

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT ELDORET

ELC APPEAL No. E049 OF 2024

ROSELINE JEPKOECH ELIAZAR **1ST**
APPELLANT

WALTER KIPKEMBOI LAGAT **2ND**
APPELLANT

VERSUS

MELVILLE KIPNGETICH SAMBU
RESPONDENT

(Being an Appeal from the Judgment of Hon. Peter Areri delivered on 24th October, 2024 in ELD CM ELC Case No. E117 of 2022)

JUDGMENT:

1. The Appellants herein filed a suit in the Chief Magistrate's court vide Plaint dated 8th August, 2022 claiming ownership of the parcels of land known as MOI'S BRIDGE/SIRIKWA BLOCK 2(ZIWA)345, 355-361 (the suit properties). The Appellants claimed that the Respondent had trespassed onto their land and they were seeking an order of eviction and a perpetual injunction against the Respondent herein. The Respondent filed his Defence on 4th October, 2022 opposing the Plaintiffs' claims. The case was heard and on 24th October, 2024 the trial court, presided by Hon. Peter Areri (SPM), dismissed the said suit with costs to the Respondent.

2. Being aggrieved by the said judgment, the Appellants filed this appeal on the following grounds set out in their Memorandum of Appeal dated 31st October, 2024:-
 1. The learned trial magistrate erred in law and fact in finding and holding that the Respondent entered the Appellant's Parcel No. **Moi's Bridge/Sirikwa Block 2 (Ziwa)/345** with the Appellant's permissions against the overwhelming evidence that the Respondent was a trespasser.
 2. The learned trial magistrate erred in law and fact that (sic) by failing to find that the Appellants were the registered owners of parcel No. **Moi's Bridge/Sirikwa Block 2(Ziwa)/345** and others and that there was no Agreement of Sale between the Appellants and the Respondent.
 3. The learned trial magistrate erred in law and fact by relying on the evidence of the Respondent that he purchased five (5) Acres from the 1st Appellant's mother-in-law to off-set loan taken by the 1st Appellant.
 4. The learned trial magistrate erred in law and fact by disregarding the proprietary rights of the registered owners as envisaged in **Sections 24, 25(1) and 26** of the Land Registration Act, No. 3 of 2012.
 5. The learned trial magistrate erred in law and fact by disregarding the overwhelming evidence and submissions of the Appellants hence arriving at a wrong decision.
 6. The learned trial magistrate erred in law and fact by arriving at the decision that the Appellants benefited from

the proceeds of sale of five (5) Acres of land without evidence adduced in court.

7. The learned trial magistrate erred in law and fact in relying on the sale Agreement between the Respondent and one **Mary Tabutany** and which the Appellants were not party to and furthermore no indication of parcel number on the Sale Agreement.
3. The Appellants asked that the Appeal be allowed with costs and that the lower court's decision be set aside.

Submissions:

4. The appeal was canvassed by way of written submissions. The Appellants filed their submissions dated 22nd April, 2025 while the Respondent's submissions are dated 16th May, 2025.

Appellant's Submissions:

5. According to the Appellants, the Respondent's evidence was to the effect that he had purchased the land from one Mary Tabutany, who claimed to be the 1st Appellant's mother-in-law. Counsel submitted that the said Mary Tabutany claimed to sell the land to offset a loan she had taken from AFC and defaulted in repaying, and that she is not a party to these proceedings. Counsel submitted that the Appellants did not sell their land, but rather it was sold by a third party who is not the registered owner without the knowledge of the actual registered owners, thus she had no title to pass.
6. Counsel submitted that the Respondent admitted that the Appellants herein were not part of the Sale Agreement and

neither did he pay money to the 1st Appellant. Counsel drew attention to the fact that the Respondent had admitted that he never saw the title deed and he did not know the registered owner, but paid the balance of the purchase price to Chemitei Advocate's Office. Counsel indicated that the Agreement was not prepared by Chemitei Advocate. Counsel further pointed out that the 1st Appellant never took a loan from AFC.

