



**Mghanga & 2 others v Mwakesi (Environment and Land Appeal E018 of 2024)
[2025] KEELC 4072 (KLR) (Environment and Land) (29 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 4072 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
ENVIRONMENT AND LAND APPEAL E018 OF 2024**

EK WABWOTO, J

MAY 29, 2025

BETWEEN

FABIAN MGHANGA 1ST APPELLANT

ALOICE MWAVULA MWASHIGHADI 2ND APPELLANT

SAMSON NYANGE MWASHIGHADI 3RD APPELLANT

AND

EVARESTA MWADIME MWAKESI RESPONDENT

(This appeal challenges the judgment of Principal Magistrate Hon. T. N. Sinkiyian arising from Voi ELC No. 17 of 2019 formerly ELC Case No. 20 “A” of 2017 and formerly Civil Suit No. 25 of 2015 Wundanyi.)

JUDGMENT

1. This appeal challenges the judgment of Principal Magistrate Hon. T. N. Sinkiyian arising from Voi ELC No. 17 of 2019 formerly ELC Case No. 20 “A” of 2017 and formerly Civil Suit No. 25 of 2015 Wundanyi. In the said matter, the Learned Magistrate delivered her judgment in favour of the Respondent. The Learned Magistrate held that the Respondent was the registered and the bonafide owner of the property title No. LR Mgange/Dawida/2X8 measuring approximately 0.41Hectares which the Appellants were illegally occupying. The Appellants were also directed to vacate within 90 days failure of which eviction and demolition to issue. Costs of the suit before the subordinate court were also awarded to the Respondent.



The Appeal.

2. The Appellant being aggrieved with the judgment of the lower court filed the instant appeal vide a Memorandum of Appeal dated 4th December 2023. The Memorandum of Appeal cited the following grounds:-
 - a. That the Honourable trial Magistrate erred in law and fact and misdirected itself by failing to find that in law there cannot exist two different Grant of Letters of Administration for the same estate of the deceased Alphonse Mwakio Msagha the first being that of Mombasa Administration Cause No. 15 of 1986 obtained by the deceased Francis Mwakesi, the late husband of Plaintiff/Respondent and the second being Mombasa Administration Cause No. 205 of 1990 petitioned by the Public Trustee Mombasa for the Estate of Alphonse Mwakio Msagha.
 - b. That the Honourable trial court erred in law and fact and misdirected itself by failing to find and hold that the 2nd Succession Cause No. 205 of 1990 revoked and annulled the illegally and unlawfully obtained grants by Francis Mwakesi in Succession Cause No. 15 of 1986.
 - c. That the Honourable trial court erred in law and fact and applied wrong principles of the law by finding and holding that the deceased Francis Mwakesi was the lawful owner of the suit property Title No. Mgange/Dawida/2X8 and hence capable of being inherited by the Plaintiff/Respondent when to the contrary, the deceased Francis Mwakesi has been found to have illegally and wrongly acquired the suit property being not a relative or next kin of the deceased Alphonse Makio Msagha.
 - d. That the Honourable trial Magistrate erred in law and fact by failing to appreciate and find the alleged ownership of the parcel of land No. Mgange/Dawida/2X8 had been revoked in Mombasa SRMCC NO. 1933 of 1988 vide judgment delivered on 19.10.1989 and hence the Respondent herein could not inherit that which never existed.
 - e. That Honourable trial Magistrate erred in law and fact by failing to find and hold that the Appellants and especially the 1st Appellant who is aged over 70 years was born and raised in the suit property and the original owner Alphonse Mwakio Msagha, who died childless and was Uncle to the Appellants never had issue with them and who have since acquired adverse possession over the suit property and/or inherited vide Mombasa Succession Cause No. 205 of 1990 and judgment dated 19.10.1989 in Mombasa RMCC No. 1933 of 1988.
 - f. That the Honourable trial court erred in law and fact and failed to find and hold that Francis Mwakesi whom the Respondent/Plaintiff purports to have inherited from him the suit property was not blood relative of the deceased Alphonse Mwakio or at all but only son to the sister of wife of the deceased Alphonse Mwakio Msagha and hence illegally inherited the deceased.
 - g. That the Honourable trial court erred in law and fact by totally ignoring to take into consideration of crucial evidence by the Appellants and/or failing to grasp its value in regard to the relationship between the Appellants vis-à-vis the deceased Alphonse Mwakio Msagha and the suit property in question.
 - h. That the trial Magistrate generally applied wrong principles of the law by arriving at the judgment.



