



REPUBLIC OF KENYA



KENYA LAW
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**Gakuru & 4 others v Muhindi (Environment and Land Appeal
E042 of 2021) [2025] KEELC 4984 (KLR) (4 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 4984 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL E042 OF 2021**

JO OLOLA, J

JULY 4, 2025

BETWEEN

**ESTHER MUTHONI GAKURU 1ST APPELLANT
GERALD MWANGI GAKURU 2ND APPELLANT
BEATRICE WAIRIMU GAKURU 3RD APPELLANT
DANIEL MAINA GAKURU 4TH APPELLANT
MARY M KIOKO WERU 5TH APPELLANT**

AND

MARY WANJIKU MUHINDI RESPONDENT

(Being an appeal from the Judgment and orders of A. Mwangi Principal Magistrate dated the 14th October 2021 case MCEL & C NO.10 of 2018 former Nyeri ELC NO.59 OF 2016)

JUDGMENT

Background

1. This is an Appeal arising from the Judgement of the Honorable A. Mwangi P.M. delivered on 14th October, 2021 in Karatina PMELC Case No. 10 of 2018.
2. By a Plaint dated 5th April, 2016, the five (5) Appellants (as the Plaintiffs) had sought for Judgment against the two (2) Respondents (as Defendants) for the following:
 - a. An order that the Registrar of Titles Nyeri do cancel title deeds No. Magutu/Gatei/1587 and Magutu/Gatei/1588 and the partitioning be done into six equal portions of the family of Patrick Gakuru Kinyua;



- b. A declaration that the registration of the Defendants as the owner of the land parcel Nos. Magutu/Gatei/1587 and Magutu/Gatei/1588 was subject to overriding interests of customary trust and the Plaintiffs therefore have beneficial interests.
 - c. Costs of the suit and interest
3. The basis of those prayers was the Appellants' contention that the said properties were their ancestral land and that the 1st Respondent who is the husband of the 1st Appellant and the father to the 2nd to 5th Appellants had sold the same to the 2nd Respondent without their knowledge and/or consent.
 4. In her Statement of Defence and Counterclaim dated 9th May, 2016. Mary Wanjiku Muhindi (the 2nd Respondent) asserted that she bought the two parcels of land as an innocent purchaser for value and that she was not aware of the history of the said parcels of land. It was her case that upon purchase of the land, she took possession thereof after the 1st Respondent and his family removed all their movable properties and re-located to Mutara in Laikipia County.
 5. It was the 2nd Respondent's further case that sometime after the purchase, the 1st Appellant returned alone to the land and proceeded to erect a structure therein. By way of her counterclaim, the 2nd Respondent sought for an order of eviction against the Appellants as well as an order of injunction restraining the Plaintiffs from entering or occupying the suit properties.
 6. Having heard the dispute and in her judgment rendered on 14th October, 2021, the Leaned Trial Magistrate came to the conclusion that the Appellants had failed to prove their case and dismissed the same while allowing the 2nd Respondent's counterclaim with costs.
 7. Aggrieved by the said determination, the Appellant moved to this court and lodged the Memorandum of Appeal dated 27th October, 2021 wherein they urge the court to set aside the said judgment on the grounds that:
 - i. The Learned Magistrate erred in law for finding as she did that lack of spousal consent ought to have been pleaded contrary to a well-established legal principle this being a question of law. A miscarriage of justice was therefore occasioned;
 - ii. The Learned Magistrate erred in law and fact for failing to find that the suit properties - Magutu/Gatei/1587 and Magutu/Gatei/1588 were subject to a customary trust and therefore the 1st Defendant could not have dealt with them exclusively;
 - iii. The Learned Magistrate erred in law for failing to find that the suit properties Magutu/Gatei/1587 and Magutu/Gatei/1588 were subject to the Plaintiff's overriding interest and therefore subject to the provisions of Section 28 (of) the Land Registration Act, 2012, Laws of Kenya. A gross miscarriage of Justice was therefore occasioned;
 - iv. The Learned Magistrate erred in law for find that the caution placed on the suit properties - Magutu/Gatei/1587 and Magutu/Gatei/1588 were irregularly removed contrary to the provisions of Section 73(2) of the Land Registration Act 2012 Laws of Kenya (sic). A miscarriage of justice was therefore occasioned;
 - v. The Learned Magistrate erred in law and fact in failing to find that the caution on the suit properties Magutu/Gatei/1587 and Magutu/Gatei/1588 was subject to the provisions of Section 29 of the Land Registration Act 2012 and therefore the 2nd Defendant is deemed in law to have had notice. A miscarriage of justice was therefore occasioned;



