



REPUBLIC OF KENYA



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**Murimi v David & 2 others (Environment and Land Appeal
E066 of 2022) [2025] KEELC 3883 (KLR) (12 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 3883 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E066 OF 2022**

BM EBOSO, J

MAY 12, 2025

BETWEEN

LILIES WANJIKU MURIMI APPELLANT

AND

ELIZABETH WANGUI DAVID 1ST RESPONDENT

MICHAEL KUNG’U NGUGI 2ND RESPONDENT

DISTRICT LAND REGISTRAR, THIKA 3RD RESPONDENT

*(Being an appeal against the Judgment of Hon. C.A Atieno - Omondi,
Senior Principal Magistrate, delivered on 30/6/2022 in Ruiru Senior
Principal Magistrate Court Miscellaneous Civil [E & L] Case No. 19 of 2019)*

JUDGMENT

Introduction.

1. This appeal challenges the Judgment rendered on 30/6/2022 by the senior Principal Magistrate Court at Ruiru [C A Otieno - Omondi, SPM], in Ruiru SPMC Misc Civil (E & L) Case No. 19 of 2019. The appellant, Lilies Wanjiku Murimi, was the defendant in the said suit. The 1st respondent, Elizabeth Wangui David, was the plaintiff in the suit. The 2nd and 3rd respondents in this appeal were the 1st third party and the 2nd third party, respectively. Two of the key issues that arose for determination in the trial court were: (i) Whether at all material times the 1st respondent owned Ruiru/Mugutha Block 1/1XX7 [the suit land]; and (ii) Whether the 1st respondent was the Elizabeth Wambui David who was alleged to have sold the suit land to the appellant in 2007. Those are some of the key issues that fall for determination in this first appeal. Before I analyze and dispose all the issues that fall for determination, I will briefly outline a brief background to the appeal and summarize the parties’ respective submissions.



Background.

2. The 1st respondent initiated the suit in the lower court through a plaint dated 15/10/2019. The plaint was subsequently amended on 15/10/2020. She prayed for a permanent injunction restraining the appellant against entering onto, remaining on, selling, offering for sale, charging, leasing, transferring or otherwise alienating or dealing with the suit land without her consent. She also sought costs of the suit. Her case was that she was the lawful allottee and the legitimate owner of the suit land by dint of her being a shareholder of Nyakinyua Investment Limited [“the land company”] holding share certificate number 5121, plot ownership certificate number 3XX6, and ballot card number 1XX7. She contended that upon being allotted the suit land by the land company through balloting, she was registered as the proprietor of the land. It was her case that the appellant trespassed onto the suit land in 2018 and erected temporary structures on the land.
3. The appellant contested the 1st respondent’s claim and made a counterclaim against her through a defence and counterclaim dated 13/11/2020. The appellant denied the allegation that the 1st respondent owned the suit land at all material times. As an alternative defence, the appellant contended that the 1st respondent sold the suit land to her through a sale agreement dated 17/5/2007. She denied the allegation of trespass on the suit land. As a further alternative defence, the appellant contended that the 1st respondent and her son, Michael Kung’u Ngugi [the 2nd respondent], sold the suit land to her vide a sale agreement dated 17/5/2007 and gave her vacant possession of the land. The appellant added that she had been in uninterrupted possession of the suit land since 17/5/2007.
4. By way of counterclaim, the appellant contended that the 1st respondent fraudulently caused the suit land to be registered in her name [the 1st respondent’s name] in May 2018 while aware that the suit land no longer belonged to her. She itemized various particulars of fraud on part of the 1st respondent.
5. Through the counterclaim, the appellant sought: (i) an order dismissing the 1st respondent’s suit; (ii) a declaration that the suit land belonged to the appellant; (iii) a permanent injunction restraining the 1st respondent against entering into, interfering with, trespassing on, passing herself off as the owner, laying claim to, or transacting on the suit land; (iv) an order compelling the 1st respondent to furnish her [the appellant] with “correct completion documents” to enable the transfer of the suit land from the 1st respondent to the appellant in the records of Nyakinyua Investments Limited; and (v) an order decreeing the Land Registrar to cancel the registration of the 1st respondent as proprietor of the suit land and register the appellant as proprietor of the land. The 1st respondent joined issues on the defence and denied the allegations in the counterclaim.
6. Michael Kung’u Ngugi (the 2nd respondent) was added to the suit as a 1st third party in 2021 through a third-party notice dated 20/2/2021. Through the third party notice, the appellant sought indemnity against the 2nd respondent. The appellant alleged that the 2nd respondent had presented to her falsified and/or incorrect documents relating to the identity card number of the 1st respondent and the original certificate from Nyakinyua Investments Limited. The appellant further contended that the 2nd respondent conspired to defraud her in the land transaction, adding that the 2nd respondent uttered falsified documents as proof of identity and prima facie ownership of the suit land by the 1st respondent. He contended that the 2nd respondent failed, neglected and/or refused to “rectify the error and/or illegality”.
7. In response to the third party notice, the 2nd respondent filed a defence dated 22/4/2021. His case in the trial court was that he had never met the appellant prior to the filing of the suit in the lower court, and that he had never presented to the appellant any document belonging to Nyakinyua Investments Limited with the aim of selling to her any interest in the suit land. The 2nd respondent further