7. In addition, Counsel submitted that the Appellants have been the absolute and registered owners of the suit property since 1995 and are entitled to the rights and privileges of such registration as provided at Sections 24 and 25(1) of the Land Registration Act. That for this reason, Mary Tabutany had no right to sell the suit land or to pass any title, and the sale, if any, is therefore illegal. Counsel relied on **Makueni ELC Case No. 152 of 2017, Elizabeth Ndulu Mathwa vs Joseph Mbiu Muthiani.**
8. Counsel submitted that the Respondent entered the Appellants' land without their consent and that the 1st Appellant was unaware her mother-in-law had sold the land. He asserted that there was no evidence that the 1st Appellant had taken a loan from AFC or that the land was in danger of being auctioned. Counsel submitted that there was also no evidence that the Appellants benefitted from the sale of the 5 Acres of the suit land.
9. Counsel faulted the trial magistrate for finding that the Respondent entered the suit land with the Appellants'

knowledge, and submitted that in any event, knowledge is not consent. Counsel pointed out that upon knowing of the Respondent's entry, they reported the matter to the provincial administration. Counsel argued that the lack of consent is the reason the land was not transferred to the Respondent since 2006. Counsel urged the court to allow the Appeal and set aside the lower court decision as well as order the eviction of the Respondent from the suit land.

Respondent's Submissions:

10. In his submissions, Counsel for the Respondent cited Sections 107 and 109 of the Evidence Act and submitted that the Respondent had proved his case on a balance of probability. Counsel submitted that the Respondent had genuinely entered a Sale agreement with Mary Tabutany to purchase 5 Acres, which he paid for in full to help her settle her loan with AFC. Counsel submits that the 1st Appellant secretly, fraudulently and maliciously had the land registered in her name. Counsel submitted that the 1st Appellant had not adduced any evidence to prove that she had inherited the land from her late husband or how the transfer was done in her favour.
11. It was submitted that the 1st Appellant was aware of the Respondent's purchase of the land, as well as his possession, occupation and use thereof until she made a complaint to the local administration vide letter dated 24th July, 2021. Counsel submitted that there was no evidence to prove the alleged trespass, or impeach the proof of purchase demonstrated by the sale agreement dated 27th June, 2006. Counsel relied on

Bungoma Election Petition No. 4 of 2017, Levi Simiyu Makali vs Koyi John Waluke & 2 Others (2018) eKLR on the shift of the evidential burden, and further submitted that the Respondent's evidence remains standing.

12. Counsel asserted that the 1st Appellant did not reject the money confirmed to have been deposited into her loan account at AFC, or cancel the said transaction. He made reference to an application for orders directing the AFC Branch Manager to avail certified copies to prove the Appellants took a loan facility. Counsel submitted that under Section 26 of the Land Registration Act, a title can be impeached if sufficient evidence is adduced and relied on the case of **Republic vs Chief Land Registrar & 2 Others (2020) eKLR** and **Kassam vs Kassam & 3 Others (2019) eKLR**. Counsel submitted that in the instant suit, the Appellant presented the title deed but failed to show how the land moved from her mother-in-law, to her husband and eventually to herself.
13. Counsel accused the Appellant of laches, arguing that no plausible explanation had been given for the delay in filing the suit. Counsel also raised the issue of acquiescence on the part of the Appellants, claiming that he had always lived on the land, yet the Appellants sat there while he developed and built on the land. Counsel cited **Abigael Baram vs Mwangi Theuri, ELC No. 393 of 2013** and **Court of Appeal Case No. 16 of 2012, Nairobi**. Counsel asked that the Appeal be dismissed with costs to the Respondent.

