

**IN THE COURT OF APPEAL
AT NAKURU**

(CORAM: WARSAME, MATIVO & GACHOKA, JJ.A.)

CIVIL APPEAL NO. 11 OF

2020 BETWEEN

STEPHEN NGIGI KIMANI (*Suing as the legal representative of the estate of JOHN KIMANI MUNYAKA*).....**1ST APPELLANT**

STEPHEN KIMANI GACHURI.....**2ND APPELLANT**

AND

HENRY MWANGI WAINAINA.....**RESPONDENT**

(Being an appeal from the judgment and decree of the Environment & Land Court of Kenya at Nyahururu (Oundo, J.) dated 17th December, 2019

in

ELC Suit No. 20 of 2017)

JUDGMENT OF THE COURT

1. The appellants herein have preferred this appeal challenging the decision of the Environment and Land Court (ELC) dated 17th December, 2019. The ELC found that the respondent was the registered proprietor of parcel No. Nyandarua/Melangine/515 (the suit property) and that he was entitled to protection by law against the appellants who

had interfered with his rights and

privileges over the suit property. Consequently, the court entered judgment in favour of the respondent and made the following orders:

- a. The appellants and members of their family, their agents and/or servants do forthwith vacate land parcel No. Nyandarua/Melangine/515 within 60 days and if they fail to so vacate, an order of eviction be issued against them.***
- b. A permanent injunction is hereby issued restraining the appellants, by themselves, their agents and/or servants from entering, cultivating, remaining, trespassing or in any way dealing with LR Nyandarua/Melangine/515.***
- c. General damages for trespass of Kshs. 100,000/=.***
- d. Costs and interests of the suit at court rates.***

2. Basically, the dispute centres on the ownership of LR Nyandarua/Melangine/515. Each party lays claim to the suit property to the exclusion of the other. The appellants' case is that the 1st appellant's father, John Kimani Munyaka (deceased) bought Plot No. 19 Melangine Scheme(now known as Nyandarua/Melangine/514 and Nyandarua/Melangine/515) from Mumbi Kiboi on 16th April,1969 through a valid sale agreement for Kshs. 12,700. They contend that he took possession thereafter, became

the registered proprietor, and

hired the 2nd appellant as a shamba boy to take care of the property.

3. To substantiate this claim, the 1st appellant adduced documentary evidence comprising three key exhibits. First, a general power of attorney executed by Mumbi Kiboi, which appointed John Kimani to act on her behalf and transact all her affairs concerning Plot No. 19 Melangine. Second, a transfer document executed by Mumbi Kiboi in favour of John Kimani dated 3rd March, 1975. Third, a letter from the District Land Adjudication/Settlement Department in Nairobi addressed to the District Land Adjudication/Settlement Officer in Olkalou.
4. The appellants maintained that this official correspondence was particularly significant as it acknowledged and validated the sale transaction between Mumbi and John, evidenced by the payment of stamp duty amounting to Kshs. 140. Notably, the same letter condemned as irregular the subsequent transfer of the land to Kiboi Ng'ang'a, citing that John Kimani did not sign the transfer document due to hospitalization nor was he properly notified of the requirement to execute the

transfer.

5. The appellants further contend that after Mumbi Kiboi died in 1975, her son Kiboi Ng'ang'a filed a succession suit in 1982 and fraudulently obtained title to the property in 1987. They allege that he subsequently appeared on the land, subdivided it and unlawfully disposed of portions thereof to third parties, including the respondent.
6. The respondent claimed that on 24th March 1987, he entered into a seemingly straightforward sale agreement with Kiboi Nganga Waweru (deceased) to purchase 1.21 hectares, carved out from a larger parcel known as Nyandarua/Melangine Plot 19 for Ksh 45,000. It was further agreed that he would clear the outstanding debt of Ksh 28,862.95 owed to the Settlement Fund Trustee (SFT). He obtained the necessary consent from the Land Control Board at Olkalou, and Plot 19 was subsequently subdivided into two distinct parcels: Plot 514 and Plot 515, the latter of which he acquired.
7. The respondent alleges that he paid all required fees, including stamp duty and registration costs, completed the transfer with Kiboi Nganga Waweru, settled on the land and

eventually received a title deed. For over two decades, from 1987 to 2008,

he lived on and worked the land until his peaceful occupation was shattered on 20th February, 2008 when the 2nd appellant entered the land without permission, destroyed the fence, brought his animals to graze on the property, and began cultivating the land as if it were his own.

