



Mungai & another v Gikera & 6 others (Environment and Land Appeal E022 of 2024) [2025] KEELC 6409 (KLR) (22 September 2025) (Judgment)

Neutral citation: [2025] KEELC 6409 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E022 OF 2024
JM ONYANGO, J
SEPTEMBER 22, 2025**

BETWEEN

**PETER WAINAINA MUNGAI 1ST APPELLANT
AMBROS MBUGUA KIRUBI 2ND APPELLANT**

AND

**STEVEN MUNENE GIKERA 1ST RESPONDENT
LUCY NJOKI KIMANI 2ND RESPONDENT
LEAH WANJIKU MUORIA 3RD RESPONDENT
GEORGE KIMUNDUI MWAURA 4TH RESPONDENT
NEW GATUNDU MIXED FARMERS LIMITED 5TH RESPONDENT
THE LAND REGISTRAR THIKA 6TH RESPONDENT
THE ATTORNEY GENERAL 7TH RESPONDENT**

(Being an appeal against the Judgment and Decree issued on 25th January 2024 by the Chief Magistrate’s Court at Thika (Hon. M.W Kurumbu P. M) in MCL&E Case No. 178 of 2019)

JUDGMENT

1. This appeal arises from the Judgment of Hon. M.W Kurumbu Principal Magistrate, delivered on 25th January 2024 in Thika Chief Magistrate’s Court E& L Case No. 178 of 2024.
2. In the said case, the 1st, 2nd and 3rd Respondents were the 1st, 2nd and 3rd Plaintiffs while the 1st and the 2nd Appellants were the 3rd and 2nd Defendants. From the record, it emerges that the 1st, 2nd and 3rd Respondents had filed the suit against the Appellants and another party not present in the appeal, claiming that the Appellants had encroached and had started construction on their properties known



as Land Parcel Numbers Juja/Komo Block 2/631 and Juja/Komo Block 2/632 (hereinafter referred to as the suit properties). The Respondents prayed for a declaration that they were legal proprietors of the suit properties and a permanent injunction to restrain the Appellants from encroaching, constructing and in any manner dealing with the suit properties.

3. In his Defence and Counterclaim the 1st Appellant denied the Respondents' claim and stated he was the owner of Land Parcel Number Juja/Komo Block 2/631. He purchased it from one Mary Waithera Muiruri who acquired it from Gatundu Mixed Farmers Company Ltd where she was a member and a holder of a share certificate and ballot number 349. He claimed that the 1st, 2nd and 3rd Respondents had acquired Land Parcel Number Juja/Komo Block 2/631 through fraud. He prayed for a declaration that he was the owner of Land Parcel Number Juja/Komo Block 2/631.
4. In his Defence and Counterclaim the 2nd Appellant denied the Respondents' claim and similarly stated that he was the owner of Land Parcel Number Juja/Komo Block 2/632 having purchased it from one Mary Waithera Muiruri, who acquired it from Gatundu Mixed Farmers Company Ltd where she was a member and a holder of a share certificate and ballot number 349. He claimed that the Respondent had acquired Land Parcel Number Juja/Komo Block 2/632 through fraud. He prayed for a declaration that he was the owner of Land Parcel Number Juja/Komo Block 2/632.
5. After hearing the parties, the trial magistrate found that the 1st, 2nd and 3rd Respondents had proved their case and entered Judgment in their favour and dismissed the Appellants' Counterclaims.
6. Aggrieved by the said Judgment, the Appellants filed this appeal, citing 12 grounds of appeal as follows:
 - i. That the learned trial magistrate erred in law and fact in holding that the 1st, 2nd and 3rd Respondents had proved on a balance of probability that they are the legal proprietors of the suit properties being. LR JUJA/KOMO BLOCK 2/ 631 & 632 (hereinafter the suit properties).
 - ii. That the learned trial magistrate erred in law and in fact in holding that the 1st to 3rd Respondents had proved their case on a balance of probabilities while their evidence was laced with contradictions and improbabilities.
 - iii. That the learned trial magistrate erred in law and fact by taking into consideration that the Appellants were the legitimate allottees of the suit properties from the initial land owner, the 5th respondent.
 - iv. That the learned trial Magistrate erred in law and in fact by finding and holding that the 1st to 3rd Respondents had proved their case on a balance of probabilities when in fact they had obtained the titles in respect of the suit properties in a shroud of illegalities.
 - v. That the learned trial magistrate erred in law and in fact by holding that the documents held by the Appellants were illegitimate yet the 5th Respondent confirmed their legitimacy.
 - vi. That the trial magistrate erred in law and in fact in relying entirely on the discredited evidence of the 1st to 3rd Respondents, thereby arriving at an erroneous Judgment exhibiting serious bias against the Appellants.
 - vii. That the learned trial magistrate erred in law and in fact in disregarding in its entirety the evidence of the Appellants, thereby arriving at an erroneous decision not supported by available evidence.