contended that he was not privy to the agreement dated 17/5/2007 which the appellant was waving and relying on. He denied receiving any money from the appellant as purchase price for the suit land.

8. The Land Registrar [the 3rd respondent in this appeal] was similarly joined to the suit through a third-party notice dated 20/2/2021. He filed a defence dated 17/5/2021. He contested the plea for indemnity. His case in the trial court was that the land register [the green card] relating to the suit land was opened on 23/5/2018 and the land was registered in the name of Nyakinyua Investments Ltd on the same day. On the same day, the suit land was registered in the name of the 1st respondent on the application of M/s Nyakinyua Investments Ltd who were the subdivision scheme owners. On 14/8/2018, the DCIO caused a restriction to be registered against the title. The Land Registrar contended that he relied on documents provided by Nyakinyua Investments Ltd [“the subdivision scheme owner”] to register the suit land and to issue a title deed to the 1st respondent, adding that the registration was done within the Land Registrar’s mandate and within the relevant statutory provisions. The 3rd respondent’s case was that the records in its custody showed that the 1st respondent was the registered proprietor of the suit land.
9. Upon conclusion of trial and upon consideration of submissions presented by the parties, the trial court rendered the impugned judgment on 30/6/2022 and issued the following verbatim disposal orders:
 - i. “An order issues for permanent injunction restraining the defendant from entering or remaining upon the suit property being Ruiru/Mugutha Block 1/1XX7 or from selling, offering for sale, charging, leasing, transferring or otherwise alienating or dealing with the suit premises without the consent of the plaintiff. This order is to take effect after the expiry of 45 days from today to allow the defendant time to vacate the suit property being Ruiru/Mugutha Block 1/1XX7.
 - ii. The plaintiff will have costs of the suit.
 - iii. Counterclaim is dismissed with each party bearing their own costs.
 - iv. The claim against the 1st third party is dismissed with each party bearing their own costs.
 - v. The claim against the 2nd third party is dismissed with each party bearing their own costs.”

Appeal.

10. Aggrieved by the Judgment of the trial court, the appellant brought this appeal through a memorandum of appeal dated 21/7/2022, advancing the following eight verbatim grounds:
 1. The learned trial magistrate erred in fact and in law by ignoring the evidence of payment to the 1st interested party (sic) for the suit land whereby the defendant (sic) was introduced to the plaintiff by the 1st interested party (sic).
 2. The learned trial magistrate erred in law and in fact in failing to appreciate the position of the defendant as a bona fide purchaser for value.
 3. The learned trial magistrate erred in law and in fact in failing to appreciate the misrepresentation by the plaintiff through the 1st third party that the subject matter had not been sold to the defendant while obtaining the certificate of title from the Lands Office.



4. The learned trial magistrate failed to appreciate that the plaintiff had met with the defendant's husband over the sale of the suit land, hence a clear indication that the plaintiff was willing to sell.
 5. The learned trial magistrate failed to appreciate that the plaintiff admitted to having given the 1st third-party agency powers by handing over the documents to him and allowing him to deal with the suit land.
 6. The learned trial magistrate erred in fact and in law in holding that the entry in the green card in the name of Elizabeth Wambui David was an error yet there was a national identity card forming part of the documents by the 2nd third party.
 7. The learned trial magistrate erred in fact and in law in ignoring the existence of criminal proceedings against the 1st third party relating to the subject matter.
 8. The learned trial magistrate erred in appreciating the 1st third party's evidence that the monies received were for the purposes of delivering doors as being accurate despite the same not being supported by any documentary evidence.
11. The appellant urged this Court to: (i) set aside the Judgment and orders of the trial court made on 30/6/2022; (ii) dismiss the 1st respondent's suit; and (iii) allow the appellant's counterclaim.

