



**Githitu v Nthiga & 2 others (Environment and Land Appeal E064 & E066 of 2023  
(Consolidated)) [2025] KEELC 3747 (KLR) (12 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 3747 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL E064 & E066 OF 2023 (CONSOLIDATED)**

**JA MOGENI, J**

**MAY 12, 2025**

**BETWEEN**

**CHARLES WAITHIMA GITHITU ..... APPELLANT**

**AND**

**MARY WANYAA NTHIGA ..... 1<sup>ST</sup> RESPONDENT**

**MWIHOKO HOUSING COMPANY LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**EQUITY MASTERS LIMITED ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal arising from the ruling of the Senior Principal Magistrates Court Ruiru  
by Honorable Joseph Were delivered on 7th November 2023 in Ruiru MISC ELC 2017/2022)*

**JUDGMENT**

1. The Appellant's appeal highlights the significant issues and ambiguities surrounding land ownership and disputes in Kenya, particularly concerning disputes over land allocation and title. These issues often stem from overlapping claims, irregularities in land allocation, and difficulties in resolving disputes through established channels.
2. A brief account of the history of this litigation as I have gathered from the record is necessary so as to properly contextualize and determine the issues urged by the parties in this appeal in support of their respective positions.
3. At the heart of this appeal is whether the Appellant had established its case against the 1<sup>st</sup> Respondent and if so, whether the learned Senior Principal Magistrate (Joseph Were) erred in entering the Judgment dated 7/11/2023 in the manner he did. Essentially, what I am called upon to do is to reconsider whether the evidence tendered by the Appellant as a whole warranted the suit being determined in his favour as opposed to the 1<sup>st</sup> Respondent as the Principal Magistrate (Joseph Were) of the trial Court did.



4. I do note that whereas the subject matter of this appeal is the suit property Ruiru Kiu Block 4/1725 there are two appeals filed against the decision of the trial Magistrate. These are ELC APPEAL NO. E064 OF 2023 where the Appellant is stated to be Charles Waithima Githithu. Whereas the second is ELC APPEAL NO. E066 of 2023 the Appellant is Equity Masters Limited.
5. Since the suit property is the same and the parties are the same I will deal with it as one appeal touching on the same suit property with two Appellants namely Charles Waithima Githithu and Equity Masters Limited. Further the two Appellants filed joint submissions dated 24/01/2025 and I do not see why it was necessary to file two appeals but be as it may that is the case at hand.
6. The two Appeals are premised on the grounds that the learned Magistrate erred by disregarding the evidence that linked the suit property to being a subdivision of LR No. 10901/31 and that he erred by holding that the suit property belonged to the 1<sup>st</sup> Respondent despite irregular and inconsistent evidence; that the Magistrate misdirected himself by requiring that the Appellant should have conducted further due diligence in 2011 at the time the 1<sup>st</sup> Respondent was acquiring the suit property yet the Appellant had acquired the same in 2010. That the Magistrate erred by finding for the 1<sup>st</sup> Respondent as the proprietor of the suit property yet no witness testified in her favour, not even the vendor, Raphael Mworira who sold her the suit property corroborated her evidence and the Magistrate filled in the gaps for the 1<sup>st</sup> Respondent.
7. The Appeal is further grounded on the fact that the Magistrate erred in failing to determine the issues in dispute on merit and showing outright bias to the case of the 1<sup>st</sup> Respondent.
8. That the learned Magistrate erred by dismissing the 3<sup>rd</sup> Respondent's Counter-claim and that the learned Magistrate entertained extraneous issues in its Judgment which were not pleaded by either party.
9. It is the Appellants submissions that the Court erred by holding that the 1<sup>st</sup> Respondent is the suit proprietor yet she has no title to the suit property thus going contra to the provisions of Section 26 and 24 of the Land Act.
10. As already intimated the parties canvassed the Appeals by way of written submissions. The Appellants choosing to file joint written submissions and as stated at paragraph 3 of the submissions the Appellant and the 3<sup>rd</sup> Respondent in ELCA E066 of 2023 collectively submitted on the Grounds of Appeal and contended that there is no traceable root of title by the 1<sup>st</sup> Respondent since the 3<sup>rd</sup> Respondent and Appellant in ELCA No. E066 of 2023 acquired the suit property on 13/08/2009.
11. The 1<sup>st</sup> Respondent filed their submissions dated 6/02/2025. The gist of their submissions is that the trial Court's assertion about a dispute between Mboi Kamiti Farmers Limited and Mwioko Housing was indeed an issue as was even evidenced on pages 126-128 of the Record of Appeal. Further that during trial this matter was brought out as having necessitated the investigation that was carried out by the DCI
12. The 1<sup>st</sup> Respondent contends that the Appellant could not prove his root of title since he produced no documents to support his claim of having purchased the suit property in 2010. On the part of Equity Master they stated that they bought the suit property in 2009 and disposed the same to the 3<sup>rd</sup> Respondent who is the Appellant in ELCA E064 of 2023 in 2009. Yet in the witness statement filed by the Appellant in ELCA E066 of 2023, they aver to have sold the suit property to the 3<sup>rd</sup> Respondent in 2011.