8. Faced with this aggressive occupation of his property, he sought the intervention of village elders, the assistant chief and law enforcement officers, but these efforts proved unsuccessful. He then sought legal redress and sent demand letters to the appellants, who refused to vacate the property. He subsequently filed the original suit in 2008(Nakuru High Court Civil Case No. 63 of 2008), seeking a declaration that he was the rightful owner of the suit land, injunctive orders against the appellants' trespass, eviction orders and pecuniary relief.
9. The learned trial judge found that the respondent had proved his case on a balance of probabilities, issued the orders as prayed, hence this appeal.
10. The appeal is anchored on a total of 12 grounds which revolve around 4 main issues namely, that the learned judge

erred by:

a) finding Mumbi Kiboi had no title to pass when she entered into the sale agreement with John Kimani Munyaka on 16th April 1969

b) finding that the 1st Respondent was the legal and rightful owner of the suit property

c) Finding that the appellants' occupation constituted trespass

d) Finding that the respondent proved his case on a balance of probabilities.

11. In their submissions filed on 12th April 2024, the appellants assert that the court disregarded crucial evidence including receipts for payment of the purchase price, the application for Land Control Board consent, the internal correspondence within the land adjudication and settlement Department acknowledging that the transfer to Kimani Munyaka was valid, the certificate of consent by Settlement Fund Trustee, and transfer forms provided as evidence.
12. The appellants contend that this documentary evidence and the sale agreement dated 16th April, 1969 adequately proved that John Kimani Munyaka had a valid claim to the suit property as required under Section 97(1) of the Evidence

Act, which mandates that property dispositions be reduced to writing.

13. Citing **Willy Kimutai v Michael Kibet [2018] KECA 573 (KLR)** and **Macharia Mwangi Maina & 87 Others Vs. Davidson Mwangi Kagiri, [2014] eKLR** the appellants emphasized that lack of Control Board consent does not automatically void equitable remedies and controlled transactions that lacked the requisite consent under the Land Control Act could still be enforced under the equitable doctrine of constructive trust, especially in the circumstances of this case where parties had executed a sale agreement, the purchaser had paid the full purchase price and was in actual occupation, the transferring the charge from the Settlement Fund Trustee to John Munyaka.
14. The appellants, therefore, maintain that Mumbi Kiboi created a constructive trust in favour of John Kimani even where the death of both parties prevented the transfer from being effected. The appellants further argue that Kiboi Ngang'a Waweru, knowing of the sale transaction, improperly registered himself as the owner of the suit property and transferred it to the respondent. They submitted that the learned judge therefore made a wrong finding by concluding

that the respondent was registered as proprietor by virtue of law with protected rights.

15. Finally, the appellants argued that they were not trespassers on the suit property as John Kimani Munyaka had legitimately acquired rights to the property through the 1969 sale agreement and had placed the 2nd appellant in occupation, and was only prevented from completing formal registration due to the vendor's death, they could not be deemed trespassers but were innocent purchasers who had entered into a valid land transaction and were successors in interest to those rights. They sought dismissal of the suit and requested that costs follow the event.
16. In response, the respondent detailed his legitimate acquisition of the land through a documented chain of title beginning with his 1987 purchase from Kiboi Nganga Waweru. He obtained proper Land Control Board consent, paid all required fees including settlement of outstanding debts to the Settlement Fund Trustee, and completed all statutory requirements for registration. The land was properly subdivided, with Plot 515 being registered in his name on 28th March 2008 after all legal impediments were resolved, including a case filed by John Kimani Munyaka that

was dismissed for want of prosecution.