Appellant's Submissions.

12. The appeal was canvassed through written submissions dated 13/6/2024, filed by M/s Wanjohi Gachie & Company Advocates. Counsel for the appellant identified the following as the four issues that fell for determination in the appeal: (i) Whether the 1st respondent proved that there was no nexus between her [Elizabeth Wangui David] and Elizabeth Wambui David; (ii) Whether the appellant was entitled to the parcel of land known as Ruiru/Mugutha Block 1/1XX7 by dint of adverse possession; (iii) Whether the 1st and 2nd respondents conspired to defraud the appellant; and (iv) Whether the 2nd respondent was liable to compensate the appellant.
13. On whether the 1st respondent proved that there was no nexus between Elizabeth Wangui David and Elizabeth Wambui David, counsel faulted the 1st respondent for producing conflicting documents in support of her claim to the suit property. Counsel submitted that the title to the suit property produced by the 1st respondent was in her name while the official search dated 26/11/2018 was in the name of Elizabeth Wangui David. Counsel further submitted that the green card produced by the 3rd respondent indicated that Nyakinyua Investment Limited transferred the suit property to Elizabeth Wambui David. Counsel argued that the evidence showed that either the 1st respondent and Elizabeth Wambui David were the same person or that the two, together with the 2nd respondent, conspired to defraud the appellant. Counsel further argued that the 1st and 2nd respondents sold to the appellant the suit land, denoted by certificate number 4168 issued by Nyakinyua Investment Limited. Counsel added that the 1st and 2nd respondents thereafter procured title deed number Ruiru/Mugutha Block 1/1XX7 to defeat the appellant's interest in the suit land.
14. On whether the appellant was entitled to the parcel of land known as Ruiru/Mugutha Block 1/1XX7 by dint of adverse possession, counsel contended that the appellant took possession of the suit land in 2007 immediately after entering into an agreement dated 17/5/2007 with Elizabeth Wambui David. Counsel further contended that the appellant made developments on the suit land and enjoyed quiet possession until 2021(sic) when the 1st respondent filed the suit at the trial court. Counsel argued that the appellant having been in continuous and uninterrupted possession of the suit property from 2007 to 2021, she was entitled to the suit property by dint of the doctrine of adverse possession. Counsel



relied on Section 7 of the Limitations of Actions and the decision in the case of *Maweu vs Liu Ranching and Farming Cooperative Society* [1985] eKLR.

15. On whether the 1st and 2nd respondents conspired to defraud the appellant, counsel contended that the 1st respondent and Elizabeth Wambui David were either the same person or the two conspired to defraud the appellant given that both the 1st and the 2nd respondents stated that they were mother and son. Counsel further argued that prior to entering into the sale agreement with Elizabeth Wambui David, the appellant conducted due diligence at Nyakinyua Investment Limited and also confirmed through the documents presented by the 2nd respondent that the suit property belonged to Elizabeth Wambui David. Counsel added that upon Elizabeth Wambui David failing to transfer the suit property to the appellant, the appellant followed up with the 2nd respondent who informed her that the documents had an error which was being rectified. Counsel argued that it was at that point that the 1st and 2nd respondents colluded to have the name in the title read “Wangui” instead of “Wambui”.
16. On whether the 2nd respondent was liable to compensate the appellant, counsel submitted that it was the 2nd respondent who introduced her to Elizabeth Wambui David and who received part of the purchase price. Counsel faulted the trial court for finding that the payment received by the 2nd respondent was for doors delivered even though the 2nd respondent did not adduce any proof of the same. Counsel further submitted that the 2nd respondent having introduced the appellant to Elizabeth Wambui David and having acknowledged receiving some money from the appellant, he was liable to compensate the appellant for the loss incurred if the Court finds that the sale agreement was invalid. In conclusion, counsel urged this court to allow the appeal and set aside the decision of the trial court.

1st Respondent’s Submissions.