13. That the 3<sup>rd</sup> Respondent filed a supplementary witness statement and now stated that it gifted the suit property on 21/06/2023 to 3<sup>rd</sup> Respondent as a payment in kind for legal services provided to the Appellant.
14. The general rule of law is that whoever desires a Court to enter Judgment with respect to any legal right or liability on the basis of facts which he/she asserts to exist is required to prove those facts. In other words, as per the well-known aphorism, 'he who asserts must prove.' See Sections 107 & 108 of the [Evidence Act](#) and Jennifer Nyambura Kamau vs. Humphrey Mbaka Nandi [2013] eKLR.
15. The centrality of evidence in any case cannot be gainsaid and was succinctly appreciated by this Court in Nation Media Group vs. Jakayo Midiwo [2018] eKLR as follows:

“On the other hand, evidence is the cornerstone of any trial. Cases are won or lost on evidence presented and the applicable laws. That is why a whole statute was enacted, the [Evidence Act](#), to provide for both the standard and burden of proof in a trial.”
16. Did the Appellant’s evidence meet the requisite threshold of establishing its case? The answer to this question lies with the facts and evidence before the trial Court.
17. The Appeal is premised on the grounds that the learned Magistrate erred by holding in favour of the 1<sup>st</sup> Respondent despite irregular and inconsistent evidence. That the Magistrate erred by failing to appreciate that the suit property was a subdivision of LR No. 10901/31 and the evidence of the 1<sup>st</sup> Respondent was fundamentally of a distinct plot No. 1293 being a subdivision of LR No. 10901/31.
18. I have considered the submissions that were filed by the parties.

### **Analysis and Findings**

19. This being a first Appeal, this Court is supposed to evaluate the evidence that was produced in the lower Court, while reminding itself that it did not have the opportunity of seeing and hearing witnesses.
20. The principles which guide a first Appellate Court were summarized in the case of *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123 at P.126 as follows:

“... Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. In particular, this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression on the demeanor of a witness is inconsistent with the evidence in the case generally.”
21. Similarly, in the case of *Peters v Sunday Post Ltd* [1958] EA 424 Sir Kenneth O’ Connor, P. rendered the applicable principles as follows:

“... It is strong thing for an appellate Court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate Court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate Court might itself have come to a different conclusion ...”



22. In the same case, Sir Kenneth O'Connor quoted Viscount Simon, L.C in *Watt v Thomas* [1947] A.C. 424 at page 429 – 430 as follows:

“ My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate Court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the class of cases in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate Court has, of Court, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate Court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a Tribunal which saw and heard the witnesses, the appellate Court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other Tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to Courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.”

23. In the case of *Kapsiran Clan v Kasagur Clan* [2018] eKLR my brother Ombwayo J summarized the applicable principles as follows: “
- a. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
  - b. In reconsidering and re-evaluating the evidence, the first appellate Court must bear in mind and give due allowance to the fact that the trial Court had the advantage of seeing and hearing the witnesses testify before her; and
  - c. It is not open to the first appellate Court to review the findings of a trial Court simply because it would have reached different results if it were hearing the matter for the first time.
24. In the Amended Plaintiff filed in the lower Court, the Plaintiff, who is the 1<sup>st</sup> Respondent herein, averred that she is the registered owner of parcel of land number LR Ruiru Kiu/Block 4/1725 having bought it from Raphael Mworira a member of Mwihoko Scheme at Kesh 400,000 and paid the 1<sup>st</sup> instalment on 1/06/2011 and the 2<sup>nd</sup> instalment in July 2011.
25. The 1<sup>st</sup> Respondent averred in the Plaintiff that she lived on the suit property from July 2011 and lived peacefully on it until 2016 when a note was dropped at her premises stating that she needed to vacate. That she reported to Mwihoko Police Station and she was directed to report to the Chief. That despite the Appellant (Defendant) being asked to report to the Police and Chief he never showed up.
26. On his part, the Appellant (Defendant) produced a copy of the Sale Agreement dated 13/08/2009 between Mboi Kamiti and Equity Masters Limited the Third Party which was for consideration of Kesh 6,000,000 and the purchaser was to take possession after paying the Kesh 6,000,000. The purchase paid kesh 2,000,000 as a down payment. He also produced a letter from Ministry of Lands