This comprehensive compliance with legal requirements stands in stark contrast to the appellants' claimed 1969 transaction, which lacked proper documentation and legal foundation. He maintained that his registration conferred absolute and indefeasible ownership rights under Sections 24, 25, and 26 of the Land Registration Act 2012, which can only be defeated by proof of fraud, illegality, or corruption—none of which the appellants have established.

17. Additionally, the respondent submitted that Mumbi Kiboi had no valid title to transfer to John Kimani Munyaka in 1969, making the appellants' entire claim legally baseless from its foundation. He argued that even if such a transaction had occurred, the appellants were clearly trespassers who had failed to produce any credible evidence challenging his registered title or proving their legal right to occupy the land. The respondent emphasized that the burden of proof lay with the appellants to substantiate their claims, which they had manifestly failed to discharge. We were consequently urged to dismiss the appeal.
18. Being a first appeal, we are mandated under Rule 31 of the

Court of Appeal Rules to re-evaluate the evidence on record
and,

where we deem appropriate, make our own findings. In doing so, we have given deference to the findings of fact by the trial court for the reason that unlike the trial court, we did not see or hear the witnesses. Nevertheless, we are also cognisant that we are empowered to interfere with those findings if they are based on no evidence, or the learned Judge is shown demonstrably to have acted on wrong principles in reaching the findings she did. (**See *Selle vs. Associated Motor Boat Company* [1968] E.A 123.**)

19. This dispute fundamentally concerns the application of the principle that registration confers indefeasible title against competing equitable claims, particularly where those claims are based on incomplete or legally defective transactions. The appellants seek to establish superior rights arising from a constructive trust emanating from the alleged 1969 sale agreement between Mumbi Kiboi and John Kimani Munyaka, while the respondent holds a registered title obtained through his 1987 purchase from Kiboi Nganga Waweru that was registered in 2008, and which title he alleges was acquired through complete legal processes. The resolution of

this appeal

therefore turns upon the correct application of statutory provisions governing indefeasibility of title and whether equitable doctrines such as constructive trust can overcome a registered title in the circumstances of this case.

20. The bedrock principle upon which our land registration system is founded is that registration confers indefeasible title. However, this principle, while representing a constitutional guarantee of security of tenure, is not absolute. As this Court emphasized in **Embakasi Properties Limited & another v Commissioner of Lands & another [2019] eKLR**, although the certificate of title is conclusive evidence that the person named therein as proprietor is the absolute and indefeasible owner, "*there is no guarantee of the title if it is acquired by fraud or misrepresentation or where it has been acquired 'illegally, unprocedurally or through a corrupt scheme'.*"

21. Section 24 of the Land Registration Act 2012 establishes the foundational principle as follows:

"Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges

belonging or appurtenant thereto."

22. Section 26 provides statutory exceptions to indefeasibility as follows:

"The certificate of title issued by the Registrar upon registration 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... and the title of that proprietor shall not be subject to challenge except:

(a) on grounds 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."

23. The appellants base their claim on several grounds: first, that John Kimani Munyaka acquired valid rights through the 1969 sale agreement with Mumbi Kiboi; second, that a constructive trust was created in his favour; and third, that the respondent's subsequent registration was tainted by knowledge of these prior rights. Did the appellants prove these assertions?

24. To answer these questions, we must examine the documentary evidence chronologically. To begin with, it is an undisputed fact that the suit property was originally allocated to Mumbi Kiboi by Settlement Fund Trustee for

purchase through a loan. In the

circumstance, the subsequent ownership of the suit property calls for interrogation of the available documentary evidence.

25. In doing so, we are guided by Sections 107, 108 and 109 of the Evidence Act, which provide as follows:

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.

108. Incidence of burden.

1) 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.

26. From the title provided on record, it is discernable that Nyandarua/Melangine/19 (the original undivided plot) was registered to Settlement Fund Trustee on 1st August 1986; this was the first entry. The second entry shows that on 16th

June

1987, Settlement Fund Trustee discharged its interest to the suit property and transferred the original land to Kiboi Ng'ang'a who was issued with a land certificate, while the third entry indicates that the land was subsequently subdivided into plots

514 and 515, with Kiboi Nganga Waweru registered as proprietor of both parcels and the title was closed.