17. The 1st respondent opposed the appeal through written submissions dated 30/10/2024, filed by Ngure Mbugua & Company Advocates. The 1st respondent’s counsel submitted on each of the grounds in the memorandum of appeal. On whether the learned trial magistrate erred in fact and in law by ignoring the evidence of payment to the 2nd respondent after the appellant was introduced to the 1st respondent by the 2nd respondent, counsel submitted that the trial magistrate was right in finding that the 1st respondent never met nor sold the suit property to the appellant and that the appellant had failed to prove her claim against the 2nd respondent. Counsel further submitted that during trial, the 1st respondent demonstrated how she acquired ownership of the suit property from Nyakinyua Investments Limited. Counsel added that the 1st respondent produced a title deed to the suit land issued in her name.
18. On whether the learned trial magistrate erred in law and in fact in failing to appreciate the position of the appellant as a bona fide purchaser for value, counsel submitted that the trial court was right in finding that the appellant was not a bona fide purchaser for value. Counsel added that the learned magistrate could not be faulted on her finding that the appellant was not a legitimate and bona fide owner of the suit property because the appellant purchased the suit property from one Elizabeth Wambui David, a person who was not the owner of the suit land.
19. On the allegation that the learned trial magistrate erred in law and in fact in failing to appreciate the misrepresentation by the 1st respondent through the 2nd respondent that the suit land had not been sold to the appellant at the time of obtaining the certificate of title from the Lands Office, counsel contended that the appellant did not prove the particulars of fraud against the 1st respondent. Counsel further contended that the learned magistrate could not be faulted for finding that the appellant had not proved her case because the finding was based on the evidence before court. Counsel argued that the appellant in her counter-claim against the 1st respondent merely alleged fraud on part of the 1st respondent but failed to strictly prove her allegations that the documents used by the 1st respondent



to effect the transfer of the suit property into her name were forgeries. Counsel further argued that the appellant did not meet the standard of proof required as defined by the Court of Appeal in *Kinyanjui Kamau vs George Kamau* [2015] eKLR, adding that the appellant failed to discharge the burden of proof as per Section 107 of the *Evidence Act*. Counsel added that the appellant, by her own admission, conceded that she failed to confirm from Nyakinyua Investment Limited that ownership certificate number 4168 which was in the name of Elizabeth Wambui David was in their records.

20. On the allegation that the learned trial magistrate failed to appreciate that the 1st respondent had met with the appellant's husband over the sale of the suit land, hence a clear indication that the 1st respondent was willing to sell the suit land, counsel submitted that the appellant entered into an agreement with one Elizabeth Wambui David and not the 1st respondent. Counsel further submitted that the 1st respondent's husband was never a party to the suit at the lower court.
21. On the allegation that the learned trial magistrate failed to appreciate that the 1st respondent admitted to having given the 2nd respondent agency powers by handing over land documents to him to deal with the suit land, counsel submitted that the learned magistrate was right in finding that there was no agency relationship between the 1st respondent and the 2nd respondent with respect to the suit property. Counsel faulted the appellant for not producing any evidence showing that the 1st respondent authorized the 2nd respondent or any other person to act on her behalf to sell the suit property. Counsel added that the 2nd respondent only assisted the 1st respondent who is his mother in processing title documents for the suit property.
22. On whether the learned trial magistrate erred in fact and in law in holding that the entry in the green card in the name of Elizabeth Wambui David was an error yet there was a national identity card forming part of the documents by the 3rd respondent, counsel submitted that the learned magistrate was right in fact and law in holding that the entry in the extract of the green card in the name of Elizabeth Wambui David was an error given that the discrepancies relating to the name "Wangui" and the name "Wambui" were clarified by the 3rd respondent through evidence. Counsel further submitted that the 3rd respondent clarified through testimony that the second name appearing on the green card as "Wambui" instead of "Wangui" was a typographical error. Counsel added that the error could not deny the 1st respondent ownership of the suit parcel.
23. On whether the learned trial magistrate erred in fact and law in ignoring the existence of criminal proceedings against the 2nd respondent relating to the subject matter, counsel submitted that the learned magistrate acknowledged the existence of a criminal case against the 2nd respondent.
24. On whether the learned trial magistrate erred in appreciating the 2nd respondent's evidence that the monies received were for delivery of doors as being accurate despite the same not being supported by any documentary evidence, counsel submitted that the 2nd respondent was not privy to any sale agreement nor did he receive any amount of money with respect to the suit property as alleged by the appellant. In conclusion, counsel urged this court to find that the appellant's appeal lacked merit and proceed to dismiss it and award costs of the appeal to the 1st respondent.