Directions of the Court.

3. The appeal was canvassed by way of written submissions pursuant to the directions of the court issued therein. The Appellants filed written submissions dated 9th May 2025 while the Respondent filed written submissions dated 7th May 2025.

The Appellants written submissions.

4. The Appellants submitted that the subject matter was a parcel of land Mgange/Dawida/2X8 originally belonged to the deceased Alphonse Mwakio Msagha.
5. It was submitted that the deceased Alphonse Mwakio Msagha died without leaving behind a family and was inherited by his brothers namely Mwakuleghwa and Mwadime vide Mombasa Administration Cause No. 205 of 1990. Reference was made to pages 121, 122 and 124 of the supplementary record of appeal which according to the Appellants confirmed that the rightful heirs of the estate and specifically the suit property No. 2X8 were Mwashighadi Mwakuleghwa And Fabian M. Mwadime.
6. It was also submitted that the 1st Appellant was the brother to the deceased while the 2nd and 3rd Appellants are the sons of Mwashighadi Mwakuleghwa who inherited their father and by extension their Uncle Alphonse Mwakio Msagha the original owner of the suit property No. 2X8.
7. It was also submitted that it had been alleged that before the deceased Alphonse Mwakio Msagha died, he had given out one of his properties No. 2X8 to one Francis Mwakesi, the husband to the Respondent Evaresta Mwadime Mwakesi as appreciation of good care he Francis Mwakesi had given the deceased Alphonse Mwakio when he was sick. And that is how the issue of this dispute started as the family of the deceased Alphonse Mwakio namely Mwashighadi Mwakuleghwa and Fabian M. Mwadime and others disputed the alleged gift made by Alphonse Mwakio to Francis Mwakesi, the husband of the Respondent herein.
8. It was further submitted that Francis Mwakesi filed Mombasa RMCC No. 1993 of 1988 and that the said suit was heard and determined on the 19.10.1989 whereof, the claim by Francis M. Mwadime was dismissed which effectively nullified all the claim as well as the title deed fraudulently obtained by Francis Mwakesi.
9. It was argued that as at the death of the said Francis Mwakesi on 26th January 2005 the Appellants herein were living in the suit property and had developed the same by establishing each his respective home and Francis Mwakesi while knowing the outcome of the Mombasa case, he had never challenged since he had waived his claim of ownership to the suit parcel.
10. It was further argued that after the death of Francis Mwakesi, the Respondent herein decided to evict the Appellants from the suit property cunningly having the knowledge of the fact that despite the judgment in Mombasa against her husband, Mwashighadi Mwakuleghwa father of the 2nd and 3rd Appellants herein had failed to follow up with the Land Registry Wundanyi for cancellation of the title to her husband hence the title remained in her late husband's name.
11. In respect to grounds 1, 2, 6 and 7 of the Memorandum of Appeal, it was submitted that the trial court failed to consider the fact that there had been intermeddling over the estate of Alphonse Mwakio Msagha while he was not a dependant. Section 29 of the *Succession Act* and the case of *Gladys Nkitoro M'itunga v Julius Majau M'itunga* (2016) eKLR was cited in support.
12. It was further submitted that the said suit before the lower court was a nullity and the court was urged to find as such.



13. In respect to grounds 3 and 4 it was submitted that the suit in the lower court was *resjudicata* vide SRMCC No. 1993 of 1998 which was filed during the lifetime of Francis Mwakesi the Respondent's husband who died in January 2005.
14. In respect to ground 5 of the appeal, it was submitted that the court had failed to find and hold that the Appellants had been in possession of the suit property for decades.
15. In respect to ground 8 of the appeal, it was argued that the trial court applied the wrong principles of law in protecting the Respondent's title.
16. The court was urged to allow the appeal and grant the prayers sought in the Memorandum of Appeal.

The Respondent's submissions.