- vi. The Learned Magistrate erred in law and fact in failing to find that the 2nd defendant was aware of the fraud perpetrated by the 1st defendant and therefore no good title could pass. A miscarriage of justice was therefore occasioned;
- vii. The Learned Magistrate erred in law in totality disregarding the evidence of the Plaintiffs' witnesses and more specifically the evidence of PW2- Daniel Maina Gakuru and PW3- David Muriirhi Warutere. A miscarriage of justice was therefore occasioned;
- viii. The Learned Magistrate erred in law and fact in failing to find that the Plaintiffs had proven their case to the required standards;
- ix. The Learned Magistrate erred in law and fact in failing to find that the 2nd defendant was not a bonafide purchaser for value without notice of any fraud. A miscarriage of justice was therefore occasioned;
- x. The Learned Magistrate erred in law and fact in failing to find that the 2nd defendant had totally failed to prove her counterclaim as required by law. A miscarriage of justice was therefore occasioned; and
- xi. The whole judgment was against the weight of the evidence adduced before the court.

Analysis and Determination

8. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand.
9. That duty was settled long ago by Clement De Lastang, VP, Duffus and Law JJA, in the Locus Classicus case of *Selle & Another –vs- Associated Motor Boat Company & Others* (1968) EA 123, where the Law Lords in their usual gusto, held as follows:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court... is by way of re-trial and the Court of Appeal is not bound to follow the trial court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanor of a witness is inconsistent with the evidence generally.”
10. Guided by those principles, I have carefully perused and considered the Record of Appeal as filed herein together with the impugned judgment. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the parties herein.
11. By their Plaint dated and filed in the Lower Court on 5th April, 2016, the five (5) Appellants had sought an order that the Land Registrar do cancel title deeds for the two parcels of land known as Magutu/Gatei/1587 and Magutu/Gatei/1588 and that the same be partitioned into six (6) equal portions for the family of Patrick Gakuru Kinyua whom they named as the 1st Defendant in their suit.
12. In addition, the Appellants sought a declaration that the registration of the said 1st Defendant as the proprietor of the two parcels of land was subject to overriding interest of a customary trust and that the Appellants therefore had beneficial interest over the said properties.
13. It was the Appellants’ case that the 1st Defendant had without their knowledge fraudulently sold the two titles which comprised of their ancestral land to the 2nd Respondent herein.



14. In her Statement of Defence and Counter-Claim dated 9th May, 2016 Mary Wanjiku Muhindi (the 2nd Respondent) stated that she was a stranger to the allegation that the suit properties were ancestral land and that the Appellants had beneficial interest therein. It was her case that she did purchase the suit properties from the 1st Defendant with the full knowledge of the Appellants and that she was an innocent purchaser for value without notice of any defect in the titles that were registered in the name of the 1st Defendant.
15. In considering the dispute before her; the Learned Trial Magistrate considered three issues. These were;
 - i. Whether there were cautions registered on the suit properties as at the time the 1st Defendant sold the same to the 2nd Respondent;
 - ii. Whether the titles were issued fraudulently without the sanctions of the Land Control Board; and
 - iii. Whether there was a customary trust in favour of the Appellants emanating from the 1st Defendants' proprietorship of the suit properties.
16. In regard to the first issue, the court came to the conclusion that the Appellants had failed to prove that any of the cautions they had lodged over the properties were removed without their consent and with the knowledge of the 2nd Respondent. In regard to the second issue, it was the Court's finding that the 2nd Respondent had produced applications made by the 1st Defendant for Land Control Board consent to transfer the titles and the consents by the Board allowing the transactions had also been exhibited. On that basis, the court came to the conclusion that the 2nd Respondent had no knowledge of any fraudulent dealings when she acquired titles to the suit properties.
17. On the last issue as to whether there was a customary trust in favour of the Appellants, the Court after citing the decision of the Supreme Court in *Isack M'iranga Kiebia –vs- Isaaya Theuri M'lintari & Another* (2018) eKLR concluded as follows:

