiff had filed a Succession Cause No. 470 of 2010, to the contrary he submits that the trial Court in paragraphs 9 to 12 of the Judgment considered the Appellant’s evidence in regard to the Succession Cause No. 470 of 2010. That the Court even went further and did not only note but also observed that the 1st Plaintiff had in cross examination indicated that he was aware that there existed Succession Cause No. 92 of 1986 in regard to the same Estate. (See



the Grant in that case on page 83 of the Record of Appeal). That would mean the Appellant filed a second Succession Case while being well aware of the earlier one to defeat justice.

32. That it is in this 2nd Succession Case the Appellant obtained a Grant (See page 122) which she used to obtain ownership documents that she presented in Court. The said Grant was issued on 14th November, 2012 and the Share Certificate o. 430 allegedly issued to the Plaintiffs was issued on 8th February, 2014. Yet, the Respondent submits by the time the Appellant was filing to be appointed administrator of the Estate of Gachuhi Njuguna in 2021, a Certificate of Confirmation of Grant to the said Estate had already been issued on 27th June, 1991 to his brother Ndabi Njuguna. The Grant issued in Succession 470 of 2021 is therefore null and void and all documents obtained using the irregularly obtained Grant are also null and void.
33. The Respondent has relied on the case of ‘We are guided by the Court in Re Estate of Charles Mwaniki Kamara (Deceased) [2021] eKLR in which the Court held;

“In my considered view, any property transferred to a beneficiary or to a third party based on a grant of probate that is later revoked must revert to the name of the deceased. The reason is that the foundation of such proprietorship was destroyed upon revocation of the grant of probate. The effect is that such property must be put together with other assets of the deceased for purpose of fresh distribution. Such a transaction is subject to nullification for the foregoing reasons.”
34. The Respondent concluded by stating that it is clear that the Appellant’s Appeal lacks merit and should be dismissed with costs to the Respondent.
35. I will now proceed to re-evaluate each of the party’s claim from the trial Court record, the evidence adduced and the trial Court Judgment in determining whether the trial Magistrate exercised his discretion correctly.
36. None of the two parties hold a title deed to the parcel in dispute but they hold various receipts and Share Certificates issued by Kyanjau Cooperative Society.
37. Since the suit property is still unregistered, the only way the trial Magistrate could establish whether the Appellant had ownership rights over the suit property was by examining of all documents presented before the Court including the Share Certificates and the various receipts in the custody of the two parties. In the case *Caroline Awinja Ochieng & Another v Jane Anne Mbithe Gitau & 2 Others* [2015] eKLR Onguto J stated that:-

“In determining the above issue it would perhaps be appropriate to first state that tracing ownership of unregistered land is dependent on tracing the root of title. Unlike registered land where ownership is domiciled and founded in the register of titles, ownership of unregistered land and the ascertainment or confirmation thereof involves the intricate journey of wading through documentary history. The simple reason is that unregistered titles exist only in the form of chains of documentary records. The Court has to perform the delicate task of ascertaining that the documents availed by the parties are not only genuine but also lead to a good root of title minus any break in the chain. It is the delivery of deeds or documents which assist in proving not only dominion of unregistered land but also ownership. The deeds must establish an unbroken chain that leads to a good root of title or title paramount. A good compilation of the documents or deeds relating to the property and concerning the claimant as well as any previous owners leading to the title paramount certainly proves ownership. It is such documents which are basically ‘the



essential indicia of title to unregistered land”: per Nourse LJ in *Sen v Headley* [1991] Ch 425 at 437. The documents in my view are limitless. It could be one, they could be several. They must however establish the claimant’s beneficial interest in the property. Examples of the deed or documents include, at least in the Kenyan context: sale agreements, Plot cards, Lease agreements, allotment letters, payment receipts for outgoings, confirmations by the title paramount, notices, et al. The instant case is no exception. It is for the Court to interrogate the evidence, especially documentary evidence and ascertain who between the two antagonists that is to say the Plaintiffs on the one hand and the 1st Defendant on the other hand, is the true owner of the suit plot. For the Court to conduct this rather wearisome and intricate task, it is proper that the documents unless otherwise agreed are produced in their original form or format.”

38. A look at the Judgment of the lower Court shows that the trial Magistrate had to perform the delicate task of establishing whether the Appellant had a valid claim over the property by analyzing the documents presented by both parties. In the Judgment, the Magistrate observed as follows:

“37. Neither of the parties herein holds a title deed over the parcel in dispute. They however have in their possession documents of ownership in form of receipts and share certificates issued by Kyanjau Co-op Society. The duty of this Court was to carefully re-evaluate the respective testimonies of the parties and to keenly analyse the documents adduced in evidence and come up with a decision as to which documents may be upheld.

38. Having embarked upon and completed the task stipulated at paragraph 37 above, this Court came to the conclusion that, on a balance of probabilities, the defense case was more believable compared to the case as presented by the Plaintiffs

39 some of the documents included a bundle of receipts dating way back to February 4, 1966, April 18,1966; October 8, 1967; December 5, 1978 and March 16,1989. He also produced a letter from the chairman of Kyanjau dating way back to June 18, 1993.

40. On the contrary, the Plaintiff’s earliest documents showing that the parcel belonged to them is share certificate no. 301 which is dated June 16, 2010. The other certificate that they produced as an exhibit was No.430 which is dated February 8, 2014.”

39. My analysis of the above reasoning of the trial Magistrate shows that he did not solely rely on the receipts presented by the Plaintiff alone to establish the rightful owners of the unregistered suit property. In his own words, he asserted that the receipts presented by the Respondent clearly show that the same were issued by Kyanjau Co-op Society to Waititu Wa Njuguna but later obliterated to insert the name Gachuhi Njuguna. That the receipts produced in evidence by both parties gave a clear picture of what the alteration led to and support the Defendant’s case that Waititu Wa Njuguna’s documents were changed by deleting his name and inserting that of Gachuhi Njuguna.

40. That a scrutiny of the entire evidence on record indicate that the parcel of land belonged to Waititu Wa Njuguna who gave it to his brother for free and then the parcel passed to the Defendant. Infact the Defendant and his late father have occupied the land for over 20 years and have developed it.



41. It is on record that this suit was only filed in 2014 so the question is why if the Plaintiff believed the suit property belong to them did they not evict the Defendants? Also if they believed the land belonged to them why did they not report this to the Police or even lodge a claim with the Cooperative Society.
42. I therefore find that the evidence produced as PWExh 1 did not fully comply with the statutory provisions and hence the same is not valid.
43. In view of the foregoing, I find that the Learned trial Magistrate exercised his discretion properly in disallowing the Plaintiff's claim. The analysis and subsequent decision was purely made upon examination of the full facts of the case together with the documents and evidence adduced in support of each party's claim. I find no need to interfere with the said decision.

Conclusion

44. In conclusion, I accordingly find that the Appeal is not merited and is therefore dismissed with costs to the Respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 29TH DAY OF MAY 2025
VIA MICROSOFT TEAMS.**

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MOGENI J

JUDGE

In the presence of:

Weyimi holding brief for Mr. Waweru for the Appellant

Ms. Njogu for the Respondent

Mr. Melita – Court Assistant