17. The Respondent submitted on the following two issues; whether the Appeal is merited and who should bear costs of the Appeal.
18. It was submitted that the Appeal arose as a result of a land dispute between the Appellants and the Respondent. It was submitted that the Respondent approached the trial court and gave evidence during hearing that she is the bonafide owner of parcel of land Registration Number Mgange/Dawida/2X8 having inherited it from her husband one Francis Mwakesi Mwadime. The Respondent further clarified to the trial court that the land in dispute belonged to one Alphonse Mwakio (deceased) who gave it to her husband for the reason that he helped him when he was blind and weak. It was further submitted that the evidence that the Respondent gave at the trial court was not challenged at all and this persuaded the court to deliver the judgment in her favour.
19. It was contended by the Respondent that the certificate of title of the land in dispute was issued in the year 1988 and has never been revoked to date by any court. The Respondent did a confirmation of grant so that she can transfer the suit land to her name. The Respondent told the trial court that the Appellants have trespassed on her land and therefore filed the suit at the trial Magistrate Court for orders of permanent injunction and eviction orders against the Appellants.
20. It was further submitted that the Respondent had proved her case to the required standard before the lower court and the court was urged to dismiss the appeal with costs.

Analysis and Determination.

21. Section 78(2) of the [Civil Procedure Act](#) mandates this court sitting as the first Appellate Court to evaluate the evidence afresh and make own conclusions albeit bearing in mind that it did not have the opportunity of seeing or hearing the witnesses first hand.
22. Having considered the Appellants Record of Appeal, Supplementary Record of Appeal and written submissions filed by both parties this court proceeds to determine this appeal based on the following salient issues;-
 - i. Who is the legitimate and bonafide owner of the suit parcel known as Mwanda/Mgange/Dawida/2X8.
 - ii. What are the appropriate reliefs to issue herein.



Who is the bonafide and legitimate owner of the suit parcel known as Mwanda/Mgange/Dawida/2X8

23. As earlier stated, it was the Appellants' case before the trial court that the suit parcel originally belonged Alphonse Mwakio Msagha (deceased). There was a dispute for the said parcel which their cousin Mwashighadi Mwakulegwa filed Civil Case in Mombasa RMCC No. 1933 of 1988 wherein judgment was delivered in their favor.
24. It was their case that after the said judgment and the death of the Respondent's husband, the Respondent fraudulently obtained letters of administration and fraudulently obtained a title deed in her name.
25. It was also their case that the suit before the trial court was res judicata and time barred.
26. During trial before the lower court, the 1st Appellant testified that the land belonged to their grand father one Mwamunyu where it was passed to their father. It was his testimony that the said land was ancestral land and that there are many graves in the said property. He also testified that the Respondent began claiming the land sometimes in 2015.
27. He also stated that in 1988 together with Mwashighadi, they had sued the Respondent's husband and won the case.
28. When cross-examined he conceded that the Respondent had a title to the suit property.
29. On the other hand, the Respondent's case was that she is the bonafide owner of the suit parcel and holds a title deed in respect to the same.
30. In her appearance before the trial court, she testified that the suit parcel was given to her by Alphonse Mwakio as an appreciation for taking care of him and his wife since he had no money to pay for their services.
31. It was also her testimony that she took all the succession steps and got the suit parcel registered in her name after the death of her husband. In respect to Mombasa RMCC No. 1933 of 1988, she stated that the court had told them that they could not take away the suit property. She also narrated how the Appellants had chased her away from the land and took away some of her items until when she had to seek administrative intervention before she returned to the land.
32. When cross-examined, she stated that she was given the land by Alphonse Mwakio as a gift and that the Appellants had their own property which was different from the suit parcel.
33. In considering who is the bonafide and legitimate owner of the suit parcel, it is worth noting that it is not in dispute that the suit parcel is currently registered in the names of the Respondent and the Appellants have challenged the same.
34. It is now trite law that whenever a title to property is challenged the owner has to demonstrate how he or she acquired the same and the court must equally examine the root and history of its acquisition. It is not sufficient to merely waive the title and claim ownership of the property in dispute.
35. Similarly, where a court is faced with two or more competing interests over the same suit property, it must look into the root of ownership of the suit said. This approach was well appreciated in the case of *Hubert L. Martin & 2 Others vs Margaret J. Kamar & 5 Others* [2016] eKLR. Equally in the case



of Nairobi High Court Civil Suit No. 1024 of 2005(O.S), *Milankumar Shah & 2 others v The City Council of Nairobi & another*, the court stated as follows:

“We hold that the registration of title to land is absolute and indefeasible to the extent firstly that the creation of such title was in accord with the applicable law and secondly where it is demonstrated to a degree higher than the balance of probability that such registration was not procured through fraud and misrepresentation to which the person or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law, and the public interest”.