- viii. That the trial magistrate erred in law and fact in dismissing the counterclaim by the Appellants, which had not been answered to nor Respondent by any of the Respondents, thereby arriving at a wrong decision. (sic)
 - ix. That the learned trial magistrate erred in law and in fact by considering tendered evidence selectively to the prejudice of the Appellants and exhibited actual bias against the Appellants resulting in an erroneous Judgment.
 - x. That the trial learned magistrate erred in law and in fact by finding in favour of the 1st to 3rd Respondents despite overwhelming evidence that they held the titles to the suit property illegitimately.
 - xi. That in view of the circumstances set out herein above, the learned trial magistrate totally misdirected herself in delivering Judgment in favour of the 1st to 3rd Respondents by failing to consider and appreciate the evidence on record as tendered fell short of proving the allegations in the plaint while in fact the counterclaim was proved.
 - xii. That the learned trial magistrate totally misdirected himself in delivering Judgment in favour of the respondent by failing to consider and appreciate the totality of evidence on record.
7. The appeal was canvassed by way of written submissions, and both parties duly complied by filing their respective submissions and lists of authorities.

Appellants' submissions

8. The Appellants filed submissions dated 19th February 2025, through the firm of M/s Wanjiku Kiwara Advocates. Counsel for the Appellants submitted on all the grounds in the Memorandum of Appeal. On grounds 1, 2, 3, 4, 10, 11, and 12, counsel submitted that the trial court erred in holding that the Respondents had proved their case on a balance of probability. Counsel further submitted that where fraud is alleged, the standard of proof is slightly higher than that of a balance of probabilities, and once established by the challenger, it shifts to the holder of the certificate of title. Counsel relied on the decision in the case of *Thuku v Kimani & 2 Others* [2023]eKLR to buttress her submission.
9. Counsel faulted the trial court for failing to consider the root of the 1st, 2nd and 3rd Respondents' title. Counsel contended that it was not in dispute that the suit properties emanated from a subdivision scheme carried out by 5th Respondent. Counsel further faulted the trial court for ignoring and failing to appreciate the letter dated 8th January 2021 issued by the Secretary of New Gatundu Mixed Farmers Co. Ltd addressed to the Thika Land Registrar, confirming that the Appellants were the owners of the suit properties. Counsel argued that while the Appellants produced primary documents of ownership of the suit properties, such as receipts issued by the 5th Respondent, the Respondents only produced the title deed and searches. She added that the title deeds held by the Respondents were not sufficient evidence of proof of ownership of the suit properties. Counsel's position was that they ought to have demonstrated how they acquired the said titles. Counsel relied on the decision in the case of *David Kiptugen vs Commissioner of Lands Nairobi & 4 Others* [2015]eKLR in support of her submission.
10. On grounds 5, 6, 7, 8 and 9, it was her submission that the 5th Respondent, having disowned the title to the suit property issued to the 1st Respondent, which was subsequently held by the 2nd Respondent, the logical conclusion was that the said title was fraudulent. Counsel further argued that even though the 2nd Respondent may not have been privy to the fraud, the title passed to him was incapable of vesting him with a legitimate interest in the suit property. Counsel relied on the decisions in the cases



of Arthi Highway Developers Limited vs West End Butchery Limited & 6 Others [2015]eKLR and Dina Management Limited vs County Government of Mombasa & 5 Others [2023]eKLR.