2nd Respondent's Submissions.

25. The 2nd respondent opposed the appeal through written submissions dated 24/9/2024, filed by Kamau Kinga & Company Advocates. Counsel for the 2nd respondent submitted on each of the eight grounds of appeal.
26. On grounds 1 and 3 of the memorandum of appeal, counsel submitted that the appellant's claim against the 2nd respondent was unfounded, noting that the appellant never produced any evidence to prove fraud on part of the 2nd respondent. Counsel submitted that the magistrate rightfully found in



favour of the 2nd respondent because the law clearly states that any allegations of fraud must be proved and not just pleaded. Counsel added that the appellant failed to prove her allegation that she paid the entire purchase price to both the 1st and 2nd respondents.

27. On whether the learned trial magistrate erred in law and fact in failing to appreciate the position of the appellant as a bona fide purchaser for value and on whether the learned trial magistrate erred in fact and law in holding that the entry in the green card bearing the name “Elizabeth Wambui David” was an error yet there was a national identity card forming part of the documents by the 2nd third party, counsel submitted that the appellant failed to prove that she was the owner of the suit property because she failed to demonstrate how she acquired ownership of the land. Counsel further argued that during trial, the 3rd respondent confirmed that the suit property belonged to the 1st respondent and did not belong to Elizabeth Wambui David as alleged by the appellant.
28. On the allegation that the learned trial magistrate failed to appreciate that the 1st respondent had met with the appellant’s husband over the sale of the suit land, hence a clear indication that the 1st respondent was willing to sell the suit land, counsel submitted that the 2nd respondent was neither privy to the alleged agreement by the appellant nor was the appellant’s alleged husband a party to this suit or a signatory to the agreement dated 17/5/2007. Counsel added that the agreement dated 17/5/2007, alleged to have been signed by the 1st respondent, contained a different person’s name.
29. On whether the learned trial magistrate failed to appreciate that the 1st respondent admitted to having given the 2nd respondent agency powers by handing over land documents to him to deal with the suit land, counsel submitted that the learned trial magistrate stated that the appellant failed to prove that the 1st respondent authorized the 2nd respondent or any other person to act on her behalf and sell the suit property to her. Counsel further argued that the 2nd respondent was just assisting his mother [the 1st respondent] during the acquisition of the suit property but he did not act as her agent to sell it on her behalf. Counsel added that the 2nd respondent was not privy to any sale agreement nor did he receive any amount of money from the appellant relating to the alleged sale of the suit property.
30. On whether the learned trial magistrate erred in fact and in law in ignoring the existence of criminal proceedings against the 1st third party relating to the subject matter, counsel submitted that Thika Criminal Case Number 3002 of 2019 was still pending in court. Counsel further submitted that the learned trial magistrate acknowledged existence of the criminal case, adding that the trial court did not ignore it as alleged.
31. In conclusion, counsel submitted that the appellant had not proved her case. Counsel urged this court to dismiss the appeal with costs.

3rd Respondents’ Submissions.

32. The 3rd respondent opposed the appeal through written submissions dated 19/7/2024, filed by Ms Ruth Kerubo, a Senior State Counsel in the Office of the Attorney General. Counsel identified the following as the two issues that fell for determination in the appeal: (i) Whether the appellant is a bona fide purchaser for value; and (ii) Whether the appellant is entitled to the suit property.
33. On whether the appellant is a bona fide purchaser for value, counsel submitted that it was upon the appellant to prove that she was an innocent purchaser for value. Counsel relied on the definition of a bona fide purchaser found in the Black’s Law Dictionary and in the Court of Appeal case of *Martevé Guest House Limited vs Njenga & 3 others* [2022] eKLR where the Court set out the requisite elements for qualification of a party as a bona fide purchaser. Counsel submitted that the appellant failed to meet the qualifications of an innocent purchaser for value.