36. Equally it is not automatic that simply accepting titles as conclusive, incontestable and indefeasible or the concomitant argument that in the face of two or more competing interests. It is not enough to wave an instrument of title or rest easy on the former rock of chronological primacy. What must now be established by he who would prevail is the solidity of the root of title. No flowery foliage, absent a sturdy and settled root speaking to a regular and legal process preceding the product that is the title, will avail the holder. That much is now the law pronounced in a lengthening line of authorities such as *Munyu Maina vs Hiram Gathiba Maina (Supra)* And *Funzi Development Ltd & Others vs Country Council Of Kwale* [2014] eKLR, and by the Supreme Court in its authoritative and all-binding decision of *Dina Management Limited vs County Government of Mombasa & 5 Others* [2023] eKLR
37. As earlier stated and without appearing to be repetitive, a court when faced with competing interest over the same land has to make an investigation so that it can be discovered who is the bonafide and lawful owner. This investigation must start at the root of the title and follow all processes and procedures that brought forth the interests of each party to the land. 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 Court of Appeal in the case of *Jacob Wekesa Bokoko Balongo v Kincho Olokio Adeya & another* [2020] eKLR held as follows on the importance of deciphering the historical acquisition of title:

“The historical background to the acquisition of the title is as good as the title itself. How else, for example, can a person seeking to impugn or impeach the title on the grounds of fraud, misrepresentation or it having been obtained unprocedurally or through corrupt means do so without placing the title in its historical context? On the ground of indefeasibility of title, it was urged that the trial judge erred in failing to find that the appellant’s title to the suit land was indefeasible... In the persuasive case of *Fahiye & 2 others – v- Omar & 4 others* [201] 2KLR, 224, it was held that indefeasibility of title is not absolute particularly where the whole transaction was void. In *Milankumar Shah and 2 Others v City Council of Nairobi & Attorney General* (Nairobi HCC Suit No. 1024 of 2005 (05), it was correctly pointed out that: “The concept of absolute and indefeasible ownership of land cannot be clothed with legal and constitutional protection if the interest was acquired through fraud, misrepresentation, illegality, unprocedural ways or corrupt schemes. This concept cannot be used to sanitize the commissioner if it allocates or issues title in such manner. In the case of *Champaklal Ramji Shah & 3 Anors v AG & Anor*, HCCC No. 145 of 1997, it was held that the court has a duty to examine the process of acquisition of such title and if it determines that there is an illegality, should nullify the titles as required.”



38. The apex court also shed light on the relevance of a historical background analysis insofar as acquisition of title is concerned restating that the ownership of land whose title was not acquired regularly is not protected under Article 40 of the Constitution on the protection of right to property. It held as follows in Dina Management Limited v County Government of Mombasa & 5 others (*supra*):

“Where the registered proprietor’s root title was under challenge, it was not enough to dangle the instrument of title as proof of ownership. It was the instrument that was in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register.”

39. Section 26 of the Land Registration Act, Act No. 3 of 2012, provides that a title which was acquired by way of fraud or misrepresentation, where a person is proved to be a party can be attacked. So too a title which was acquired illegally, procedurally or through a corrupt scheme. The said Section is drawn as follows: -

“26.

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

40. From the evidence that was adduced herein during trial, it was evident and not disputed that the suit property initially belonged Alphonse Mwakio Msagha the brother to the 1st Appellant and an Uncle to the 2nd and 3rd Appellants. What was in dispute was whether the Respondent lawfully acquired the said suit property which is currently registered in her name.

40. In analysing this issue, the court then ought to clearly address itself on whether the interest over the property was legitimately transferred to Francis Mwakesi the deceased husband to the Respondent and later to the names of the Respondent.

41. In the instant case, the Appellants witness testified that they stay on the suit property as their ancestral land since the same initially belonged to their grandfather and that the Respondent fraudulently had



- the title registered in her names. They also testified that they had filed a suit in Mombasa being Case No.1933 of 1988 which the court ruled in her favour.
42. The Respondent in demonstrating how she acquired the property, testified that the same was given to her and her late husband by Alphonse Mwakio Msagha. She also stated that when her husband passed away, she took the necessary steps to have the land registered in her name.
 43. The Appellants submitted that the issue of ownership of the suit parcel had been determined on Mombasa SRMCC No. 1933 of 1988 vide a judgment delivered on 19th October 1989 which quashed the Respondent's claim that her husband and herself had been gifted the land.
 44. Having analyzed the evidence on record, it is evident that the said property belonged to Alphonse Mwakio Msagha who was its original owner. It therefore follows that the root of this title and or property can be traced back from the ownership by Alphonse Mwakio. The court then has to consider who legitimately acquired the suit parcel from Alphonse Mwakio.
 45. The Appellants fronted their case to the effect that the Mombasa Administration Cause No. 205 of 1990 confirmed the rightful heirs of Alphonse Mwakio Msagha as Mwashighadi Mwakulega and Fabian M. Mwadime. According to the Appellants they had every right to inherit the same from Alphonse Mwakio who was the brother to the 1st Appellant and an Uncle to the 2nd and 3rd Appellants.
 46. It was contended by the Appellants that the suit is res judicata vide Mombasa SRMCC No. 1933 of 1998 and Succession Cause No. 205 of 1990.
 47. The evidence tendered on record confirms that the late husband to the Respondent Francis Mwakesi Mwadime who had been given the property as a present by Alphonse Mwakio was issued with a title deed on 10th February 1988 and upon his death on 26th January 2005, the Respondent was issued with a title deed for the said property on 5th May 2015.
 48. While the Appellants stated that the suit was res judicata vide Mombasa SRMCC No. 1993 of 1998, they did not furnish this court with any judgment emanating from the said case. In respect to the Succession Case No. 205 of 1990, it is worth noting that where there is a dispute as to ownership of the property, the ELC Court is the right forum for determining the same. A succession court does not have jurisdiction over matters relating to use, occupation and title to land or put it differently ownership disputes over land. See the cases of *Raphael Muriithi Ngugi v Paul Thuo Kimani* (2017) eKLR, *Wilson Mthui Mutunga v Beatrice Gathoni & Another* (2016) eKLR and *Beatrice Matonya (Co-Administrator of Estate of Walter Otuon Matega (Deceased) v Henry Matonya Manyaga (Administrator of Estate of Francis Obaga Matoya (Deceased))* (2016) eKLR. In the circumstances the said suit cannot be said have been res judicata.
 49. As to the ownership of the suit property, the Appellants never challenged and or contested the decision of Alphonse Mwakio to willingly give the land to the Respondent and her late husband. From the record of the proceedings before the trial court, the Appellants only had an issue as to whether or not the Respondent was the rightful heir to the deceased Alphonse Mwakio who had died without leaving behind a family. From the analysis of the evidence on record, this court is satisfied that the Respondent was able to demonstrate a clear root of the title and how the same got to be registered in her name. There was no evidence adduced by the Appellants before the trial court that the same was acquired fraudulently and as such it is the finding of this court that the Respondent remains to be the bonafide owner of the suit parcel.



What are the appropriate reliefs to grant in respect to this appeal

50. The Appellants sought for several reliefs as enumerated in their memorandum of appeal. However, this court having arrived at its finding that the Respondent remains to be the bonafide and legitimate owner of the suit property, it is the finding of this court that the reliefs sought by the Appellants cannot be granted.

Conclusion

51. Consequently, the entire appeal is unmerited and the same is hereby dismissed. Each party to bear own costs of the Appeal.

DATED, SIGNED AND DELIVERED IN OPEN COURT/VIRTUALLY AT VOI THIS 29TH DAY OF MAY 2025.

E. K. WABWOTO

JUDGE

In the presence of:

Mr. Mwinzi for the Appellants.

Mr. Mwzighe for the Respondent.

Court Assistant: Mary Ngoira.