Analysis and Determination:

14. Having reviewed the Memorandum of Appeal and the Record Appeal, and similarly having considered the written submissions filed by the advocates for the parties herein, the following issues arise for determination: -
- i. Whether the sale agreement and/or transaction between Mary Tabutany and the Respondent was lawful and/or legitimate;*
 - ii. Whether the Respondent acquired a valid title to and in respect of the suit property;*
 - iii. Whether the Appeal is merited;*
 - iv. Who shall bear the costs?*
15. This being a first appeal, the duty of this court as the first appellate court was discussed in the case of **Peter M. Kariuki vs. Attorney General (2014) eKLR** where, the court held as follows: -
- “We have also, as we are duty bound to do as a first appellate court, to reconsider the evidence before the trial court and re-evaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are inconsistent with the evidence.”***
16. This court is therefore tasked with re-evaluating, re-analysing and reconsidering the evidence presented in the trial court afresh, and come up with its own conclusions and determinations but bearing in mind that it had no opportunity to

see the witnesses testify and ought to give due allowance for that.

i. Whether the sale agreement and ensuing transaction between Mary Tabutany and the Respondent was lawful and/or legitimate.

17. Although the Appellants filed suit regarding several of parcels of land, it came out from the hearing that the Respondent is in occupation of MOI'S BRIDGE/SIRIKWA BLOCK 2(ZIWA)345. The Appellants claim is that they are the registered owners of the said parcel of land. The 1st Appellant produced a copy of the Title Deed to the suit property as proof of the said ownership. She also testified that the land had been in her name since 1995. Indeed, the Title Deed produced shows that it was issued on 25th September, 1995.
18. The 1st Appellant testified that she did not know that there was a sale agreement between her mother-in-law, Mary Tabutany, and the Respondent, and added that her mother-in-law had no right to sell her land. She further testified that she was unaware that her mother-in-law had taken a loan that was repaid by the Respondent.
19. On his part, the Respondent testified that he did in fact buy the land from Mary Tabutany and not the 1st Appellant. He produced the Agreements marked DEXb 1(a) and 1(b), which he claimed was drafted by Chemitei Advocate, as proof of the alleged sale. He testified that the land he purchased was Number 345. The Respondent admitted that the plot number was not in the sale

agreement. The Respondent also admitted that he did not conduct due diligence to confirm the owner of the land before purchasing it. The Respondent testified that the dispute had gone before the area chief and the DO.

20. He produced a receipt from the Agricultural Finance Corporation dated 27th June, 2006 for payment of KShs. 179,000/- by Mary Tabutany to the Account of Roseline J. Eliazar. According to the Respondent, Mary Tabutany had told him that she had a loan with AFC and was selling the land to offset it. The Respondent admitted that he never saw the Title to the suit property and could not know who the registered owner was, or when it was so registered in favour of the Appellants. He further testified that he never paid any money to the Appellants.
21. Although the Respondent conceded that he had paid the money to Mary Tabutany before Chemitei Advocate, he insisted that he had bought land from the Appellants. He also admitted that neither 1st nor 2nd Appellants' names were on the sale agreements. The Respondent further testified that Mary Tabutany sold the land to him with the 1st Appellant's consent, although he did not know what the agreement between Mary and Roseline was.
22. The Respondent's second witness was Harun Kipchumba Misoi, who testified that his father sold land to Mary Tabutany. He testified that he went with the Respondent and Mary Tabutany to Chemitei, where they were told that the land had a loan with AFC, and they went to AFC to pay the loan. He confirmed that

there was a dispute between Mary and the 1st Respondent at the D'O office. He could not tell when Mary transferred the land to the 1st Appellant, but speculated that some fraud must have occurred. This witness also confirmed that the Plot number is not in the Agreement.

23. With regards to sale of land, Section 3(3) of the Law of Contract Act, which is reflected at Section 38(1) of the Land Act, provides that:-

3. Certain contracts to be in writing.

(1) ...

(2) ...

(3) No suit shall be brought upon a contract for the disposition of an interest in land—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

24. Section 3(6) of the Law of Contract Act defines the term 'party' to include any agent, auctioneer or advocate duly authorized in writing to act in the absence of the party who has given such authority. It further provides that a signature, in relation to a contract, is an indication that one intends to bind themselves to the contents of the instrument.