34. On whether the appellant is entitled to the suit property, counsel submitted that it was the 1st respondent's case that she was the owner of the suit property and that she had the original title to the suit property. Counsel further submitted that in support of the 1st respondent's position, the 3rd respondent confirmed that the 1st respondent was the owner of the suit property, having been issued with a title in the year 2018. Counsel added that the appellant, on the other hand, did not produce evidence to prove that the 1st respondent sold the suit property to her. Counsel relied on Section 26 (1) of the [Land Registration Act](#) No. 3 of 2012 and the cases of *Veronica Waithira Trustee of Inter-Christian Churches & 3 Others vs Kenya National Highways Authority* [2014] eKLR and *Kenya National Highway Authority vs Shalien Masood Mughal & 5 others* [2017] eKLR on the doctrine of the sanctity of title.
35. Counsel contended that the title held by the 1st respondent was protected under Section 26 of the [Land Registration Act](#), 2012 as indefeasible hence the appellant could not claim ownership of the suit property as against the 1st respondent who was the registered owner. In conclusion, counsel submitted that the appellant had not demonstrated that she was entitled to the suit property and as such the trial court did not err in holding that the 1st respondent was the owner of the suit property. Counsel added that the appeal was not only frivolous but an abuse of the court process, and should be dismissed and costs be awarded to the respondents.

Analysis and Determination.

36. The court has read and considered the entire record of the trial court, the record filed in this appeal, the grounds of appeal, and the parties' respective submissions. The appellant's defence and counterclaim in the trial court have been summarized in paragraph 2 of this Judgment. In this appeal, the appellant advanced eight (8) grounds of appeal which have been reproduced verbatim in this Judgment. In her submissions on the appeal, the appellant identified only four (4) issues which have been reproduced in the Judgment. This court is seized of this appeal as a first appellate court.
37. Taking into account the pleadings that the parties presented to the trial court; the grounds of appeal; and the parties' respective submissions, the following are the key issues that fall for determination in the appeal: (i) Whether at all material times the 1st respondent owned land parcel number Ruiru/Mugutha Block 1/1XX7; (ii) Whether the 1st respondent is the "Elizabeth Wambui David" who was alleged to have sold the suit land to the appellant, and if so, whether the appellant acquired a valid ownership interest in the suit land through the sale agreement dated 17/5/2007; (iii) Whether the title held by the 1st respondent was extinguished through adverse possession of the suit land by the appellant; and (iv) Whether the appellant proved the notice/claim for third party indemnification against the 2nd and 3rd respondents. I will be brief in my sequential analysis of the four issues. Before I analyze and dispose the issues, I will outline the principle that guides this court when exercising appellate jurisdiction.
38. The task of a first appellate court was summarized by the Court of Appeal in the case of *Susan Munyi v Keshar 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.



39. 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.”

40. Was the 1st respondent the owner of the suit land at all material times? For clarity, this issue flows from paragraph 3 of the appellant’s defence in which the appellant contended the 1st respondent’s ownership of the suit land at all material times.

41. The 1st respondent identified herself as Elizabeth Wangui David. She sued the appellant using that name. The appellant alleged that she purchased the suit land from one Elizabeth Wambui David [not Elizabeth Wangui David] through a sale agreement dated 17/5/2007. The case of the 1st respondent was that in 2007, she was the beneficial owner of the suit land by dint of having been allocated the suit land by M/s Nyakinua Investment Limited [“the land company”] and by dint of her shareholding in Nyakinuya Investment Limited and by dint of having been issued with share certificate number 5121, plot ownership certificate number 3XX6 and ballot card number 1XX7 by the land company. She contended that plot ownership certificate number 3XX6 and ballot card number 1XX7 denoted the suit land which was subsequently surveyed and registered in the name of Nyakinuya Investments Ltd as land parcel number Ruiru/Mugutha/Block 1/1XX7 (the suit land). Nyakinuya Investment Ltd in turn caused the land to be registered in her name as its lawful allottee within the subdivisions scheme.

42. During trial, the 1st respondent produced the above documents. They all bore the name Elizabeth Wangui David. She also produced receipts issued by Nyakinuya Investments Limited bearing the name Elizabeth Wangui David. Besides the above documentary evidence, she produced her identity card number 4304911 bearing the name Elizabeth Wangui David. She also produced a title deed issued to Elizabeth Wangui David of identity card number 4304911. Her evidence was that she was the legitimate owner of the suit land in May 2007 when the appellant allegedly purchased the suit land from one Elizabeth Wambui David. It was her evidence that her name was Elizabeth Wangui David and she was not the Elizabeth Wambui David who was alleged to have sold the suit land to the appellant.

