Njoroge & 3 others v Maina (Environment and Land Appeal 16 of 2021)
[2022] KEELC 4799 (KLR) (15 September 2022) (Judgment)

Neutral citation: [2022] KEELC 4799 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ENVIRONMENT AND LAND APPEAL 16 OF 2021

JG KEMEI, J

SEPTEMBER 15, 2022

BETWEEN

DAINA MAINA NJOROGE ..... 1ST APPELLANT

JOSEPH NJOROGE MBURU ..... 2ND APPELLANT

JACKSON MWAURA MBURU ..... 3RD APPELLANT

PETER MAINA MBURU ..... 4TH APPELLANT

AND

JOHN NDUNGU MAINA ..... RESPONDENT

(Being an appeal from the judgement of the Learned HON M W Wanjala SRM delivered on the 11/2/2021 in CMCC NO 878 OF 2015)

JUDGMENT

1. In the lower court the respondent sued Daniel Maina Njoroge and Mburu Njoroge, the sons of Njoroge Muru alias Njoroge Muuru, Deceased. It is commonly agreed that Kiganjo/gachika/244 (mother title) measuring 4.5 acres was registered in the deceased name. I say so because none of the parties presented a copy of the register or title before the court.

2. According to the Respondent he entered into a sale agreement on the May 10, 1995 with Njoroge Mburu and purchased one acre out of the expected inheritance of Njoroge Mburu from his father's land for the consideration of Kshs 300,000/-. Thereafter he was put in possession and developed the land and occupied it for 20 years as he awaited the completion of succession cause in the estate of Njoroge Muuru, Deceased so that his one acre would be transferred to him. The family of Muuru Njoroge petitioned for letters of grant of administration in 1995 where he was included as one of the beneficiaries in recognition of his purchaser's right to the extent of one acre. This however did not go well with some of the members of the family who insisted that his name should be removed as a he

was not a beneficiary. Sometime in April 2014 the family of the appellants and the respondent met at the chief's office and agreed to remove the name of the respondent to expedite the completion of the succession process and that Mburu Njoroge and the respondent were to resolve the issue of one acre after the succession cause was completed. On the May 21, 2015 the certificate of confirmation of grant was issued naming the two brothers Daniel Maina Njoroge (Daniel) and Mburu Njoroge (Mburu) as beneficiaries of the suit land in equal shares. Sensing lack of cooperation from Mburu Njoroge, the respondent caused a demand letter dated the June 17, 2015 to be sent to the said beneficiaries of the estate seeking transfer of one acre to his name. On the September 7, 2015 the respondent filed suit in the lower court against the two beneficiaries seeking specific performance with respect to the transfer of one acre from Mburu's inheritance, permanent injunction, and in the alternative, an order of refund of the purchase price interalia. Contemporaneously the Respondent obtained interim orders restraining the two brothers from selling disposing and/or transferring the suit land parcel 244 pending the hearing and determination of the application on September 18, 2015. Subsequently, following the confirmation of the grant the mother title was subdivided into two portions parcel namely parcel 3075 and 3076 and registered in the names of Daniel and Mburu respectively on the October 22, 2015. On the September 28, 2015 Mburu transferred the suit land parcel 3076 to his sons Joseph Njoroge Mburu Jackson Mwaura Mburu and Peter Wainaina Mburu. On the December 18, 2015 the Court issued orders to the Land Registrar to place a caution on parcel No 3076.

3. Mburu died on the December 31, 2016. The suit was amended on the January 4, 2017 to include the three sons of Mburu namely the 2nd - 4th appellants.

4. The appellants denied the respondent's case in the lower court and contended that there was no agreement of sale between the respondent and Mburu and neither was any consideration in the sum of Kshs 300,000/- paid. In admission was the fact of their being heirs and beneficiaries of the suit land parcel 244 in equal shares. They denied that the respondent was entitled to one acre of the land and sought to put the respondent in strict proof and that they will rely on the principle of *nemo dat non quod habet* and the limitation of time in response to the respondent's claim. The Appellants contended that in the event that the respondent entered into an agreement with Mburu, which was denied, the same was a forgery and undertook to lead evidence in support. The appellants contended that the transaction is void ab initio for lack of land control board consent and it is time barred. They pleaded particulars of fraud against the respondent in para 14-19 of their defence.