25. Pursuant to Section 26(1) of the Land Registration Act, the Title deed is prima facie evidence that the suit property belongs to the Appellants. Since the land by law belongs to the Appellants, any subsequent disposal of that interest could only be done by the Appellants and no other party. Any third party attempting to sell the land could only do so with the consent of the registered owners.
26. Evidently, none of the Appellants signed the Agreement selling the suit land to the Respondent herein. The Respondent has not alleged or even presented any evidence to the effect that the Appellants herein had authorised Mary Tabutany to sell the land on their behalf or otherwise.
27. The lack of consent is made clear by the history of the conflict between the Appellants and the Respondent, which started way back in 2012. There is a letter dated 24th May, 2012 where the District Commissioner, Eldoret West District referred the land dispute between the parties herein to the Area Chief, Ziwa Location for investigation and arbitration. The letter dated 24th July, 2012 from the Chief of Ziwa Location details the Appellants complaint about the Respondent's occupation of the land and directed him to vacate it.
28. In addition, the allegation that Mary Tabutany sold the land to settle a loan that the 1st Appellant had taken from the Agricultural Finance Corporation was not proved. Notably, vide a Notice of Motion Application dated 19th August, 2024 the Defendant sought orders directed at the Branch Manager AFC

Eldoret to produce the loan documents. The application was allowed on 22nd August, 2024 and the order extracted on 7th November, 2024. However, even with the said order, the Respondent has not detailed any steps he took to ensure that he obtained the loan documents and/or presented them before the court.

29. There is no doubt that the appellants never signed the agreement with the Respondent herein. In the absence of any evidence that they authorised the sale of the land by Mary Tabutany, the Appellants cannot be a party to the Agreement. For this reason, the agreement cannot be legal and/or legitimate. Certainly, the said agreement could not bind the Appellants who were not privy to it.

ii. **Whether the Respondent acquired a valid title to and in respect of the suit property.**

30. With regards to ownership and title to land, Section 26(1) of the Land Registration Act provides that:-

26. Certificate of title to be held as conclusive evidence of proprietorship

(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.

31. The Appellants herein have exhibited the title to the suit property with their names appearing as the registered proprietors thereto. Although the Respondent raised allegation that the Appellants obtained registration to the land secretly and fraudulently, he did not present any evidence of these allegations.

32. Furthermore, from the title, the Appellants have owned the land since 1995, way before the agreement of 2006 between the Respondent and Mary Tabutany. Therefore, the Respondent's allegation that the Appellants secretly registered it in their favour is unfounded. In any event, the information regarding the ownership of the land was always available before, during and after the agreement that the Respondent could have found out had he looked for it, yet he chose not to do so.

33. Since Mary Tabutany did not hold a title deed to the suit property, can the Respondent allege to have acquired good title to the suit land? The answer is a clear and resounding no. It is now firmly settled that no one can give that which they do not have. This concept is captured in the common law principle of *nemo dat quod non habet*.

34. In **Onsongo vs Njagi & 2 others (Civil Appeal E008 of 2022) (2024) KEHC 3648 (KLR)**, the court was dealing with sale of a motor vehicle, however, it explained the principle astutely in the following words:-

“26. Moreover, the 1st Respondent was barred from the private law principle of nemo dat quod non habet from selling the motor vehicle since he did not hold the title to the motor vehicle and therefore could not sell it. In Daniel Kiprugut Maiywa vs Rebecca Chepkurgat Maina (2019) eKLR the Honourable Court pronounced itself as follows:-

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

law provides some exceptions to this rule in the following certain circumstances; For example where a person buys the property in good faith believing that the person who sold it to him was the owner or authorized agent of the owner; where the property is sold by a mercantile agent who is in possession of the goods or documents of title; sale by a joint owner who sells the property with the permission of the co-owner or sale by a person in possession of goods or property under a voidable contract.'

27. The Appellant could not benefit from the exceptions above since he did not prove that he carried out a background check to verify the ownership of the motor vehicle or he exercised due diligence. There was no transfer forms signed and he was not given the log book.”

35. Since Mary Tabutany had no good title, or at all, to the suit property, she could not, without the owners' authority or consent, sell and/or confer a better title in the suit property than she had be it to the Respondent or anyone else. The consequence thereof is that the Respondent acquired no valid title over the suit property.

iii. Whether the Appeal is merited

36. The next question is whether, bearing the above findings in mind, the Appeal herein is merited. This court has already found that the Agreement for Sale between Mary Tabutany and the

Respondent was illegal, and further that the Respondent could not acquire any good or valid title from it.

37. As such, it follows that being the registered proprietors, the Appellants are entitled to rights over the land including the right of possession to it. It is immaterial that the Respondent has developed the land, as that fact alone does not strip the Appellants of their rights and interest over the land.
38. The Respondent can have nobody but himself to blame for his failure to conduct due diligence and failing to confirm that Mary Tabutany had authority of the owners to sell the land. Since the Respondent has no title to the suit property, he equally has no right to remain thereon, and it is only just that an order of eviction do issue against him.
39. The Appellants had also sought from the trial court a perpetual injunction against the Respondent. I am guided by the holding of the case of **Kenya Power & Lighting Co. Limited vs Sheriff Molana Habib (2018) eKLR**, where the court stated and held thus:-

“8. ... A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually

restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected.”

40. As already stated, the Respondent has no title over the suit property and no right and/or interest to remain on or further access the suit property. Therefore, the prayer for an order of perpetual injunction against the Respondent and/or anyone claiming under him, is also merited.

41. In the premises, I find that the trial magistrate committed an error of law. For the foregoing reasons, the Appeal herein succeeds and the decision of the lower court is hereby set aside. It is my finding that the Appellants had proved their claim and were entitled to the reliefs sought in the plaint.

iv. Who shall bear the costs?

42. On costs, Section 27(1) of the Civil Procedure Act, Cap 21 provides as follows:-

Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and give all the necessary directions for the purposes aforesaid; and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of those powers;

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise direct.

43. It is therefore well recognised that costs follow the event, meaning that costs are awarded to the successful party. Costs are awarded for purposes of compensating the successful party for the trouble taken in prosecuting or defending a suit.
44. Although Section 27 above gives the Court discretion on the issue of costs, that discretion must be exercised judicially. The court may, however, depart from the general if there is justifiable reason for it. However, should the Court opt not to abide by the general principle, it is required to give reasons for doing so.
45. The Appellants being the successful party in this appeal, and there being no reason to order otherwise, the Appellants will have the costs both of this appeal and in the lower court.

Orders:

46. Accordingly, I find that the Appellants' appeal dated 31st October, 2024 is merited and hereby succeeds. The result is that the judgement of the trial magistrate (Hon. Peter Areri - SPM) delivered on 24th October, 2024 in ELD CM ELC Case No. E117 of 2022 is hereby set aside, and replaced with the following orders:-

- (a) An order directing the Respondent to vacate the suit property within 90 days, failure to which the Appellants shall be at liberty to evict him from the suit property.
- (b) An order directing the O.C.S. Ziwa Sirikwa Police Station to ensure compliance of order (a) above.
- (c) A perpetual injunction is hereby issued, restraining the Respondent by himself, his servants and or agents from ever trespassing or interfering with the Appellants' interests over the suit property.
- (d) The Appellants shall have the costs of the Appeal and the lower court.

47. Orders accordingly.

DATED, SIGNED and DELIVERED virtually at **ELDORET** on this **2ND** day of **OCTOBER, 2025** vide Microsoft Teams.

HON. C. K. YANO
ELC, JUDGE

In the presence of;

No appearance for the Appellants.

Mr. Gichana for Respondent.

Court Assistant - Laban.