11. Counsel contended that the 1st, 2nd and 3rd Respondents failed to prove the root of their title, which was confirmation of fraud on their part as pleaded by the Appellants. Counsel further contended that the 1st, 2nd and 3rd Respondents did not file a Defence to the Appellant's Counterclaim. In conclusion, counsel urged this court to allow the appeal as prayed.

1st, 2nd and 3rd Respondents Submissions

12. The 1st, 2nd and 3rd Respondents filed written submissions dated 17th April 2025 through M/s J.W. Wanjohi & Company Advocates. In response to the grounds of appeal, counsel for the 1st, 2nd and 3rd Respondents contended that the 1st, 2nd and 3rd Respondents produced sufficient documentary and oral evidence proving their ownership of the suit property. Counsel added that the Respondents produced certified copies of title deeds, allotment letters and official searches in support of their case.
13. Counsel identified the following three issues for determination: (i) whether the trial court properly evaluated the evidence on record; (ii) whether the trial court erred in ruling in favour of the Respondents; and (iii) whether the Appellants have established grounds for appellate interference.
14. On whether the trial court properly evaluated the evidence on record, counsel relied on the decision in the case of Republic vs Mwalulu & Others [2005]eKLR to submit that a party alleging bias must prove a real likelihood of bias, not mere dissatisfaction with the outcome. Counsel further submitted that the trial court analyzed both oral and documentary evidence before arriving at its decision. Counsel added that the Appellants had not identified any specific evidence that was ignored or improperly considered.
15. On whether the trial court erred in ruling in favour of the Respondents, counsel contended that Section 26(1) of the *Land Registration Act* provides that a certificate of title is prima facie evidence of ownership and can only be challenged on grounds of fraud or illegality. Counsel further contended that the burden of proof in establishing fraud or illegality lies on the party making the allegation. Counsel relied on the decision in the case of Kinyanjui Kamau vs George Kamau [2015]eKLR to buttress his submission. It was his submission that the Appellants did not provide sufficient evidence to prove fraud or illegality.
16. On whether appellate interference was warranted, counsel submitted that an appellate court ought not interfere with a trial court's findings unless there was a misapprehension of evidence or application of wrong legal principles. Counsel relied on the case of Peters vs Sunday Post Ltd [1958] EA 424, where the court held that an appellate court should not substitute its own views unless the trial judge was plainly wrong. Counsel further submitted that the Appellants had not demonstrated any fundamental error in the trial court's decision. He added that the grounds of appeal were an attempt by the Appellants to reargue the case rather than point out genuine errors.
17. In conclusion, counsel denied the allegation that the 1st, 2nd and 3rd Respondents failed to file a defence to the Appellants' counterclaim.

Analysis and Determination

18. This being a first appeal, my primary role as a first appellate court is to re-evaluate, re-assess and re-analyze the evidence on record and then determine whether the conclusions reached by the learned trial magistrate are sound or not and give reasons either way. See the case of Kenya Ports Authority vs Kustron (Kenya) Limited 2000 2EA 212.”



19. Similarly, the principle was espoused in *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, as follows:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. 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 this respect...”

20. In essence, the primary role of this court is not merely to endorse the trial court’s conclusions, but to carefully reassess all the evidence, while recognizing the limitations of relying solely on the written record.

21. Having considered the Memorandum of Appeal, Grounds of Appeal and the entire Record of Appeal, the following issues fall for determination:

- i. Whether the Respondents proved their case to the required standard.
- ii. Whether the Appellants proved their Counterclaim.
- iii. Whether the appeal should be allowed.

22. On whether the Respondents proved their case to the required standard, I shall rely on Section 107 of the *Evidence Act*, CAP 80 Laws of Kenya states that:

“ 107. Burden of proof.

