



**Mbiti v Mugo (Environment and Land Appeal 1 of 2020)
[2025] KEELC 5996 (KLR) (11 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 5996 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND APPEAL 1 OF 2020
AK BOR, J
SEPTEMBER 11, 2025**

BETWEEN

EMILIO NYAGA MBITI APPELLANT

AND

MIKE NJUNJA MUGO RESPONDENT

JUDGMENT

1. Being dissatisfied and aggrieved by the judgment of Hon. W. Ngumi, Principal Magistrate, delivered on 29/7/2020 in Siakago MCL & E No. 56 of 2018, the Appellant lodged this appeal. The grounds of appeal are that the Learned Magistrate failed to accept that the plaint was incurably defective for non-compliance with Section 91(4) (a) of the [Land Registration Act](#) which provides that a disposition in land must be made by all the joint owners yet in this case the Respondent filed the suit alone to the exclusion of the other registered owner; that the trial court relied on Section 26 of the [Land Registration Act](#) on the sanctity of the title whereas the title held by the Respondent was jointly owned and he did not present any authority to plead on behalf of the other registered owner in contravention of Order 1 Rule 13 of the Civil Procedure Rules.
2. Further, that the Learned Magistrate approbated and reprobated by acknowledging that the mutation forms were prepared in accordance with the consent and that some parties were issued title deeds and at the same time concluded that there was no instrument of transfer; that the trial court failed to comprehend that upon issuance of the consent by the District Officer (D.O), Gachoka, land parcel number 1385 was only available to Lucia Ngari as the per the consent of the D.O.
3. The Learned Magistrate was also faulted for amending the Respondent's prayers in the plaint to include eviction yet the Appellant's defence was that he was not a trespasser on the suit land. The other ground was that the trial court based its decision on extraneous matters and not the evidence on record. The Appellant sought to have the judgment of the trial court set aside and dismissal of Siakago MCL&E No. 56 of 2018 with costs to him.



4. The court directed parties to file and exchange written submissions on the appeal, which it has considered. The Appellant submitted that the court fell into error when it did not comprehend that the title over the suit land was registered in the joint names of the Respondent and Naomi Nthiga. He argued that Section 91 of the *Land Registration Act* stated that where land is occupied jointly, a disposition can only be made by all the joint owners. He argued that “disposition” includes legal proceedings and that the suit filed by the Respondent alone was incompetent and incurably defective, and that the trial court therefore erred by deviating from the principle of unity in title.
5. The Appellant urged that the Respondent did not present any authority to plead on behalf of Naomi Nthiga in contravention of Order 1 Rule 13 of the Civil Procedure Rules. The Appellant relied on *Savala and another v Ndanyi* [2022] KEEL 2536 (KLR) where the court found that the suit was incompetent where a party acted on behalf of others without their express written authority.
6. The Appellant faulted the trial court for confirming that mutation forms were prepared and a consent for subdivision adopted for Anthony Njiru Mbiti’s land as per the letter dated 25/5/1996 from the D.O Gachoka, as a result of which other parties acquired their own titles after Anthony Njiru Mbiti signed the mutation forms giving the validity to the consent. He argued that that consent created a constructive trust that Anthony Mbiti held the title for Mbiti/Gachuriri/1865 in trust for Lucia Ngari Njiru. The Appellant contended that the trial court could not affirm the validity of the consent and then turn around and declare Anthony Mbiti as the owner of the land yet he was merely a trustee of Lucia Ngari who during her life time was in occupation of the entire parcel of land and upon her death, Anthony Mbiti decided to dispossess her children of the land.
7. The Appellant argued that constructive trust was an equitable concept, which acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention. He added that having consented to the division of the land in terms of the consent before the D.O Gachoka and having placed Lucia Ngari Njiru on the land from 1997 to December 2017, Anthony Mbiti could not turn back to acquire the land and dispossess her of the land two months after her death. He urged that the trial court erred in its judgment on the twin issues of incurability of the plaint and the question of ownership of the land in light of the consent before the D.O Gachoka and the constructive trust created in favour of Lucia Ngari who was in possession of the land.
8. The Respondent submitted that the subject matter of this appeal is Mbeti/Gachuriri/3644 registered in the joint names of Naomi Wawira Nthiga and the Respondent, having purchased the land from the Appellant’s father Antony Njiru Mbiti. The parcel of land was carved out of Mbeti/Gachuriri/1385. After registration of the title, the Respondent visited his land intending to cultivate it but was chased away by the Appellant and his employees. The Respondent filed the suit in Siakago seeking to restrain the Appellant, his agents or family from trespassing onto parcel number 3644. At the hearing before the trial court, both the Respondent and the Appellant each called two witnesses to give evidence following which the court delivered its judgment, which is the subject of this appeal.
9. The Respondent submitted that before purchasing parcel number 3644 with Naomi Wawera Nthiga, he conducted due diligence and was satisfied that the land was free from any encumbrances. He was emphatic that due process was followed and the title was jointly registered in his name and Naomi Nthiga. He maintained that he did not commit any fraud in solely filing the suit against the Appellant and that the exclusion of the second proprietor did not negate his rights as a registered proprietor to file suit. He relied on Article 159 of *the Constitution*, which provides that justice should be administered without undue regard to procedural technicalities.
10. Regarding the issue of the consent for transfer issued by the D.O Gachoka, the Respondent submitted that that consent was not an encumbrance on parcel number 3644 and that the Respondent had no



- obligation to familiarize himself with the purported consent, which had not been implemented or acted upon. He added that it was trite law that all encumbrances should be listed against the title save for overriding interests provided under Section 28 of the Land Registration Act. He urged that a consent was not one of the overriding interests contemplated under that Act.
11. He submitted that a title deed was prima facie evidence of the rights of a registered proprietor unless such registration is challenged on grounds of fraud, which the Appellant failed to prove before the trial court. He maintained that he discharged his burden of proof and demonstrated his rights to the suit property before the trial court. Those rights are set out under Sections 24, 25 and 26 of the Land Registration Act. He concluded that there was no error in the judgment of the trial court.
 12. The issue for determination is whether the court should allow the appeal and set aside the decision of the trial court. The Appellant summarised the twin issues of incurability of the plaint and the question of ownership of the land in light of the consent before the D.O Gachoka as the main issues for determination in this appeal. The genesis of this dispute is that the Appellant's father sold parcel number 3644 to the Respondent and Naomi Nthiga who were jointly registered as the owners of the suit land. The Respondent's claim is that when he went to take possession of the suit land, the Appellant and his agents chased him away.
 13. The Appellant's position is that parcel number 3644 which was excised from parcel number 1385 was fraudulently transferred to the Respondent by his father yet the land had been allocated to his late mother vide a consent reached by the family before the D.O Gachoka. The Appellant denied trespassing on the suit land and maintained that it formed part of his late mother's estate because his father had allocated it to his mother.
 14. In its judgment, the trial court noted that the Appellant's late mother had filed a suit for the division of matrimonial property prior to her demise. The court noted the Appellant's view that his father could not have dealt with parcel number 1385 and that his action of subdividing the land into parcel numbers 3644 and 3645 and subsequent sale of parcel number 3644 was fraudulent.
 15. In the counterclaim, the Appellant enumerated particulars of fraud on the part of his father as obtaining registration of the suit land which was supposed to be transferred to the late Lucia Njiru; and fraudulently misrepresenting to the land control board the status of parcel number 1385, which was matrimonial property where Lucia Njiru was buried and causing the land to be subdivided. The particulars of fraud against the Respondent were obtaining registration in respect of parcel number 3644 while aware that the consent was given for the land to be transferred to Lucia Njiru and being aware that the property was not vacant. Lastly, obtaining the suit land without proper documentation.
 16. The trial court noted from the green card tendered in evidence that parcel number 3644 was initially registered in the name of Njiru Mbiti on 9/9/2016 and later changed to the names of Mike Mugo and Naomi Nthiga on 9/2/2018. In addition, the trial court noted that the land had always been in the name of Njiru Mbiti. The court noted that it did not get a copy for the consent for transfer dated 25/5/1997 and that it was not clear whether the land board sat on that day.
 17. The court went further to observe that even if there was a consent as the Appellant alluded to vide which parcel number 1385 was allocated to Lucia Njiru, in the absence of a duly executed instrument of transfer to accompany the consent, the consent alone could not amount to a transfer and could not convey an interest in land to the estate of the late Lucia Njiru.
 18. The court flagged the issue of lack of clarity on whether a stay was granted in dealing with the parcels of land listed by Lucia in the case which she filed for the division of matrimonial property. The court also noted that it was not clear whether the division of matrimonial property case had abated or not.



- Flowing from that was also the issue of whether that suit survived the plaintiff in that case. The court referred to the decision in *L.N v A.N* [2018] eKLR in which Judge Onyiego noted that the applicant was not a spouse who could claim a right or share from his father under the law governing matrimonial property. Further, that he could not ride on his late mother's source or arrive at the destination and that the death of the plaintiff marked the end of the road because the suit could not survive her death.
19. This court agrees with the findings of the Learned Magistrate that the Appellant failed to prove fraud on the part of the Respondent. The trial court cited the decision in *Charles Saitto Kiaria v Samuel Kinyanjui Saitto (Personal Representative of the Estate of Mary Wambui Nyambuya and another* [2014] eKLR where the court quoted a previous decision where a finding was made that the rights of a registered proprietor could not be defeated by claims founded on the moral duty of a family. Further, that claimants founding their claims as family members can only do so in succession matters or in proceedings for matrimonial property. Further, the court observed that the right of ownership by the applicants could not be defeated by the Respondents based on family relationship. The trial court noted that the Appellants claim that his mother had a right over the suit land and that she was buried on the land was more of a claim on the family moral obligations.
 20. The trial court also cited *Muriuki Marigi v Richard Marigi, Lydia Njoki Muriuki & Another Civil Appeal Number 189/1996* (unreported) where the Court of Appeal noted that the *Law of Succession Act* recognized rights of wives and children over the husband's or father's estate, as the case may be, but that those rights accrued after death. The court noted that since the Appellant as the registered owner of the suit land was still alive, his property was not available for subdivision and distribution among his wives and children unless he decided of his own free will to subdivide and distribute the property among them.
 21. The Learned Magistrate noted that in his evidence, Peter Muriuki Njiru who testified on behalf of the Appellant told the court that the matrimonial property case filed by his late mother was not concluded and that it was thrown out following her demise. He conceded that the property did not devolve to his mother and that parcel 1385 had never been registered in his mother's name. Further, that there was no encumbrance registered against that land. The trial court noted that the Land Control Board lacked jurisdiction to compel the Appellant's father to transfer the land to his mother who was dead and that the Appellant's father had a clean title to parcel number 1385.
 22. The trial court concluded that the rights of a registered proprietor could not be defeated based on family relationships unless it was through a decision of the court based on a finding concerning the division of matrimonial property or in succession. The court found that property in parcel number 3644 properly passed to the Respondent based on Section 25 of the *Land Registration Act* protected the rights of a registered proprietor.
 23. The court noted that the Appellant's mother was buried on parcel number 3645 and not 3644 and that her house was also situated on parcel number 3645 and not 3644. The court found that the Appellant had no legal right or claim over parcel number 3644. Upon conclusion of the trial, the court issued an order restraining the Appellant from entering or dealing in any manner with parcel number Mbita/Gachuriri/3644 from the date of the judgment and that the Officer Commanding Kiritiri Station would ensure compliance with the court order.
 24. Section 91 (4) of the *Land Registration Act* provides that if land is occupied jointly, no tenant is entitled to any separate share in the land and, that dispositions may be made only by all the joint tenants. On the death of a joint tenant, that tenant's interest vests in the surviving tenant or tenants jointly. Further, that each joint tenant may transfer their interest inter vivos to all the other tenants but to no other person, and any attempt to so transfer an interest to any other person shall be void.



25. Disposition is defined in Section 2 of the *Land Registration Act* as a sale, charge, transfer, grant, partition, exchange, lease, assignment, surrender, or disclaimer and includes the creation of an easement, usufructuary right, or other servitude or any other interest in land or a lease and any other act by an owner of land or under a lease whereby the person's rights over that land or lease are affected; or an agreement to undertake any such disposition.
26. Going by the definition in the Act, filing a suit does not fall within the ambit of the definition of a disposition for which the consent of a co-owner is required as the Appellant argued in the appeal. The rule does not require that all persons registered as co-owners of land must file suit, although that would be the ideal situation. What one of several co-owners of land cannot do is sell, charge, transfer, grant, partition, exchange, lease, assign, surrender, or create an easement or usufructuary right whereby the co-owner's rights over that land or lease are affected. Filing a suit for eviction as the Respondent did would affect the co-owner's rights over the land in a positive way, for such action is geared towards asserting the ownership rights and possession of the land.
27. Order 1 Rule 13 of the Civil Procedure Rules provides that where there are more plaintiffs than one, any one or more of them may be authorised by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding. The authority should be in writing signed by the party giving it and should be filed in the case.
28. The authority under Order 1 Rule 13 of the Civil Procedure Rules is required where there are more than one plaintiffs. Although Naomi Wawira Nthiga is registered as a co-owner of the suit land, she was not a plaintiff in the suit for Order 1 Rule 13 of the Civil Procedure Rules to be applicable as the Appellant argued. That rule does not stop one of the joint owners of land from pursuing a claim and asserting his rights over the land that is jointly owned.
29. The appeal lacks merit, and is dismissed with costs to the Respondent.

DELIVERED VIRTUALLY AT EMBU THIS 11TH DAY OF SEPTEMBER 2025.

K. BOR

JUDGE

In the presence of: -

Mr. Dennis Kirwa for the Appellant

Ms. Rose Migwi for the Respondent

