



**Wakahiu v Ndungu & 2 others (Environment and Land Appeal
E055 of 2023) [2025] KEELC 4205 (KLR) (28 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 4205 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E055 OF 2023**

JA MOGENI, J

MAY 28, 2025

BETWEEN

MAGDALINE WANJIRU WAKAHIU APPELLANT

AND

SIMON NGUGI NDUNGU 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

THE LAND REGISTRAR-RUIRU 3RD RESPONDENT

*(Being an Appeal from the Judgment, of Ruiru Senior Principal Magistrates Court delivered
by Hon Joseph Were (SPM) on 9th October 2023, in RUIRU ELC CASE NO. E138 OF 2022)*

JUDGMENT

1. The Defendant/Appellant herein after referred to as Appellant being dissatisfied with the trial Court Judgment delivered in *Ruiru ELC Case No. E138 OF 2022* on 9/10/2023, filed her Memorandum of Appeal dated 3/11/2023 on grounds;
 1. That the learned Trial Magistrate erred in law and fact by disregarding the fact that Nyakinyua Investment Limited held the suit property, Ruiru/Mugutha Block 1/7713 in constructive trust of the Appellant having bought the same from them and issued with the respective allotment, clearance and maintained the register in the Appellants name.
 2. That the learned trial magistrate erred in law and fact in holding that Nyakinyua Investment Limited formally and lawfully transferred the suit property to the 1st Respondent regardless of the fact that Nyakinyua Investment Limited held the suit property in constructive trust on behalf of the Appellant and as such had no legal capacity to transfer the same to any third party without the consent of the Appellant.



3. That the learned trial magistrate erred in law and fact by considering the alleged transfer by Nyakinyua Investment Ltd allegedly filed by the 2nd Respondent while neither they were not produced as the 2nd Respondent did not appear in Court and in so doing gave validity to the title held by Charity Kigo and transferred to the 1st Respondent.
 4. That the learned trial magistrate erred in law and fact by considering the validity of the transfer of the suit property to the 1st Respondent yet Nyakinyua Investment Limited lacked capacity to effect such transfer to any third party without the consent of the Appellant.
 5. That the learned Trial Magistrate erred in law and fact by failing to consider that the initial and the only allotment of the suit property made vide ballot number 1/7713 resulting in Ruiru/ Mugutha Block 1/7713 was to the Appellant a fact that was undisputed during trial.
 6. That the learned Trial Magistrate erred in law and fact by relying heavily on the premise that the Appellant's delay in having Nyakinyua Investment Limited effect a transfer in her favor is suspect or in any way vacated her rights as lawful owner of the suit property.
 7. That the learned Trial Magistrate erred in law and fact by failing to consider that the Appellant had actually completed her contractual obligations after the Appellant had out rightly paid all dues owed to Nyakinyua Investment Limited and received her allotment and her ownership certificate in her name securing her legal right and claim over the suit property.
 8. That the learned Trial Magistrate erred in law and fact in failing to address himself to the fact that only members of the said society owned plots and that Charity Kigo had no documents of membership which should have been produced by the 1st.
 9. That the learned Trial Magistrate erred in law and fact by finding that the 1st Respondent holds a good Title Deed over the suit property yet the initial transfer from Nyakinyua Investment Limited giving root to the 1st Respondent Title Deed is the very definition of an illegality and impropriety in the transfer and registration of Title in land.
 10. That the learned Trial Magistrate erred in law and fact by failing to uphold the Appellant's allotment of the suit property by Nyakinyua Investment Limited that legally recognized her as the sole proprietor of the suit property.
 11. That the learned Trial Magistrate erred in law and fact by placing undue regard on the transfer between Charity Njoki Kigo and Nyakinyua Investment Limited which is a nullity in law and as such the 1st Respondent could not acquire good Title.
 12. That the learned Trial Magistrate erred in law and fact by disregarding the evidence of the Appellant and dismissing her claim.
 13. That in view of the foregoing the learned magistrate totally misdirected himself in dismissing the Appellants claims by failing to consider and appreciate evidence and records of the Appellant.
 14. That the learned Trial Magistrate erred in law and fact by not granting costs of the suit to the Appellant.
2. The Appellant urges this Honorable Court allow the Appeal, vary and/or set aside the Judgment dated 9th October 2023 of Honorable Hon. Joseph Were (SPM).
 3. The background of the Appeal is that, the 1st Respondent filed his suit against the Appellant in the trial Court *vide* a plaint dated 07/09/2022 (sic). He sought the following orders:



- a. A permanent or order of injunction restraining the 1st Defendant by herself, her servant, agents, employees, tenants or otherwise howsoever from entering, trespassing, digging trenches, occupying, charging or carrying development or interfering with the Plaintiff's quiet and peaceful occupation with Land Parcel known as Ruiru/Mugutha Block 1/7713 measuring 0.0465 Ha in any manner whatsoever prejudicial to the interests of the Plaintiff
 - b. A declaration that the Plaintiff is the legal owner and proprietor of Land Parcel known as Ruiru/Mugutha Block 1/7713 measuring 0.0465 Ha
 - c. An order that the Land Registrar Ruiru do remove the caution placed on 15th October 2015
 - d. General damages
 - e. Costs of this suit and any other relief
4. The Appellant opposed the suit through a Statement of Defence and counter claim dated 14/10/2022 where inter alia she urged the Court to dismiss the Respondent's suit, stating that her husband bought the shares of Nyakinyua investment and subsequently nominated her to be the registered owner of the suit property. That upon completion of her obligations she was issued her respective allotment and suit property Ruiru/Mugutha Block 1/7713.
 5. That the records of Nyakinyua bear her witness as the rightful owner as reflected in the records as late as 19/08/2021 and she has a right to develop the suit property. She therefore denies particulars of fraud and trespass. She also averred to have placed a caution on the suit property when she realized the title had been given to someone else.
 6. In the counter claim she asked the Court to fine and enter Judgment in favour of the Appellant/ (Plaintiff) and issue the following orders:
 - a. The 1st Defendant is the rightful and legal owner of Ruiru/Mugutha Block 1/7713.
 - b. The Title Deed 1st Defendant Simon Ngugi Ndungu be cancelled together with the corresponding Green Card
 - c. The Land Registrar Ruiru does issue a new title deed for the suit property in the name of Magdaline Wanjiru Wakahiu
 - d. General Damages
 - e. Costs and Interest
 - f. Any other or further relief as this Honorable Court may deem appropriate to ne made
 7. On 19/07/2023, the suit was set down for hearing. The 1st Respondent testified as PW1 and called no other witnesses. Whereas the Appellant called one witnesses in support of her case where she testified as DW1 and her husband Nancy Wakahiu Theuri 2nd Defendant testified as DW2. The 1st Respondent's claim was that he was the registered owner of Ruiru/Mugutha Block 1/7713 having bought it in 2012 and was issued with title in 2013 having bought the suit property from one Charity Kigo who was the legitimate owner having bought from Nyakinyua Investment. He testified that he did not have the sale agreement which he lost. That he obtained the consent to transfer from the Land Control Board dated 28/04/2014 and the title was issued on 12/04/20214. It was his testimony that Charity who he bought the land from only produced the ballot and not the Certificate.
 8. On his her part the Appellant's claim that her plot No. 7713 was bought by her husband from Nyakinyua Company and that the husband registered it in her name. That she did not have a title and



so when she checked and found land registered in another person's name she put a caution on it on 15/10/2015. She did not produce the ballot in Court. She testified that Nyakinyua also indicated that she is not the owner of the suit property.

9. It was her testimony that the Green Card showed Nyakinyua as the 1st registered owner and then Charity Kigo as the next owner who then transferred it to the 1st Respondent. That when she learnt about the title being in someone else's name she placed a caution but never did anything.
10. DW2 testified that the suit property belonged to him but he had registered it in his wife's name. He told the Court that he misplaced the ballot but the property was registered in the wife's name. He also told the Court that when he went to report about the suit property to CID Juja he was told to vacate the suit property. He told the Court he placed a caution but he did not produce a copy to support the claim in Court. He testified that the Green Card showed Nyakinyua Investment Company as the registered owner and then Charity Njoki Kogi.
11. Although he testified to have reported the issue of his wife's parcel to Nyakinyua he did not produce any document to support the claim that he reported to Nyakinyua. He also stated that he never sued Nyakinyua since he had not issue with Nyakinyua and at the same time he stated that he never reported the loss of the ballot to the suit property.
12. Upon hearing the suit the trial Court pronounced itself in favour of the Plaintiff then as follows;
 - a. That the Plaintiff is the legal owner and proprietor of the parcel of land known as Ruiru/Mugutha Block 1/7713 and measuring 0.0465 hectares.
 - b. A permanent injunction does hereby issue restraining the 1st Defendant either by herself, her servant, agents, employees, tenant or otherwise howsoever from entering, trespassing, digging trenches, occupying, charging or carrying out developments or interfering with the Plaintiff's occupation of the parcel of land Ruiru/Mugutha Block 1/7713 measuring 0.0465 hectares and
 - c. The 2nd Defendant is hereby directed to remove the caution placed on the said land by the 1st Defendant on 15th October 2015 forthwith.
 - d. Each party to bear its costs of the suit.
13. It is the above decision which the Appellant was aggrieved by and filed this Appeal. On the 23/05/2025 parties elected to prosecute the Appeal by way of written submissions.
14. Having considered the Appeal, the Grounds of Appeal, the trial Court file, the written submissions and all the material placed before me, the key issues for determination are; whether the Appeal is merited; who is the lawful owner of the suit land; and costs of the Appeal.

Analysis & Determination

15. This is a first Appeal. The task of a first Appellate Court was summarized by the Court of Appeal in the case of *Susan Munyi v Kesbar Shiani* (2013) eKLR as follows;

“As a first appellate Court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusion.”