- (1) Whoever desires any court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

23. Additionally, Section 108 and 109 of that same Act provides that:

“ 108. Incidence of burden.

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact.

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

24. The 2nd Respondent testified as PW1 during the trial. She stated that she had the authority to testify on behalf of Splendour Friendship Enterprises, whose proprietors were the 1st, 2nd and 3rd Respondents. She adopted her witness statement in which she stated that they bought 6 plots vide a sale agreement dated 27th August, 2009. She stated that upon payment of the full purchase price, they were issued with the title deeds for the said properties on 27th March, 2010. She added that the Appellants encroached on two out of the said six plots, which were the suit properties.



25. She testified that they reported the dispute to the provincial administration and that her advocate wrote a demand letter. She denied having forged the title documents but admitted that they did not present certified documents to the Land Registrar for registration. She added that they had never been summoned by the Police in respect of the titles.
26. During cross-examination, she stated that she was present during the purchase of the plots and that they conducted due diligence prior to purchase. She further stated that she was not aware that the land was initially owned by New Gatundu Investment Ltd before it was subdivided. She admitted that they did not have a search indicating the 4th Respondent as the owner of the suit properties, the transfer documents from the 4th Respondent to themselves, the stamp duty payment receipt, the application for the LCB consent or the LCB consent. Even though she testified that they paid the 4th Respondent through a bank transfer, she stated that she was not in possession of either the bank statement or the receipt of payment. It was her position that they sued the 4th Defendant because they were advised by the DCI to do so and also because they wanted clarifications from him.
27. In re-examination, the 2nd Respondent stated that she was in possession of the stamp duty application form. She further testified that she had copies of the 4th Defendant's title, signed transfer and bank deposit slips and that she was ready to produce the same.
28. The 1st Appellant testified as DW1. He produced a sale agreement dated 16th May 2011, a ballot card no. 348, a cash deposit slip dated 8th December 2011, and a bundle of 18 receipts. The 1st Appellant adopted his witness statement dated 31st October 2018 as part of his examination-in-chief. His testimony was that he was the legitimate owner of land parcel Juja Komo Block 2/631 (Ballot No. 348), which he purchased from one Mary Waithira Muiruri in 2011. He explained that the land originally belonged to the New Gatundu Mixed Farmers Limited (the 5th Respondent), where the said Mary Waithira Muiruri was a member therefore legitimately in possession of the ballot card.
29. He concluded by alleging that after the purchase and after he had begun cultivating the land, the 1st, 2nd and 3rd Respondents fraudulently acquired a title deed for the same property without his knowledge or consent. He asserted that since his occupation of Land Parcel Number Juja/Komo Block 2/631 in 2011, no one, not even the 1st, 2nd and 3rd Respondents, had attempted to evict him thereof.
30. During cross-examination, he stated that land Ballot Number 348 culminated in title number 631. He reiterated that he bought the land from Mary Waithera Muiruri, paid, but the title was not issued in his name. He confirmed that all the documents in his possession referred to his land as 348. He added that the Respondents obtained title to the suit property fraudulently. It was his position that he did not call Mary Waithera Muiruri as his witness because she was sick but that she could be made available. He identified the 2nd Appellant as his neighbour who laid a claim to land parcel number Juja/Komo Block 2/632.
31. During re-examination, he confirmed that New Gatundu Mixed Farmers Co. and the Registrar of Lands were named as Defendants in his Counterclaim, but noted that they had not responded to the same.
32. He stated that the title deed for land parcel Komo Block 2/631 registered in the names of the 1st, 2nd and 3rd Respondents ought to be cancelled. He insisted that Mary Waithera was the legitimate owner of the original plot (Ballot No. 348, which corresponds to Title No. 631) and that he purchased it from her lawfully and paid the purchase price in the presence of the board members of New Gatundu Mixed Farmers and Land Ltd.