27. The green card produced for Nyandrua/Melangine/515 by PW3(the Land Registrar) provides an unambiguous documentary history of the property. The entries on this official register tell a compelling story which we summarise below:

Entry No.	Date	Nature of entry	Details
1	13.6.89	KIBOI NG'ANG' A	Registration of Kiboi Nganga Waweru as proprietor following subdivision of Plot 19
2	10.7.89	CAUTION	John Kimani Munyaka registers caution claiming purchaser's interest (less than one month after Entry 1)
3	19.4.95	RESTRICTION	Director of Land Settlement places restriction Ref No. LD/218/19/80
4	19.3.08	ORDER	Court order removing Entry No. 2 (caution) via Nakuru Case No. 229/1998

5	27.3.08	REMOVAL	Removal of Entry No. 3 (restriction) vide a letter Ref No. DSO/NYA/5706/28/VOL.1 from the District Land Adjudication and Settlement Office (DLASO)
----------	---------	----------------	--

6	27.3.08	TRANSFER	Transfer to HENRY MWANGI WAINAINA (the respondent)
7	28.3.08	TITLE DEED	Issuance of title deed to Henry Mwangi Wainaina

28. This documentary evidence establishes three irrefutable facts that weaken the appellants' case: first is a temporal impossibility where Mumbi Kiboi purported to sell the land in 1969, but the land was clearly not registered until 1986, a gap of seventeen (17) years during which no registrable interest existed.

29. Second is her legal incapacity. Even when the land was eventually registered to the Settlement Fund Trustee in 1986, Mumbi Kiboi was not the registered proprietor; consequently, she possessed no legal capacity to transfer registered land. It is undisputed that Mumbi Kiboi never satisfied requirements for Settlement Fund Trustee discharge. As was held by this court in **Boniface Oredo v Wabomba Mukile Civil Appeal No 170 of 1989 (unreported)**, the interest of the Settlement Fund Trustee is really that of a chargee. It lends money for development to persons to whom it has allocated land and the repayment of such money is secured by a charge upon the property.

The

appellants did not provide any proof of payment of the loan advanced.

30. Thirdly, the green card indicates that the succession was resolved and Kiboi Nganga Waweru obtained letters of administration following his mother's death, he acquired title through proper legal succession, and upon discharge of the property by Settlement Fund Trustee he was able to transfer it to the respondent.
31. These documentary facts lead us to an inescapable conclusion grounded in a fundamental principle of law, "*nemo dat quod non habet*", "no one can give what they don't have." In our view, the appellants' entire case rests on shaky ground. They seek to enforce rights arising from a transaction where the vendor possessed nothing to sell and could convey nothing to the purchaser. The appellants have relied on the cases of **Willy Kimutai v Michael Kibet [2018] KECA 573 (KLR)** and **Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri [2014] eKLR** to argue that equitable principles should prevail over the indefeasibility doctrine. While we acknowledge that these

cases recognize the potential application of

constructive trust principles, they are distinguishable from the present case. The doctrine of constructive trust requires, as its foundational premise, a valid and enforceable underlying transaction. In this case, the purported 1969 sale agreement between Mumbi Kiboi and John Kimani Munyaka was void ab initio. A constructive trust cannot arise from a void transaction.

32. Our position is fortified even further by the fact that the documents relied upon by the appellants suffer from fatal procedural defects that undermine their entire case. The transfer document they rely upon admittedly was not stamped, and there is no evidence of Land Control Board consent for the alleged 1969 transaction
33. Again, the appellants' reliance on the internal correspondence from the Director of Land Adjudication and Settlement (DLASO) clearly mischaracterizes the nature and legal effect of such communications. The said DLASO letter addressed to the District Land Adjudication officer Olkalou claims that Mumbi Kiboi properly transferred the plot to John Kimani Munyaka in 1975, with proper witnesses and stamp

duty paid. It further claims that the failure to sign the final documents was due to

John Munyaka's hospitalization and did not invalidate the sale and lastly, called for investigation due to the irregular documentation that resulted in transmission of the land to Kiboi Nganga Waweru as administrator of Mumbi's estate, who after payment of the outstanding loan, bypassed the valid 1975 transfer and received title.