43. The evidence of the 1st respondent was corroborated by the Land Registrar who testified as DW4. The Land Registrar produced the documents that informed his decision to register the 1st respondent as proprietor of the suit land and issue here with the title deed that she holds. Among the documents which the Land Registrar produced was a clearance letter dated 2/2/2018 through which M/s Nyakinuya Investments Ltd unequivocally confirmed that Elizabeth Wangui David was the owner of the suit land. The suit land is located in a subdivision scheme that is owned by Nyakinuya Investment Ltd. The said company is the custodian of all records relating to the shareholders to whom they allocated land in the subdivision scheme.

44. On her part, in paragraph 3 of her defence, the appellant denied ownership of the suit land by the 1st respondent at all material times. She made the allegation of sale of the suit land to her by the 1st respondent as an alternative to her primary defence. Having contested the 1st respondent’s ownership of the suit land at all material times, it was the duty of the appellant to lead evidence to controvert the evidence which the 1st respondent and the Land Registrar tendered in relation to the 1st respondent’s beneficial ownership and ultimate registered ownership of the suit land. Instead of doing that, during trial, the appellant abandoned her primary defence and took the position that the appellant sold the suit land to her in May 2007 and subsequently conspired with her son to register the suit land in her



- name. In so doing, the appellant indirectly conceded that the 1st respondent was the legitimate owner of the suit land in May 2007.
45. Given the above evidence which was before the trial court, this court comes to the finding that the 1st respondent, Elizabeth Wangui David, proved that she was the beneficial owner of the suit land in May 2007 when the appellant allegedly entered into a sale agreement with one Elizabeth Wambui David. On account of the corroborative evidence of the Land Registrar, the court comes to the finding that the 1st respondent was the legitimate registered proprietor of the suit land in 2019 when the suit giving rise to this appeal was filed. The court agrees with the trial court that capture of the middle name “Wambui” in the land register was a typographical error as clarified by the Land Registrar.
 46. Is the 1st respondent the Elizabeth Wambui David who is alleged to have sold the suit land to the appellant in May 2007? If so, did the appellant acquire a valid ownership interest in the suit land? Despite being aware of the differing identities between the 1st respondent and the vendor with whom she signed the sale agreement dated 17/5/2007, the appellant did not plead in her defence and counterclaim that Elizabeth Wangui David and Elizabeth Wambui David were one and the same person. She raised the issue of common identity during submissions.
 47. The vendor with whom the appellant signed the sale agreement identified herself as Elizabeth Wambui David of identity card number 4425182. The said Elizabeth Wambui David was not sued as a defendant in the counterclaim. She was not physically identified by the appellant during trial.
 48. The advocate who witnessed the signing of the agreement dated 17/5/2007 was not called to identify the vendor who signed the sale agreement identifying herself as Elizabeth Wambui David. During cross-examination, the appellant testified that she did not look at the identity card and the other identification documents of the vendor with whom she signed the sale agreement. It was her evidence that it is her advocate who looked at the documents. She did not, however, lead evidence by the advocate for the purpose of identifying the vendor who identified herself as Elizabeth Wambui David.
 49. The appellant testified during cross-examination that she was certain that the identity card which they were given in relation to Elizabeth Wambui David was fake. She did not lead any evidence to demonstrate that the 1st respondent is the vendor with whom she signed the agreement. The advocate who was given Kshs.200,000/= and allegedly paid out the money in cash as purchase price was not called to identify the vendor to whom he/she paid the cash money.
 50. Given the above evidence, the trial court had no evidence to suggest that the 1st respondent was the Elizabeth Wambui David who was alleged to have signed the sale agreement dated 17/5/2007 and to have received cash sum of Kshs. 200,000 from the appellant.
 51. For the above reasons, it is the finding of this court that the appellant did not prove that the 1st respondent [Elizabeth Wangui David] is the same person as the Elizabeth Wambui David who she alleged sold to her the suit land and received purchase price from her. For the same reasons, it is the finding of the court that the appellant did not acquire a valid ownership interest in the suit land through the sale agreement dated 17/5/2007.
 52. Was the 1st respondent’s title extinguished through adverse possession of the suit land by the appellant? First it is important to observe that subsequent to the impugned decision, the Court of Appeal made a pronouncement to the effect that Magistrate Courts did not have jurisdiction to deal with adverse possession disputes. If not for any other reason, the plea for orders of adverse possession would fail on account of lack of jurisdiction on part of the trial court.
 53. The common law doctrine of adverse possession of land connotes possession which is inconsistent with and in denial of the title of the true owner of the land. In Kenya, the doctrine has been legislated



and is underpinned by Sections 7, 17 and 37 of the *Limitation of Actions Act*. Under the doctrine, the title of the true owner of land is extinguished when an adverse possessor remains in peaceful, open and uninterrupted possession of the land for a period of 12 years. The Court of Appeal interrogated the constitutionality of the doctrine in the context of the current Constitution in *Mtana Lewa V Kahindi Ngala Mwangandi* [2015] eKLR and did not find it to offend the constitutional framework on protection of the right to property.

54. To establish adverse possession, the claimant must prove on a balance of probabilities, that he has had both the factual possession of the land and the requisite intention to possess the land [*animus possidendi*]. Secondly, he must prove that he has used the land without force, without secrecy and without persuasion (*nec vic, nec clam, nec precario*) for the prescribed statutory period of twelve (12) years preceding the initiation of the suit seeking vesting orders. Thirdly, he must demonstrate that the registered/true owner of the land had knowledge [or the actual or constructive means of knowing] that the adverse possessor was in possession of the land. Fourthly, the possession must be continuous; it should not be broken or interrupted.
55. In *Mweu v Kiu Ranching & Farming Co-operative Society Ltd* [1985] KLR 430 the Court of Appeal observed that:

“ Adverse possession is a fact to be observed upon the land. It is not to be seen in the title...”
56. Did the appellant meet the criteria for crystallization of title under the doctrine of adverse possession? The appellant contended in her defence and counterclaim that she had enjoyed quiet possession of the suit land since may 2007. The 1st respondent on her part contended in her defence to the counterclaim that the suit land was vacant from the time she acquired it upto 2018 when the appellant trespassed onto it.
57. The appellant did not lead evidence of any clear manifestation of her factual adverse and exclusive possession of the suit land. There was no photographic evidence of any structural development or any other physical activity that manifested her adverse possession of the land from 2007 to 2018. None of the exhibits produced by the appellant bore evidence of any manifestation of adverse possession of the suit land by the appellant. Consequently, my finding is that the appellant did not establish the essential elements of adverse possession and did not satisfy the criteria for crystallization of title under the doctrine of adverse possession.
58. Did the appellant prove the claim for third party indemnity against the 2nd and 3rd respondents. The third party indemnity claim against the 2nd respondent was anchored on fraud. It was not a claim for an interest in land. It did not relate to environment. The third party claim against the 3rd respondent was founded on negligence. Through the two third party notices, the appellant sought indemnification against the two third parties.
59. The third party claims were destined to meet headwinds for various reasons. First, the trial court was seized of the primary claim and the counterclaim as a magistrate court exercising jurisdiction as an Environment and Land Court under Section 26(3) of the *Environment and Land Court Act* and Section 9 (a) of the *Magistrates’ Courts Act*. It was not seized of the dispute as an ordinary civil magistrate court. Inviting the trial court to adjudicate a claim for indemnification on account of fraud and negligence raised the question of jurisdiction. The appellant had access to the ordinary civil courts that had clear jurisdiction to adjudicate claims for indemnification on account of fraud and negligence.
60. Even if the trial court had jurisdiction, nothing was presented to the trial court in terms of pleadings relating to the quantum that was sought as indemnity. Similarly, nothing was presented in terms of



evidence relating to the indemnity. The trial court had no basis upon which to consider or award indemnity.

61. Equally important, were the trial court to be the proper court to entertain the appellant's claim for indemnity on account of fraud and negligence, a counterclaim under Order 7 rules 8 of the Civil Procedure Rules as read together with Order 7 rule 9 and 10 of the Civil Procedure Rules would have been the appropriate frameworks on which to anchor the two claims if she chose to do so in the same cause. For reasons which only the appellant knew, she elected not to plead a counter-claim against the 2nd and 3rd respondents.
62. For the above reasons, I do not think the appellant was entitled to the orders of indemnification that she sought in the trial court on the platform of third party notices.
63. In light of the above findings, this appeal fails for lack of merit.
64. On costs, there is no proper reason to warrant a departure from the general principle in Section 27 of the Civil Procedure Act – that costs follow the event. Consequently, the appellant shall bear costs of the appeal.

DATED, SIGNED AND DELIVERED AT VIRTUALLY THIS 12TH DAY OF MAY 2025

B M EBOSO [MR]

JUDGE

In the presence of

Ms Waweru for the 2nd respondent

Ms Wambui for the appellant

Mr. Tupet – court assistant