33. He stated that both he and the 2nd Respondent who was the lawful owner of (Title No. 632), were in active use of their land, unlike the 1st, 2nd and 3rd Respondents. In summary, the 1st Appellant concluded by formally requesting the court to grant his counterclaim.
34. The 1st, 2nd and 3rd Respondents sought inter alia a declaration that they were lawful owners of the suit properties. On the other hand, through their Counterclaim, the Appellants stated that they were the lawful owners of the suit properties and sought a similar order declaring them to be the owners of the suit properties. They also sought an order directing the 6th Respondent to rectify the records on the Green Cards to the suit properties by registering them as the owners.
35. The learned trial magistrate identified the following four issues for determination: (i) who is the owner of L.R No. Juja/Komo Block 2/631 and 632 (the suit properties); (ii) Was there fraud in the registration of the 1st, 2nd and 3rd Respondents as the owners of the suit properties; (iii) Are the parties entitled to the orders sought both in the Plaintiff and the Counterclaim; and (iv) Who should bear the cost of the suit and the Counterclaim.
36. On the issue of ownership, the trial court magistrate found that the 1st, 2nd and 3rd Respondents had successfully proved that they were the legal proprietors of the land parcels in question. This conclusion was based on their production of certified title deeds and official searches, which showed they were registered as owners in 2009 and 2010. She noted that the documents presented by the Appellants, including sale agreements and ballot cards from 2011, were unreliable and could not override the 1st, 2nd and 3rd Respondents registered titles, especially since the Appellants' purported seller was not the registered owner at the time of those later sales.
37. On the allegation of fraud the trial magistrate found that the 2nd and 3rd Appellants had failed to prove their allegations of fraud against the 1st, 2nd and 3rd Respondents. She stated that the Appellants did not specify which documents were forged, to whom they were presented, or how they led to the fraudulent issuance of the titles. She relied on Section 26 of the [Land Registration Act](#), which holds that a certificate of title is conclusive evidence of ownership, challengeable only on proof of fraud or illegal acquisition. She found that the Appellants had not met this high threshold of proof. Furthermore, she dismissed a letter from New Gatundu Mixed Farmers Co. Ltd. presented by the Appellants, finding that it carried no legal weight against the 1st, 2nd and 3rd Respondents' official title documents.
38. Consequently, she found that the 1st, 2nd and 3rd Respondents had proved their case on a balance of probability and proceeded to enter Judgment in their favour. She issued a declaration that they are the legal owners of the land and granted a permanent injunction restraining the Appellants from encroaching on or dealing with the properties. She also ordered the Appellants to remove any structures they had erected on the land. Costs were awarded to the 1st, 2nd and 3rd Respondents.
39. The Appellants desire this court to make a finding that they were the lawful proprietors of the suit properties. Based on the evidence on record, I cannot fault the trial magistrate for arriving at her finding that the 1st, 2nd and 3rd Respondents were the lawful owners of the suit properties.
40. Section 26 of the [Land Registration Act](#) provides that:
 - (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except:



- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.
41. In the case of *Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & Another*, Eldoret ELC Case No. 609 B of 2012 Munyao J stated as follows:-
- “...it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.”
42. The 1st, 2nd and 3rd Respondents’ title could not be challenged, except on two specific grounds: (i) fraud or misrepresentation, where the proprietor is proved to be a party to fraud or misrepresentation in acquiring the title and (ii) illegal or corrupt acquisition where the certificate of title was acquired illegally, unprocedurally, or through a corrupt scheme.
43. The Appellants failed to discharge the burden of proof since their evidence that they were the lawful owners of the suit properties fell short of the standard required. The Appellants also failed to prove that the 1st, 2nd and 3rd Respondents acquired the suit properties either fraudulently or illegally.
44. Consequently, it is my finding that there is no sufficient justification to interfere with the decision of the trial magistrate. The upshot is that the appeal lacks merit and it is hereby dismissed with costs.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 22ND DAY OF SEPTEMBER 2025.

.....
J. M. ONYANGO

JUDGE

In the presence of:

- 1. Mr Muthomi appearing alongside Ms Wanjiku for the Appellants
- 2. Mr Wanjohi for the 1st, 2nd & 3rd Respondents

Court Assistant: Hinga