“From this authority the Plaintiffs need to prove (sic) that before the first registration Magutu/Gatei/65 from which the suit lands emanate, the land was family, clan or group land. They have offered no such proof as all they say is that the land was their grandmother's land which the 1st defendant thereafter inherited. They are also to prove they were entitled to the registration save they have not proved this...”
18. From a perusal of the record herein, it was evident that the Appellants herein were members of the family of the 1st Defendant – Patrick Gakuru Kinyua. The 1st Appellant was his wife while the 5th Appellant was his daughter-in-law. The 2nd, 3rd and 4th Appellants were the children of the 1st Defendant together with the 1st Appellant.
19. As it turned out, the 1st Defendant passed away some ten (10) days after his family filed this suit accusing him of fraudulently disposing of the two properties to the 2nd Respondent. It was not clear if the 1st Defendant was ever served with the suit papers herein before he passed away on 16th April, 2016. He did not file any response to the suit.
20. Perhaps given the unique circumstances of this case, none of the Appellants could stand in as his legal representative and the 1st Defendant was therefore never substituted in these proceedings. From the court record, it was apparent that when the matter came up for hearing on 23rd May, 2017, it was confirmed that the suit as against the 1st Defendant had abated and that the Appellants would not be pursuing any claim against him.



21. In respect of the death of one or more Defendants, Order 24 Rule 4 of the Civil Procedure Rules provides as follows:
 1. Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.
 2. Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.
 3. Where within one year no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.
22. From the nature of the dispute herein, the cause of action survived the deceased and there was therefore a need to substitute him with a legal representative. Having failed to substitute him, it was unclear how the Appellants would have proceeded against the 2nd Respondent without amending their claim that the 1st Defendant held the land in trust for the Appellants and that the deceased had fraudulently sold the same to the 2nd Respondent without their consent.
23. Be that as it may and as the trial court rightfully concluded, the Appellants did not demonstrate in anyway that the suit property had been registered in the name of the deceased Defendant in trust for themselves. As at the time the deceased acquired the original parcel No. Magutu/Gatei/65, they had no relations with the 1st Appellant. According to the 1st Appellant herself, she got married to the deceased in the year 1986 and found him residing on a portion of the suit properties. She could not have been entitled at the time of the registration to be registered as the owner as she was nowhere in sight and did not belong to the clan.
24. While the Appellants accused the deceased of fraudulently selling the land to the 2nd Respondent without their consent, it was clear they knew the deceased had sold the suit properties and had bought land elsewhere in Laikipia. The 1st Appellant admitted to that fact in her testimony before the court and conceded that when her husband died, they were not residing on the suit properties.
25. That fact is supported by a letter that was provided by the Appellants dated 11th March, 2016 and addressed to the County Land Registrar Nyeri. At the relevant portion of that letter they address the Registrar as follows:

“That on 2nd November, 2015, a group of people came early in the morning and dismantled our houses and took away everything and we realized our father had sold our ancestral land without our consent.

We are now landless and seek your intervention because the community have assisted our mother by putting up a house on the already sold land to a lady we don’t know and had registered a caution on the land, even before the land was sold.”
26. It was clear to me that the Appellants were not landless as they claim. The family Patriarch had received the purchase price from the 2nd Respondent and had acquired for them another parcel of land in Laikipia as conceded by the 1st Appellant. Their re-entry onto the suit properties was therefore unlawful and an act of impunity.



27. It follows that I was not persuaded that any of the grounds of Appeal had any basis. This Appeal is dismissed with costs to the 2nd Respondent.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT MOMBASA THIS 4TH DAY OF JULY, 2025

J.O. OLOLA

JUDGE

In the presence of:

- a. Ms. Firdaus Court Assistant.
- b. Ms. Maina holding brief for Ng'ang'a Advocate for the Appellant
- c. Mrs. Macharia holding brief for Muthoni Advocate for the Respondent