16. The principle was similarly outlined in *Abok James Odera t/a A.J. Odera & Association v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR as follows:-

“This being a first Appeal, we are reminded of our primary role as a first appellate Court, namely to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”

17. This is a case of two persons claiming the same land and the starting point is to analyse the evidence led by both parties in the trial Court with respect to the root of their title. The Court will be guided by a few decisions of the Superior Courts which I shall mention for reference on the issue of establishing the root of title.
18. In this Appeal, the Respondent holds a title derived from Nyakinyua, while the Appellant claims to have a ballot supporting their claim. However, the Appellant failed to produce this ballot in Court, a significant point raised in the Appeal. The 1st Respondent's claim of title is being contested, with the Court needing to decide whether the Appellant's claim, based on an unrepresented ballot, holds sufficient weight.
19. My role the Court in this Appeal is to assess the validity of both the Respondent's title and the Appellant's claim, particularly given the absence of the crucial ballot evidence by the Appellant. The Court will need to determine whether the Appellant's claim is sufficient to overturn the Respondent's title, which is derived from a legitimate source (Nyakinyua).
20. For the Court to determine whether the Appeal is merited, it must determine whether the trial Court arrived at a wrong conclusion. It is not in doubt that both the Appellant and the 1st Respondent are laying claim to the suit property. The title being held by the 1st Respondent was challenged by the Appellant. While the Appellant claims to have bought the suit property from Nyakinyua through DW2 the husband who allegedly bought and registered it in her name, the 1st Respondent claims to have bought it from one Charity Kigo. None of the parties sued Nyakinyua Investment Company an issue that was observed by the trial Court. Since Nyakinyua is alleged to be the first owner of the suit property, it would have been apt for the Company to be sued or brought in as a witness.
21. In the case of *Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others* [2016] eKLR, the Court held that;

“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.”

22. It is not in doubt that the suit property initially belonged to Nyakinyua Investment Company. The Appellant has contended that her husband, DW2 bought the suit property from Nyakinyua and



registered it in her name. DW2 did not produce any evidence of how he bought the said suit property from Nyakinyua and he also did not present a Ballot Certificate to support his claim of having acquired it through balloting and registering it in his wife's name. Although DW1 produced a letter from Nyakinyua confirming that she was the registered own of parcel number 7713 and also her ballot. But having not been a member of Nyakinyua how did she get the ballot?

23. However, the 1st Respondent though did not produce the Sale Agreement was able to produce the ballot paper No. 7713, Land Control Board Consent, Register from Nyakinyua, Copy of the Transfer, Copy of the Green Card and a copy of the Title Deed.
24. DW2 had alleged that he had lost the ballot but he did not present any evidence that this issue was ever reported to the Police. Also there is nothing that prevented the Appellant from seeking any documentation confirming the root of the title to be produced in Court. The Court therefore finds and holds that the Appellant failed to prove the root of her title by failing to show how her husband obtained the lost ballot from Nyakinyua and finally registered it in her name.
25. It may be that indeed her husband obtained a ballot from Nyakinyua nothing prevents him from approaching Nyakinyua to give him another ballot and allocate him a plot using proper documentation which he will then register in his wife's name.
26. On the other hand, the Respondent testified that he bought the suit property from Charity Kigo. To buttress his case, he produced a Land Control Board Consent and the Transfer documents although he alleged to have lost the Sale Agreement in between his moving to United States of America (USA) and back to Kenya. He also produced the ballot from Nyakinyua Investment Company that proved that the said Charity Kigo was a Shareholder at the Company, ballot for plot No. 7713 and a list of members that evidenced that the said Charity Kigo held Certificate No. 8223 and was therefore a member of the Company. With the above evidence, the Court is satisfied that indeed the 1st Respondent was able to prove the root of his title.
27. This Court is thus satisfied that the Learned trial Magistrate correctly held that the title held by the 1st Respondent was appropriately acquired. Having found that the same was appropriately acquired, the only cause of action therefore would be to confirm ownership to the 1st Respondent.
28. In the case of *Alice Chemutai Too v Nickson Kipkurui Korir & 2 Others* [2015] eKLR the Court held that:

“It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part. I had occasion to interpret the above provisions in the case of *Elijah Makeri Nyangwara v Stephen Mungai Njuguna & Another*, Eldoret ELC Case No. 609 B of 2012 where I stated as follows:- “...it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent titleholder. It means



that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally, or through a corrupt scheme. The titleholder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions. “I stand by the above words and I am unable to put it better than I did in the said dictum.”

29. The totality of the evidence that was placed before the trial Court is that, on a balance of probabilities, the 1st Respondent proved that he was the beneficial owner of the suit land. Further, based on the evidence before the trial Court, the Appellant did not prove her Counterclaim.
30. For the above reasons, this Court has not found merit in this Appeal. The Appeal is rejected and dismissed for lack of merit. In tandem with the general principle in Section 27 of the Civil Procedure Act, the Appellant shall bear costs of the Appeal.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 28TH DAY OF MAY 2025 VIA MICROSOFT TEAMS.

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MOGENI J

JUDGE

In the presence of:

Ms. Kiema holding brief for Ms. Gichio for the Appellant

Mr. Gachoya for the 1st Respondent

2nd and 3rd Respondents – Absent

Mr. Melita – Court Assistant

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MOGENI J

JUDGE