- to Equity Masters dated 10/06/2010 which sought to allocate the land to Equity Masters on condition that Equity Masters formally accepts the offer and fulfils conditions therein.
27. What is not clear is how Mboi Kamiti (not parties to the suit) entered into a Sale Agreement with Equity Masters for sale of land LR No. 10901/31 from which the suit property LR Ruiru Kiu/Block 4/1725 was a subdivision from. Then again the Ministry of Lands offered the same subdivision to Equity Masters (Third Party herein) on 10/06/2010. The Agreement for Sale between Equity Master and the Appellant is dated 17/12/2012.
  28. From the Agreement there is no indication that the Appellant paid for the purchase price, no indication of payment of stamp premium payment, there was no receipt produced to show that this payment was made. The Appellant claims that this payment was in lieu of legal services offered by the Appellant to the Equity Master – Third Party. There was no evidence produced to support the claim of payment in lieu such as a fee note or even letter from the Company stating so.
  29. Equity Master being a Company did not produce a CR12 to support their claim of having transferred the land to the Appellant in lieu of payment of legal fees. Infact the testimony of Alexander Kungu alias Alex Maina contradicts the information provided in the Sale Agreement. In his testimony in Court he stated that the 2<sup>nd</sup> Defendant (Appellant herein) was supposed to buy three plots from the Company but the Sale Agreement referred to one plot only and that he paid a downpayment of Kesh 200,000. Yet while testifying in Court he stated that the 2<sup>nd</sup> Defendant paid Ksh 1,000,000. So therefore how much exactly did he pay and for how many plots?
  30. From the record, the 1<sup>st</sup> Respondent (Plaintiff) bought the suit property in July 2011 from Raphael Mworira who is a member of Mwihoko Housing Company. The letter from Mwihoko dated 29/09/2022 confirmed that the 1<sup>st</sup> Respondent was the proprietor of the suit property. She testified to have lived peacefully till 2016 when a note was dropped at her house and she reported the incident to Mwihoko Police and they were referred to the Chief but the Defendant did not show up.
  31. The Appellant contends learned Magistrate erred in his finding. However I note that in his Judgment, the learned Magistrate held, and rightly so, that the only evidence that the Appellant produced to show that the disputed land belonged to him is the Transfer of Interest. I have scrutinized the said transfer and noted that it is undated at the same time it is not registered at the Land Registry. I have already stated that there is no Company Resolution accompanying the document to show that the Company resolved to pay the Appellant fees through the gifting him with the land. Again there is no fee note produced in Court. Infact the Lawyer who drafted the Sale Agreement is recorded as Meshack Okoth and so it is not clear what the 2<sup>nd</sup> Defendant was being paid if at all.
  32. These inconsistencies cast serious doubts on the validity of the Appellant's title raising pertinent questions on the legality of its acquisition both in terms of compliance with the law and procedure.
  33. Infact, the Sale Agreement itself is dated 17/12/2012 whereas the 1<sup>st</sup> Respondent's Agreement is for July 2011. If not for anything else then the 1<sup>st</sup> Respondent was already the proprietor of the suit property and it was not available for gifting to the 2<sup>nd</sup> Respondent by Equity Master – Third Party.
  34. The learned Magistrate further correctly held that the Appellants did not prove the allegations that the 1<sup>st</sup> Respondent had procured the suit property fraudulently.
  35. In my opinion, the trial Court correctly analysed the evidence before it and found in favour of the 1<sup>st</sup> Respondent. I do not find any valid ground or evidence to entitle me to set aside the Judgment of the lower Court.



36. On the issue of costs, it is trite law that costs follow the event and since I find no merit in this Appeal and accordingly I award costs to the 1<sup>st</sup> Respondent.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 12<sup>TH</sup> DAY OF MAY, 2025**

.....

**MOGENI J**

**JUDGE**

In the Presence of:-

Mr. Kinyua for the Appellant

1<sup>st</sup> and 2<sup>nd</sup> Respondents – Absent

Mr. Nakhone for the 3<sup>rd</sup> Respondent

Mr. Melita - Court Assistant