5. The matter was heard and the trial Court delivered its judgement on the February 11, 2021 and interalia held that specific performance could not be granted because Mburu lacked the legal capacity to sell the land since the registered owner was Deceased and no letters of grant of administration had been taken out and further that no land control board consent was obtained. The Hon Magistrate allowed a refund of Kshs 300,000/- at compounded interest from 1995. This is what provoked the appeal before me.

6. The appellants being aggrieved with the judgement of the trial court brought this appeal on the grounds set out below;

    a. That the learned magistrate erred in law and fact in failing to appreciate that the respondent did not prove the payment of the total purchase price warranting issuance of a Judgment in his favour.

    b. That the learned magistrate erred in law and fact by relying on secondary evidence in terms of photocopies of alleged sale agreement in clear contravention of section 67 of the *Evidence Act* therefore arriving at a wrong decision.

c. That the learned magistrate erred in law and fact by awarding compound interest on purchase price alleged paid for a land sale transaction with the Land Board consent in clear contravention of the provisions of *Land Control Board Act* therefore arriving at a wrong decision.

d. That the learned magistrate erred in law and fact in awarding the refund of the purchase price when such claim was statutory barred under the provisions of *Limitations of Action Act* Cap 22 of the Laws of Kenya therefore arriving at a wrong decision.

e. That the learned magistrate erred in law and fact in finding that the purported sale transaction was void ab initio for lack of legal capacity to enter in the same but then proceeded to award and intermeddler of the Estate of the late Njoroge Muru alias Njoroge Muuru namely the respondent for purchase price refund at compound interest from date of sale agreement.

f. That the learned magistrate erred in law and fact by trying to breach life in a void land sale transaction by awarding the respondent the alleged purchase price with compound interest without considering that he had occupied and used the suit premises as an intermeddler for 20 years without awarding mesne profits due to the appellants.

g. That the learned magistrate erred in law and fact by being an active participant in the dispute by calling a witness who was not an expert witness with a view of favouring the respondents case to validate an void land transaction therefore arriving at a wrong decision.

h. That the learned magistrate erred in law and fact by finding for the respondent against the appellants yet the appellants were not the legal representative/Administrators of the estate of the late Mburu Njoroge whereby arriving at a wrong decision.

i. That the learned magistrate erred in law and fact in not considering the appellants submissions file don record on February 2, 2021 therefore failing to appreciate the legal authorities that would have guided the court to arrive at a fair and just decision.

j. That the learned magistrate erred in law and fact by considering extraneous issues instead of relying on the evidence on record whereby arriving at the wrong decision.

k. That the learned Magistrate erred in law and fact by arriving at a wrong decision despite knowing what law states in right of land transactions that are void due to lack of legal capacity to contract, lack of Land Board Control Consent under *Land Control Act* and provisions of lack of *Succession Act*, in relation to intermeddling with assets of a deceased person.

l. That the learned magistrate erred in law and fact by issuing an order that was not pleaded in the respondent Plaint dated September 1, 2016 against all the appellants yet the prayers was for against Mburu Njoroge (dcd).

m. That the learned magistrate erred in law and fact by finding for the respondent against the appellants who did not participate in land sale transaction that court found to be void ab initio therefore arriving at a wrong decision.

7. Consequently the appellants sought orders ;that the judgment of the trial court of the February 11, 2021 and all subsequent orders arising therefrom be set aside; orders be issued dismissing the respondents case in entirety; appellant be awarded costs of the suit and the appeal.

8. It was submitted by the appellants that Mburu lacked capacity to sell the land and secondly the agreement was void for lack of land control board consent and that pursuant to section 7 of the *Land Control Act* if any monies are paid in the course of a controlled transaction that becomes void under

the Act, the money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid but without prejudice to section 22 of the *Limitation of Actions Act*. That despite the recoverability of the monies paid, it was submitted that the same become unrecoverable going by the provisions of section 4 (1) (d) and (e) of the *Limitation of Actions Act*. The Appellants relied on the case of *Gharib Suleiman Gharib v Abdulrahaman Mohamed Agil* LLR No 750 (CAK) CA NO 112 of 1998.

9. The second issue raised by the appellants in their submissions is whether the documents produced were admissible in law. They submitted that the copies of documents produced by the respondent were photocopies and therefore not admissible. It was submitted that section 68 of the *Evidence Act* permits the production of secondary evidence when it is demonstrated that the originals have been destroyed or lost or when the party offering evidence of its contents cannot for any other reason not arising from his own default or neglect- produce it within a reasonable time. That the respondent having not explained the circumstances leading to the production of the photocopies, the secondary evidence was inadmissible.

10. It was also submitted that no evidence was tendered to proof that the balance of the purchase price was paid if any. That having admitted occupying the land for over 20 years the respondent owes the appellants mesne profits.

11. The respondent submitted that PW2 and PW3 witnessed the agreement of sale and the payment of the purchase price to Mburu. That the trial court was justified in admitting in evidence a copy of the sale agreement as the original could not be traced without occasioning undue delay or had been lost. The Respondent relied on the provisions of sections 35 and 68 of the *Evidence Act* in support of this position.

12. It was the submission of the respondent that he demonstrated through the evidence of his witnesses and the local Chief that he purchased the land, paid Mburu and was put in possession.

13. As to the refunds to the respondent, the respondent relied on the decision in *Benedict Nzioka vs Agnes Waita* (2020) eKLR where the court awarded the Plaintiff a refund of the purchase price since the beneficiaries had no capacity to sell a portion of the land before letters of grant of administration had been confirmed.

14. Further the respondent submitted that after the demise of Mburu his estate devolved to the 2nd - 4th appellants. The 1st appellant is the brother and administrator in the suit land. That though the appellants did not participate in the sale transaction, they shared in the estate of the late Mburu upon his demise.

15. As a first appellate court, this court's duty is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make its own conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. See the decision in *Selle & Another v Associated Motor Boat Co Ltd & Others* (1968) EA 123.

16. PW1- John Ndungu Maina testified that he bought one acre of land from Mburu Njoroge in 1995 and paid Kshs 300,000/-. He produced a copy of the agreement of sale in support. That he took possession and developed the land for 20 years. The land belonged to Mburu's father and he was buying a portion of his inheritance. Once the grant was confirmed Mburu instead transferred the land to his 3 sons. That he was evicted from the land in 2015.

17. PW2- Patrick Mwaura stated that he was witness to the agreement of sale having introduced the Respondent to Mburu Njoroge. He also witnessed the payment of the Kshs 200,000/- to Mburu in the month of May 1995 and the balance of Kshs 100,000/- was paid on May 25, 1995.

18. PW3- Francis Mungai stated that he drafted the agreement of sale in Kikuyu language because Mburu spoke Kikuyu. He was a workmate of the respondent. He witnessed the agreement of sale as the secretary and payment of the deposit. That the balance of Kshs 100,000/- was paid later.

19. DW1 - Daniel Maina Njoroge stated that he was not involved in the sale transaction between his brother Mburu Njoroge and the Respondent. He stated that the respondent came onto the land in 1995 and he saw him cultivate the same for many years. He cultivated a portion of the land on the side of Mburu. He was not privy to whatever agreement the parties had with each other as he did not enjoy a good relationship with Mburu. He confirmed that grant of letters of administration were issued in 2015.

20. DW2- Joseph Njoroge Mburu denied any sale between his father Mburu Njoroge and the respondent. That the respondent forged a sale agreement. He admitted that the respondent was on the land but with the permission of his father. That the respondent vacated the land on his own.

21. DW3- Jackson Mwaura testified and stated that his father never sold any land to the respondent. He admitted that the respondent was cultivating the land but on lease from his father. He was not present nor privy to the sale agreement. He was 10 years in 1995.

22. DW4 - Peter Wainaina Mburu stated that he lives in Naivasha, his brother's land. Similarly, he denied any agreement between his father and the respondent.

23. DW5- Veronica Wangui Wamiti – stated that she is the Chief of Gachika Location. She wrote a letter on April 3, 2014 confirming the beneficiaries of the estate of Njoroge Muuru. That the respondent had been included as a beneficiary but on protests by family members, it was agreed that his name be removed to allow the succession to be completed and that after the confirmation Mburu was to transfer the land to the respondent. She confirmed that Mburu sold one acre of the land to the respondent. Later she found out that Mburu transferred the land to his sons leaving out the respondent. The respondent sought court orders preventing Mburu from being buried on the land and he was eventually buried on the 1st appellant's land. That the respondent had erected a temporary structure on the land for his workers but was removed / evicted and the sons of Mburu now occupy the land in particular the 3rd appellant. She stated that the land was not leased to the respondent.

24. Having carefully considered the record of appeal, the lower court record, the submissions of the parties the issues for determination are; whether there was a valid agreement of sale; whether the documents produced in evidence were admissible in law; whether the refund of the purchase monies to the respondent was unfounded? Whether the appeal is merited and who meets the costs of the appeal.

Valid Sale Agreement

25. This issue was aptly canvassed by the parties and considered by the trial court. The respondent and his witnesses testified that he entered into an agreement for sale in 1995. PW1 and PW2 witnessed the same. The copy of the agreement was presented in court. DW4, the chief of the local area confirmed that the respondent purchased the land, occupied it, planted crops and constructed a structure for his workers. The appellants led evidence and denied the agreement of sale. They contend that the respondent was leased the land by Mburu and in the same breath failed to produce the lease agreement and secondly the evidence of rent payments flowing from the lease agreement. They also contend that if there was an agreement as alleged by the respondent then the same was a forgery. There was no evidence led before the trial court to proof forgery of the signature of Mburu. The court is convinced that there was an agreement between Mburu and the respondent and that explains why the respondent occupied the land for that long and the appellants tried unsuccessfully to disown the same.

26. Was the agreement vitiated? It is not in dispute that the original suit land was registered in the name of Mburu's father and the same was sold in 1995 before the completion of succession of the estate of the late Njoroge Muuru. It is on record that the estate was succeeded in 2015, where the original suit land was awarded to Mburu and his brother, the 1st appellant.

27. Section 45 of the *Law of Succession Act* provides that except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

28. According to Musyoka, J in *Veronica Njoki Wakagoto (Deceased)* [2013] eKLR:

> " The effect of [Section 45]...is that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorised to do so by the Law. Such authority emanates from a grant of representation and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence."

29. *Re Estate of Paul M'Maria (Deceased)* [2017] eKLR, where the court held that;

> " The restriction provided by law that no immovable property shall be sold or distributed before confirmation of grant is not merely directory or an embellishment. It is a statutory command with fatal consequences on any transaction done in contravention of the said law. Accordingly, acquisition of immovable property of the estate in contravention of the *Law of Succession Act* is tinctured with killer poison; and is unlawful acquisition; thus, property so acquired does not enjoy the protection of property rights under article 40(6) of the *Constitution*. See the claw-back provision of the *Constitution* that:- 40(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired. Therefore, applying the law and the *Constitution*, the sale of Plot 18A Mitunguu Market on July 12, 2004 was in contravention of the *Law of Succession Act* and therefore vitiated by that illegality. It is thus invalid, null and void transaction. Such contract is *ex facie* illegal and is unenforceable; no person can maintain an action based on or recover on the basis of a contract which is prohibited by statute"

30. Going by the provisions of the *Succession Act* and precedent cited above, Mburu lacked the legal capacity to transfer the suit land to the respondent between 1995 to 2015.

31. Having said that, the question is when did the cause of action arise? According to the amended plaint the respondents cause of action arises from para 9 and 10 where he states that at the completion of the Succession Cause and after the land is registered in the name of Mburu, Mburu transferred the whole land (2.5 acres entitlement) to his sons and left out the respondent. Evidence was led by the respondent, the chief and DW1 that the respondent had been included in the succession cause as a beneficiary but due to the protest by one of daughters of Mzee Muuru Deceased, it was agreed in a meeting at the chiefs office that he be removed so that his quest for his one acre could be resolved by Mburu later. This shows that the respondent was actively pursuing his interest in one acre out of Mburu's inheritance from a known beneficiary called Mburu. That the subject matter of his pursuit was also known to the extent that an attempt was made to include him as a beneficiary of the estate for purposes of securing his interest. In other words his interest was not an idle one.

32. The demand letter dated the June 17, 2015 marked the odyssey of the respondents claim that is to say that his cause of action arose on this date. There is no evidence that this demand elicited any response

from Mburu. By the June 17, 2015 the confirmation of grant in the estate of Njoroge Muuru alias Njoroge Muuru had been issued on the May 21, 2015. Mburu therefore had been awarded 50% of the suit land being 2.5 acres. At this point Mburu is a beneficiary of 2.5 acres of the land he inherited from his father. Mburu had the capacity to transfer the one acre to the respondent if he wanted to. On the October 22, 2015 Mburu became registered owner of the parcel Kiganjo/gichika/3076. Again, at this point he had capacity to transfer the land to the respondent but he did not. The suit is filed on the September 7, 2015 but Mburu went ahead on the December 9, 2015 to transfer the land from himself to his sons whilst the suit was pending and I think in the face of an existing interim injunction.

33. In my view therefore the 1995 agreement of sale though void was acted upon by the parties. Their intention was to convey an interest in the portion of Mburu's inheritance in the land to the respondent. That explains why the respondent was made a beneficiary in the succession cause. The respondent was put in possession and he waited patiently as per the understanding between him and Mburu for the completion of the succession of the estate of Njoroge Muuru. If the contrary were true, then Mburu has not explained why he allowed him to occupy the land for 20 years. Evidence was led by the Chief that the 3rd appellant lived on a portion of the 2.5 acres while the respondent lived on the balance but when the respondent was evicted he took over the whole land in 2015. The 1st appellant led evidence and stated that the respondent was his neighbour and that he cultivated a portion of Mburu's land.

34. The appellants have argued that the transaction is void because of the rule in *Nemo dat habet* – that is that Mburu did not transfer a good title because he had none.The said principle is embodied in section 23 of the *Sale of Goods Act* which stipulates as follows:

> " 23 (1) Subject to the provisions of this Act where goods were sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

35. The nemo dat principle means one cannot give what he does not have. This principle is intended to protect the title of the true owner. The rationale behind this principle is that whoever owns the legal title to property holds the title thereto until he or she decides to transfer it to someone else. Accordingly, an unauthorized transfer of the title by any person other than the owner generally has no legal effect, which means the owner continues to hold the title to the property while the person who received the invalid title owns nothing.

36. I have held that Mburu had the capacity to transfer the land to the respondent on two occasions; at the confirmation of grant and at the registration of the title in his name. This rule therefore does not apply to the circumstances of this case.

37. The other issue raised by the appellants was the issue of Section 4 of the *Limitations of Actions Act* which is that the refunds could not be recovered because it is statute barred. Having held that the cause of action arose in 2015, I find that this ground fails.

38. From the preceding paras it becomes clear that Mburu was paid the consideration for the land and his actions were aimed at defeating the claim of the respondent. He wanted to keep the land and the money. Evidence was led by the respondent that upon being paid Mburu purchased a larger parcel of land in Naivasha where he settled his family. This was confirmed by DW4, his son who informed the court that he lives in 22020 Naivasha. This must be the land that Mburu bought using the proceeds of the land in question. The question then that a court of equity such as this should ask is whether Mburu and his estate should keep the land and the money.

39. In the case of *Macharia Mwangi Maina and 87 others v Davidson Mwangi Kagiri* (2014) eKLR, the Court of Appeal being reminded and guided by the dicta in Chase International case (supra), held that;-

> "This court is a court of law and a court of equity; Equity shall suffer no wrong without a remedy; no man shall benefit from his own wrongdoing; and equity detest unjust enrichment. This court is bound to deliver substantive rather than technical and procedural justice. The relief, orders and directions given in this judgment are aimed at delivery of substantive justice to all parties having legal and equitable interest in the suit property." (Emphasis added)

40. It is important to note that trust is an equitable remedy which is recognized at Article 10 2 (b) of the *Constitution of Kenya, 2010* . This court is bound by the national values and principles of governance under the said Article as can be seen below.

41. Equity having been elevated to a constitutional edict, and in the circumstances of this case, allowing Mburu and his sons to keep the land and the money amounts to unjust enrichment. Equity detests injustice. Going back to the conduct of Mburu and his sons, it is evidence that Mburu inherited 2.5 acres that was burdened with a one acre interest in favour of the respondent, whose purchasers interest crystalized the moment Mburu was confirmed as beneficiary and upon registration of the title in his name. He held one acre in trust for the respondent. The interest transferred to his three sons was therefore encumbered with trust in favour of the respondent to the extent of one acre. By transferring the whole land to his three sons evidently Mburu was keeping the land away from the respondent. The 2nd -4th appellants have not denied that they received an asset that was encumbered with a trust in favour of the respondent. They have admitted and evidence was led that the Respondent occupied the land for 20 years.

42. In the case of *Chase International Investment Corporation and Another v Laxman Keshra and 3 others* [1978]eKLR where the court observed as hereunder;

> "If the circumstances are such as to raise an equity in favour of the Plaintiff and the extent of the equity is known, and in what way it should be satisfied, the Plaintiff is entitled to succeed. As I have said, all three ingredients are satisfied in this case. Lord Mansfield said (in *Moses v Macferlan*) "obliged by the ties of natural justice and equity to refund the money". Anything else would be against conscience. The recovery is based upon an obligation imposed by law which, to use an expression I have employed previously, justice demands, therefore the law requires, to be done. It is a rule of reason. As Lord Atkin said in *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1, 29: When these ghosts of the past stand in the path of justice clanking their mediaeval chains the proper course of the judge is to pass through them undeterred."

43. On my own account, I rely on the equitable principle that where the extent of equity is known, the court will not hesitate to grant.

44. Ground No 1 – Evidence was led by PW3 that he witnessed the payment of 200,000/- on the May 10, 1995 as well as the sum of Kshs 100,000/- on the May 25, 1995. No evidence was led by the appellants to rebut or challenge this position.

Ground No 2 -Whether the documents produced in evidence were admissible in law

45. It is the appellants contention that the respondent produced copies of documents which were relied by the court. I have perused the list of documents produced by the respondent which included the agreement of sale dated the May 10, 1995 in Kikuyu and English translation, certificate of confirmation of grant, letter dated the April 3, 2014. The respondent submitted that the trial court was justified in admitting the documents as the original document could not be traced without occasioning undue delay.

46. Section 35 of the *Evidence Act* provides as follows;

> "In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say-
>
> a. if the maker of the statement either-
>
> i. had personal knowledge of the matters dealt with by the statement; or
>
> ii. where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and
>
> b. if the maker of the statement is called as a witness in the proceedings:
>
> Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable."

47. In the case of *Kiplagat Korir v Dennis Kipngeno Mutai* (2006) eKLR, it was held

> "In this case, the appellant has raised the issue of jurisdiction so much later in the day. Substantial justice frowns upon a party who invokes provisions of the law unduly and at a later stage of a proceeding to take undue advantage against an opponent. In any event, this court would be placed in an awkward situation were it to uphold the argument of the Appellant where it has been called upon to decide on an issue which is raised for the first time on appeal. If this court were to make a determination on the issue of jurisdiction on this appeal as urged by the appellant, this court would not be sitting on appeal, but be acting as a court of first instance. This is because the issue of jurisdiction was not raised before the trial resident magistrate's court. I say no more on that score. I will disallow the grounds of appeal on jurisdiction."

48. Applying the parity of the above decision to this appeal. I have carefully read the record of the trial court and I note that the appellants did not challenge the production and or the admission of the documents. In any event the appellants have not specified which documents should not have been admitted in the list of documents produced by the respondent. The issues now being raised by the appellant were therefore not investigated or tested by the trial court. They were equally not a subject of contest. This court would be converting itself into a court of first instance if it were to determine the issue.

49. With respect to the calling the chief as a witness, it is borne of the record that the court having heard evidence and exercised its discretion gave reasons why the chief was a necessary witness to the suit so as the shed light to the issues in controversy. The appellants did not state any opposition to the calling of this witness. This issue is being raised too late in the day. I have perused the evidence led by the chief and it is not different from the documentary evidence presented by the appellants in evidence. It would appear that the appellants are selective on the evidence of this witness and where it favours them they are content and where it disfavours they want it kept away from the court. I find no ground to fault the learned magistrate on this.

50. Grounds 4, 5 & 6- Refund of purchase monies; The Appellants have faulted the trial court for granting refund of the purchase price when such claim was time barred, the transaction was void *ab initio*. The appellants argued that the respondent was not entitled to refunds on account of long occupation of the property without paying rent. The respondent on the other hand has urged the court to uphold the decision of the trial court. It was submitted that although the sale transaction was void on account of lack of capacity to sell, the respondent should not be left without a remedy seeing that the estate of Mburu devolved to the appellants.

51. Given my holding in this judgment I find that the refund was not time barred; secondly it is fair and equitable that refund be made to prevent unjust enrichment to the appellants. I have carefully evaluated the evidence and I find no fault on the part of the 1st appellant. He played no role in the controversy and in my considered view I found no cause of action against him.

52. The totality of my evaluation is that the trial magistrate arrived at the correct decision by allowing the alternative prayer of refunds. The only exception is that from the 1995 – 2015 the respondent was in occupation of the land when he was evicted/vacated. In the interest of justice I will allow refunds from the date of filing suit until payment in full. Other than that I find no reason to disturb the decision of the trial court.

53. Final orders;

    a. The 2nd - 4th appellants are ordered to refund to the respondent the sum of Kshs 300,000/- together with compounded interest at Court rates from the September 7, 2015 till payment in full.

    b. The 2nd - 4th appellants shall pay the cost of the suit in the lower court as well as this appeal together with interest at court rates until payment in full.

54. Orders accordingly.

DELIVERED, DATED AND SIGNED AT THIKA THIS 15TH DAY OF SEPTEMBER 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms Mathia HB Mr. Gachoka for 1st, 2nd, 3rd and 4th Appellants

Wanjiru Njehia for Respondent

Court Assistant – Phyllis Mwangi