34. In our view, administrative correspondence expressing concerns or raising questions cannot and does not constitute legal proof of an invalid title which requires formal court proceedings and judicial determination. It has not escaped our mind that the appellants did not call any witness from DLASO to testify to the contents of the letters or investigations arising, if any. However, more telling, is the fact that the very same DLASO office that allegedly questioned the validity of transfers subsequently removed the restriction they had placed on the property thereby clearing the path for the respondent's final registration. This administrative reversal by DLASO demonstrates that any concerns they may have had, were ultimately resolved in favour of the respondent's acquisition.

35. We have keenly reassessed the record and there is no scintilla of evidence pointing towards fraud, forgery and misrepresentation in the transfer and registration of title in the name of the respondent. Further still, the cases filed by the parties lend credence to the respondent's title. The proceedings in **Civil Suit 66 of 1990 (Kiboi Ng'ang'a Waweru v Stephen Kimani)** reveal that John Kimani Munyaka admitted in his testimony that he objected to the grant of letters of administration but his application was dismissed. This effectively confirms that Kiboi Waweru was the rightful successor to his mother's estate.
36. In **Nakuru High Court Civil Case No. 229 of 1998, John Kimani Munyaka Vs Kiboi Nganga Waweru**, John Munyaka sought declarations that Kiboi Nganga Waweru had acquired Nyandarua/Melangine/514 and 515 as trustee for him; An order of permanent injunction against Kiboi Nganga Waweru and an order for transfer of both L.R Nyandarua/Melangine/514 and 515 to him. The case was dismissed for want of prosecution on 4th July 2007.

37. The consequences of this dismissal was immediate and far-reaching. It cleared all legal impediments that had prevented the respondent from obtaining clean title, including the removal of cautions and restrictions that John Kimani Munyaka had initiated against the property. More importantly, it allowed the respondent to complete his registration process and obtain the statutory protections that come with registered ownership and ultimately allowed him to file the High Court suit for trespass against the appellants. Even then, the appellants had an opportunity to file a counterclaim to assert the rights asserted in the dismissed Civil Suit 66 of 1990 but they failed to do so, which is telling of their conduct.

38. Having carefully analyzed the convoluted history of this dispute, we painfully find that the learned trial judge correctly evaluated the evidence before her, applied the law and properly came to the correct conclusion. The respondent has established his claim to the suit property through a clear chain of evidence and facts, which stands in stark contrast to the appellants' claim. The appellants arguments cannot

overcome the fundamental defects in the foundation of their case, which we have

highlighted herein above. Legal principles, however elegantly articulated, must be grounded in facts, and the facts in this case simply do not support the appellants' claim.

39. Again, the appellants have failed to establish any fraud, misrepresentation, or illegality that would defeat the respondent's title. The documentary evidence, particularly the green card entries, confirms the proper legal succession from Mumbi Kiboi to her son Kiboi Nganga Waweru, who subsequently transferred the subdivided Plot 515 to the respondent.

40. Consequently, and having exhaustively considered the entire record of appeal and the applicable law, we find no error in the decision of the trial court. Clearly, the trial court considered all areas of the dispute and arrived at the correct conclusion.

41. In the end, we make the following orders:

a) The appeal is dismissed in its entirety with costs to the respondent

b) The judgment and orders of the Environment and Land Court dated 17th December 2019 are hereby confirmed and upheld.

c) The appellants shall vacate the suit

***property within 60 days of this judgment,
failing which***

the respondent may apply for appropriate enforcement orders.

It is so ordered.

Dated and delivered at Nakuru this 21st day of October, 2025.

M. WARSAME

.....
JUDGE OF APPEAL

J. MATIVO

.....
..... **JUDGE OF APPEAL**

M. GACHOKA C.Arb, FCIArb.

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR