

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA**  
**ELCA NO E005 OF 2025**  
**MICHAEL KARIUKI GACHENGA & 6 OTHERS.....APPELLANTS**  
**VERSUS**  
**NAOMI WANGUI KIMUHU & 7**  
**OTHERS.....RESPONDENTS**

*(being an appeal on the judgment delivered on 2<sup>nd</sup> September 2024 by H.O Barasa, Principal Magistrate in Senior Principal Magistrate's Court, Engineer ELC Case No E004 of 2023)*

**JUDGMENT:**

The Appellants filed suit in the Engineer Senior Principal Magistrate's Court on 27/1/2022 being ELC Case No E004 of 2023 where they averred that they were the registered proprietors of the parcels of land known as L.R Nos. NYANDARUA/NJABINI/9187, 9130,9149, 9131, 9132,9165,9150,9151,9163,9164,9137,9186,9167,9168,9134,9152, 9166,9133,9172,9182,9177 and 9191 which were distributed as follows: -

- a. David Kibunja Kagai - NYANDARUA/NJABINI/9187,9130,9149.
- b. Penninah Wagio Ngure -NYANDARUA/NJABINI /9131/9132/ 9165/9150/9151 and 9163.
- c. Michael Kariuki Gachenga & Margaret Wairimu Gachenga - NYANDARUA/NJABINI/9137,9164 and 9177.

- d. Damaris Nyambura Kimuhu - NYANDARUA/NJABINI/9186, 9167 and 9168.
- e. Dorcas Wanjiku Mutitu - NYANDARUA/NJABINI/9134, 9152 and 9166.
- f. Mary Wambui Kagai - NYANDARUA/NJABINI/91349172 AND 9182.
- g. MICHAEL Kariuki Gachenga, David Kibunja Kagai and Mary Wambui Kagai - NYANDARUA/NJABINI/9191.

The Appellants averred that the Respondents also claimed ownership of the suit lands and have variously threatened to evict the Appellants therefrom and such incidents were witnessed on 13/11/2022. These acts interfered with the Appellants' quiet and peaceful possession of the subject parcels of land. They enumerated the particulars of illegality caused by the Respondents as: -

- (i) Trespassing and/or entering onto the suit properties without any lawful excuse and/or permission or authority of the Appellants.
- (ii) Attempting to carry out cultivation on the suit properties without any permission and/or authority from the Appellants.
- (iii) Causing damage to the perimeter fence surrounding the suit properties without any valid or excusable reason.

which acts resulted to loss and damage to the Appellants as follows:-

1. Being deprived of the use, full possession and quiet enjoyment of the suit properties.
2. Destroying the Appellants' perimeter wall.

Accordingly, the Appellants prayed for Judgment for the following orders: -

- (a) An order of permanent injunction restraining the Defendants (Respondents) herein by themselves, their agents and/or servants from invading, trespassing, cultivating or in any way whatsoever interfering with the Plaintiffs' (Appellants') quiet possession and use of all those parcels of land known as NYANDARUA/ NJABINI/9187, 9130, 9149, 9131, 9132, 9165,9150,9151,9163, 9164,9137,9186,9167,9168,9134,9152,9166,9133,9172,9182,9177 and 9191.
- (b) General damages for their illegal conduct.
- (c) Costs of this suit.
- (d) Interests on (b) above at Court rates.
- (e) Any other or further relief that this Court may deem fit and just to grant.

In their joint Statement of Defence, all the 8 Respondents denied the Appellants' claim, averred that the Titles in respect of the suit parcels were irregularly and fraudulently obtained and that there was a Consent Order recorded in Nakuru High Court Civil Suit No 232 of 2021(OS) on the sharing of the properties of the late John Kimuhu Gachenga. They further claimed that the Appellants have never occupied the suit parcels of land but that since 2015 they have been attempting to occupy the said land but with no success and that the Surveyor never went to the land and that he never surveyed the land in accordance with the Consent Order of 18/3/2015 nor were beacons ever placed on the said parcels.

The Respondents further claimed that there exists no succession cause of the late John Kagai Gachenga alias John Kimuhu Gachenga to distribute his estate and that the suit land has always been occupied by the 1<sup>st</sup> Respondent. They equally claim that some of the properties mentioned in the Plaint were to be left in the name of the late John Kagai Gachenga alias John Kimuhu Gachenga.

The Respondent denied that the S.P. M's Court at Engineer did not have jurisdiction to determine the suit before it.

In addition, the Respondents filed a counter-claim and claimed that the suit parcels of land i.e. NYANDARUA/NJABINI/9187 - 9191 (inclusive) were illegally and fraudulently obtained by the Appellants. They further claimed that NYANDARUA/NJABINI/267 was sub-divided contrary to Court orders dated 2/7/2012 which should be cancelled. They gave the particulars of fraud as follows: -

- i. Obtaining respective Titles in their names in complete contradiction of the consent orders recorded in Court on 18<sup>th</sup> March, 2015 in Nakuru High Court Civil Case No 232 of 2022 (O.S)
- ii. Obtaining Title Deeds without the surveyor visiting the ground, sub-dividing and installing beacons on the ground.
- iii. Causing the Land Registrar issue Titles over unsurveyed land.
- iv. Using a mutation form that was not registered and causing the Land Registrar to issue Titles based on the same.

The Respondents urged the Court to effect the Consent Order in Nakuru High Court Civil Case No 232 of 2012 (OS) and consequently dismiss the Appellants' suit.

They further prayed for

- i the nullification of the Title Deeds held by the Appellants i.e. Title Nos. NYANDARUA/NJABINI/9187 - 9191 (inclusive) so that the same do reflect the name of the late John Kagai Gachenga alias John Kimuhu Gachenga as the proprietor of the parcels of land pending the filing of probate in respect to the latter's estate.
- ii. a Declaration that Title No's NYANDARUA/NJABINI/9187 to 9191(inclusive) held by the Appellants were illegally and fraudulently obtained.
- iii. Costs of the counter-claim.

The Appellants filed a Reply to Defence and Defence to counter-claim in which they denied all averments contained in the counter-claim and the prayers therein and reiterated the averments contained in the Plaint and further claimed that the Respondents must have misread and misunderstood the full meaning of and extent of the Consent Order of 18/3/2015 in Nakuru and that the suit properties were legally and regularly obtained by themselves and that their ownership of the prperties did not in any way contradict the above Consent.

Michael Gachenga, the 1<sup>st</sup> Plaintiff/Appellant gave evidence on behalf of all the Appellants and adopted his 2 witness statements as his

evidence in chief. He said his co-appellants are his siblings and the 1<sup>st</sup> Respondent their step-mother. The statements are dated 25/1/2023 and 17/10/2023 respectively.

He testified that the 12 parcels of land herein referred to as the suit properties were gifted to him and his co-appellants by their late father, John Kagai Gachenga alias John Kimuhu Gachenga for which they already had Title Deeds copies of which were produced in Court as well as official searches showing that the parcels of land are in their respective names. The same are void of any caution, inhibition or any other encumbrances. The searches were conducted in the year 2023. He produced documents in support of his case as follows:

1. Copies of Title Deeds for L.R No's NYANDARUA/NJABINI 9187,9130,9149,9131,9132,9165,9150,9151,9163,9164,9137,9186,9167,9168,9134,9152,9166,9133,9172,9182,9177 and 9191 respectively.
2. Copies of Certificate of official search dated 2<sup>nd</sup> December, 2022.
3. Video tape dated 13<sup>th</sup> November, 2022.
4. Demand letters dated 19<sup>th</sup> November, 2022.
5. OB NO. 06/23/11/2022 KARANGATHA POLICE STATION.
6. OB NO. 06/242/11/2022 KARANGATHA POLICE STATION

The 1<sup>st</sup> Appellant said that Nakuru High Court Originating Summons Civil Suit No 232 of 2012 was filed against his late father who owned NYANDARUA/NJABINI/267 by the 1<sup>st</sup> Respondent. A Consent in the suit was filed on 18/3/2015 and by this time all consents to transfer

the parcels of land had been issued by the Land Control Board, Njabini and the Surveyor had completed all the work on the ground.

The suit in Nakuru never went to full hearing. In 2015 the family, including the 1<sup>st</sup> Respondent sat down and agreed that NYANDARUA/NJABINI/267 be sub-divided into 68 parcels to be distributed among 4 parties as follows: -

1. 1<sup>st</sup> wife and her children.
2. The 1<sup>st</sup> Respondent and her children.
3. The deceased's 3<sup>rd</sup> wife.
4. The deceased himself.

He further testified that as for the 1<sup>st</sup> Respondent and her children's portions, the land was not transferred to them since they did not reimburse the deceased the money he had spent for the survey work, registration and other sub-division expenses. He claimed that the amount spent by the deceased was Kshs. 176,470/= for their respective parcels of land but the Appellants and the 3<sup>rd</sup> family did pay for their respective portions and got their respective Titles.

The deceased allocated to the 1<sup>st</sup> Respondent and her children 23 parcels of land and 24 parcels were given to the Appellant's mother and her children. The Appellants' deceased father died on 17/12/2015 and by which time the 23 parcels of land were already registered as L.R. No MUKEU/NJABINI/T49 where there was situate a Bar and Restaurant reserved for the 1<sup>st</sup> Respondent and her children. This was not part of NYANDARUA/NJABINI/267. The 22 parcels in the name of the deceased is what is subject of the succession cause in

Court. He finally said that in 2015 the Appellants attempted to enter the suit land but they were faced with hostility, verbal abuses and violence. He then said the following Titles were carved out as follows:

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1. Nyandarua/Njabini/9130
2. Nyandarua/Njabini/9131
3. Nyandarua/Njabini/9132
4. Nyandarua/Njabini/9133
5. Nyandarua/Njabini/9134
6. Nyandarua/Njabini/9135
7. Nyandarua/Njabini/9136
8. Nyandarua/Njabini/9137
9. Nyandarua/Njabini/9138
10. Nyandarua/Njabini/9139
11. Nyandarua/Njabini/9140
12. Nyandarua/Njabini/9141
13. Nyandarua/Njabini/9142
14. Nyandarua/Njabini/9143
15. Nyandarua/Njabini/9144
16. Nyandarua/Njabini/9145
17. Nyandarua/Njabini/9146
18. Nyandarua/Njabini/9147
19. Nyandarua/Njabini/9148
20. Nyandarua/Njabini/9149
21. Nyandarua/Njabini/9150
22. Nyandarua/Njabini/9151

- 23.Nyandarua/Njabini/9152
- 24.Nyandarua/Njabini/9153
- 25.Nyandarua/Njabini/9154
- 26.Nyandarua/Njabini/9155
- 27.Nyandarua/Njabini/9156
- 28.Nyandarua/Njabini/9157
- 29.Nyandarua/Njabini/9158
- 30.Nyandarua/Njabini/9159
- 31.Nyandarua/Njabini/9160
- 32.Nyandarua/Njabini/9161
- 33.Nyandarua/Njabini/9162
- 34.Nyandarua/Njabini/9163
- 35.Nyandarua/Njabini/9164
- 36.Nyandarua/Njabini/9165
- 37.Nyandarua/Njabini/9166
- 38.Nyandarua/Njabini/9167
- 39.Nyandarua/Njabini/9168
- 40.Nyandarua/Njabini/9169
- 41.Nyandarua/Njabini/9170
- 42.Nyandarua/Njabini/9171
- 43.Nyandarua/Njabini/9172
- 44.Nyandarua/Njabini/9173
- 45.Nyandarua/Njabini/9174
- 46.Nyandarua/Njabini/9175
- 47.Nyandarua/Njabini/9176
- 48.Nyandarua/Njabini/9177

- 49.Nyandarua/Njabini/9178
- 50.Nyandarua/Njabini/9179
- 51.Nyandarua/Njabini/9180
- 52.Nyandarua/Njabini/9181
- 53.Nyandarua/Njabini/9182
- 54.Nyandarua/Njabini/9183
- 55.Nyandarua/Njabini/9184
- 56.Nyandarua/Njabini/9185
- 57.Nyandarua/Njabini/9186
- 58.Nyandarua/Njabini/9187
- 59.Nyandarua/Njabini/9188
- 60.Nyandarua/Njabini/9189
- 61.Nyandarua/Njabini/9190
- 62.Nyandarua/Njabini/9191
- 63.Nyandarua/Njabini/9192
- 64.Nyandarua/Njabini/9193
- 65.Nyandarua/Njabini/9194
- 66.Nyandarua/Njabini/9195
- 67.Nyandarua/Njabini/9196
- 68.Nyandarua/Njabini/9197

When cross-examined by Ms. Nancy Njoroge for the Respondents, the witness said that plot Nos. 60,49,26, 68, 65, 64,63, 59 together with the plot occupied by Mwangaza Bar were to be registered in the name of their late father and that no plot was left out of the Consent. lot No. 56 was shown as NYANDARUA/NKJABINI/9185. It is in the name of George Koimburi, a brother to the 1<sup>st</sup> Appellant. He also was

of the opinion that the High Court Civil Case No 232 of 2012, Nakuru was concluded by the Consent dated 18/3/2015. He admitted that the Land Registrar never signed the Mutation forms nor was the date indicated but that the Land Control Board Consent was dated 28/6/2012 for the sub-division of NYANDARUA/NJABINI/267 (Exhibit No. 8).

He testified that the beacons placed by the Surveyor were uprooted by the Respondents.

On re-examination, the witness said that there was no clause in the consent barring his late father from dealing with the property that was in his name and that what was to be shared is what was left in his name at the time of his demise and that it is not true that the land the Appellants were claiming is where the 1<sup>st</sup> Respondent's homestead was.

After the close of the Appellants' case, Stephen Waithaka Githinji, Land Registrar of Nyandarua and Samburu counties took to the witness stand as a neutral witness. He produced the green card in respect of parcel No. NYANDARUA/NJABINI/267 and the resultant subdivisions. He testified that the land was first registered on the 28/8/1978 under Settlement Funds Trustee. It was then transferred by the Settlement Funds Trustee to John Kagai Gachenga on 14/7/1998 and on the same date a Title Deed was issued. Then on 8/5/2015 it was sub-divided with some of them in the name of John Kagai Gachenga. The new plots were:-

1. Nyandarua/Njabini/9148

2. Nyandarua/Njabini/9145
3. Nyandarua/Njabini/9141
4. Nyandarua/Njabini/9142
5. Nyandarua/Njabini/9147
6. Nyandarua/Njabini/9143
7. Nyandarua/Njabini/9145
8. Nyandarua/Njabini/9180
9. Nyandarua/Njabini/9173
10. Nyandarua/Njabini/9160
11. Nyandarua/Njabini/9153
12. Nyandarua/Njabini/9196
13. Nyandarua/Njabini/9181
14. Nyandarua/Njabini/9174
15. Nyandarua/Njabini/9162
16. Nyandarua/Njabini/9154
17. Nyandarua/Njabini/9159
18. Nyandarua/Njabini/9171
19. Nyandarua/Njabini/9178
20. Nyandarua/Njabini/9183
21. Nyandarua/Njabini/9146

All the rest were registered on 8/5/2015 and a caution had been registered against them on 3/7/2012 pursuant to an Application dated 2/7/2012 in Nakuru High Court Civil Suit No 232 of 2012 - a restriction.

There was then an order that lifted the said restriction registered on 30/4/2015. He also produced copies of the Green Cards and mutation

forms (not signed by the Land Registrar) and a copy of the mother Title together with the individual Titles resultant therefrom.

On cross-examination by counsel for the Appellants, Mr. Louise, the witness said that what he had in Court as a mutation is what is normally the initial stage of presenting the mutation to the Land Registrar. It is enclosed so that the Land Registrar can amend the R.I.M. He also said that it was safe to conclude and assume that the mutation had completed its full cycle.

The Land Registrar with over 20 years' experience also said that it was not possible for all the sub-divisions to be done without the mutation having completed its full cycle. He also said that all the Numbers in the mutation appeared in the Map and that what was before the Court was supposed to be the final product. The date the mutation is received at the counter is the same date that appears on the registration section and then the signature follows.

It is also the same date the mother Title is closed and the resultant Titles are issued. The mutation form is then left at the Land Registrar's Office for him to sign and effect the registration.

He also said that the lack of signature is not fatal. He further testified that the searches produced in Court must have emanated from his office and that the Green Cards were to date and they revealed what was in the Land Registry. He finally admitted that the Green Cards were genuine.

On re-examination, the Land Registrar, Mr Githinji said that according to the sub-divisions regulations the mutation he had is what is

supposed to be signed and dated which is a requirement and that the Surveyor is required to indicate the date when submitting the mutation to the Land Registrar. But in this case, the mutation had been stamped but not dated. But he was also quick to state that the form itself had provisions where the date is supposed to be indicated but this was not done. However, the same had a date for the amendment of the mutation i.e. on the 21/5/2015 but that what he had in Court were not original but copies. The Land Registrar was stood down on 13/2/2024 so that he could find out whether he could get other mutation forms in respect to NYANDARUA/NJABINI/267. He came back to Court on 14/5/2024 and said that he could not trace any mutation or any other document(s) relating to parcel No NYANDARUA/NJABINI/267 and that on the last page of the mutation there was a thumb print and that the effect of the date of registration is that it closes the original card and opens new Green cards.

On further cross-examination by Mr. Louise for the Appellants, the Land Registrar admitted that the Title Deeds in question emanated from his office and that as they were, the documents can effect a transaction and that there was no objection, no restriction and no injunction to restrain any registration of the sub-divisions and that there was a thumb print alongside the name of John K. Gachenga ( the transferor) and there was nothing to suggest that the thumb print was not his.

DW2, James Macharia, a Surveyor from Nyandarua South said that he found the mutation documents in respect of NYANDARUA/NJAMBINI /267 in his office. The same were received in his office on

11/7/2012. The requisition fees for its amendment was paid. The RIM was to be amended. It is indicated that 68 parcels resulted from the land as sub-divisions. The same could not show the date it was registered which ought to be indicated by the licensed Surveyor who did the work. The Surveyor's name in the document is J.D Ober. He did not indicate the date. John K. Gachenga had put a mark where his signature ought to be. He noted that the mutation's date of registration was missing. There was also an order prohibiting any dealings on the land according to the search whose Entry was made on 3/7/2-12 from Nakuru High Court Civil cause No. 232 of 2012. He finally produced the mutation in Court and said that the same was received in their office on the 11/7/2012.

When cross-examined by Counsel for the Appellants, Mr. Louise, the Surveyor insisted that the mutation he produced in Court was a legitimate document. It was used to produce the 68 Title Deeds and that based on this mutation, the RIM was amended officially. He said he did not have any evidence contrary to the fact that the same was that same person said to have fixed it i.e. John K Gachenga. He also said that the District Land Surveyor had signed all the documents he was supposed to sign. He further held that the Land Registrar had signed the mutation and that the only thing missing was the date (an inadvertence) and the signature of when the mutation was registered by the Land Registrar.

He said he did not know when the Title Deeds were issued. He testified that the Register for L.R No. NYANDARUA/NJABINI/267 was closed in 2015. Entry No. 10 shows that the Order in the High Court

Civil Suit No. 232 of 2012 (OS) (Nakuru) being a restriction (No.8) was lifted. The withdrawal of the Caution (Entry No.4) is dated 7/5/2015 long before the registration of the sub-divisions. He said that he was not aware of any Order barring the Land Registrar from issuing the 68 Titles out of NYANDARUA/NJABINI/267.

On re-examination by Ms. Nancy Njoroge for the Respondent, the Surveyor said that by the time of the search dated 4/7/2012 the Land was still NNYANDARUA/NJABINI/267 and that there was no caution against the land. He held that the mutation was genuine but that the Surveyor who did the work did not date the mutation such that you cannot tell when he did the work. However, the lack of the date could not vitiate the registration.

The 3<sup>rd</sup> Defence witness, Naomi Wangui Kimuhu who is the 1<sup>st</sup> Respondent, gave her evidence by first adopting her witness statement dated 16/3/2023 as her evidence in chief. She said that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents were all her children and that the 8<sup>th</sup> Respondent was her daughter-in-law. She said that in 2012 she filed a suit in Nyahururu which was transferred to and given serial number Nakuru High Court Civil Suit No 232 of 2012. She said that she then withdrew the case after going to the Land Control Board. A consent by this time had been recorded and distribution of the suit land already been agreed upon. But the Surveyor never went to the ground of the suit land. Some plots remained in the deceased's name. The same, according to his wish, were to be shared equally among the 3 houses (wives). But the land was given to the Appellants yet she had lived on the suit land since 1963

together with her children. She said she had no problem with her husband's wishes. She said she did not recognize the Titles issued and which she prayed the Court cancels so that the land could be re-distributed. Naomi said by the time her husband died, he was on a wheel chair and too old to put a thumb print on the documents. She said she was even surprised he had married another wife. And she only came to learn from the evidence adduced by the 1<sup>st</sup> Appellant that there was a Succession Cause No 43 of 2019 in Court. The witness then produced a few documents to buff up her case. The same are as per the list of documents dated 16/3/20 as follows: -.

1. Consent dated 18<sup>th</sup> March, 2015 in Nakuru High Court Civil Suit No. 232 of 2012 (OS)
2. Order dated 11/5/2012 in Nyahururu SPMCC No. 89 of 2012.
3. Injunctive Orders granted on 14/11/2012.
4. Mutation dated 11/7/2012 and Development Plan dated 4/7/2012.
5. Copy of search dated 4/7/2012.
6. Order dated 2/7/2012 in HCCC No. 232 of 2012 (OS).
7. Searches for parcel Nos:
  - NYANDARUA/NJABINI/9135.
  - NYANDARUA/NJABINI/9136.
  - NYANDARUA/NJABINI/9138.
  - NYANDARUA/NJABINI/9139.
  - NYANDARUA/NJABINI/9140.
  - NYANDARUA/NJABINI/9157.

NYANDARUA/NJABINI/9158.

NYANDARUA/NJABINI/9161.

NYANDARUA/NJABINI/9175,

NYANDARUA/NJABINI/9176.

NYANDARUA/NJABINI/9190.

The witness, a widow of the late John Kagai Gachenga alias John Kimuhu Gachenga testified that her husband was also husband to one Damaris Nyambura, the 5<sup>th</sup> Appellant who had 2 grown-up children. Damaris and George Koimburi N. Kimuhu, a son of the first wife were manipulating her late husband due to his old age.

She said she was the 2<sup>nd</sup> (middle) wife. She held that the Consent recorded in Nakuru H.C.C case No 232 of 2012 (O.S) was brokered by her husband's brother, one John Kagai Gachenga who came to sub-divide the land in May 2012 and that she also objected to the land being sub-divided at the Land Control Board's meeting of 28/6/2012. She said the suit at Senior Resident Magistrate's Court, Nyahururu she had filed was withdrawn by herself due to want of pecuniary Jurisdiction before she filed another one in Nakuru High Court i.e. Civil Suit No 232 of 2012 (OS). The Restraining Orders had been issued at the Nyahururu Senior Principal Magistrate's Court No. 89 of 2012 and in the Nakuru HCCC 232 of 2012 on 8/5/2012 and 14/11/2012 respectively.

On cross-examination by Mr Louise for the Appellants, Naomi Wangui Kimuhu said she was the 2<sup>nd</sup> wife of John Kimuhu but that she did not know the 3<sup>rd</sup> wife well and that the latter did not get any children

with the Deceased. She came with her own children to the marriage. She was in occupation of the Suit parcel of land and which she has never prevented the Appellants from cultivating. The Appellants normally came to the land where their mother is buried. She cultivates some part of the land. She testified that when she heard the Appellants were to get Titles to the suit land she went to Nyahururu Court to stop the exercise of sub-division. She said that the Consent dated 15/3/2015 in Kikuyu language was not properly translated in English and therefore not everything in the Consent was agreed upon.

The terms of the Consent were not met because survey work was not done. She said they never went to the Land Control Board. She said her late husband was senile and could therefore not demand that she pays money for transfer of land to be given to her. He was on a wheel chair. But she said that she had evidence that her husband was senile but which was not produced in Court.

On re-examination, the witness said that her husband's brother Mr. Kagai is the one who facilitated the meeting that gave rise to the Consent recorded in Court. There was an Order issued in Nyahururu Court on 15/5/2012 restraining the Surveyor from surveying or subdividing the suit land - L.R No NYANDARUA/NJABINI/267. It also stopped the placing of beacons on the said land.

DW4, John Maina Gathoni, who sat in Court all along as all earlier witness were giving evidence, adopted his witness statement dated 27/7/2023. He told the Court that on the 12/5/2012 at around 12:00

noon when he was placing beacons on the suit land with instructions from the Surveyor whom he did not name, Jack Mwangi Kimuhu Kibinga and another person he did not know came and served the Surveyor, Dorcas and Koimburi with a Court order. However, he did not produce a copy of the court order which he said was left with them. They then stopped the work and were paid their wages. No beacons had been placed by the time they left the place.

On cross-examination by Mr Louise, the witness denied that he had been given the task of placing beacons by the Surveyor. He did not even know the Surveyor. He then said he does not even know how to use the instrument for taking the measurements. He saw the instrument for the first time. He said he is not the one who was served with the Court Order nor did he know what the order said.

On re-examination, Mr. Gathoni maintained that the work was given to him by Koimburi and the 5<sup>th</sup> Appellant. He said that certain pipes were brought where they were and they were told that the papers given to them were the Court Orders and they stopped the work immediately even before they started placing beacons on the suit land. He testified that he was the one who took a Mr. Maina, Process Server, to identify a Mr Kibunja, the 3<sup>rd</sup> Appellant on the 12/5/2012 at around midday for purposes of serving a Court Order issued on 11/5/2012 upon the 5<sup>th</sup> Appellant. After the identification he returned to Mwangaza Bar where he worked as a Pool Attendant. He said that he saw the process server, at the site.

After hearing the submissions of Counsel for both sets of parties the Honourable Principal Magistrate wrote Judgment as follows: \_

1. THAT prayers (a) and (b) of the Plaint are declined in the interest of justice.
2. THAT the prayer for cancellation of the 22 Titles in this Suit is granted to give way to a fresh process.
3. THAT Orders made in this Judgment shall apply to the 22 parcels which are the subject matter of the Suit. The innocent third parties shall not be affected by this Judgment.
4. THAT this being a family dispute, each party shall bear its own costs.

The Honourable Trial Magistrate reasoned his Judgment as follows: \_

1. The late John Kimuhu Gachenga was the owner of L.R No NYANDARUA/NJABINI/267 measuring 8.1 Hectares.
2. The 1<sup>st</sup> Respondent sued John Gachenga in Nakuru H.C.C case No 232 of 2012 (OS).
3. It appears that in the aforesaid Suit a Consent was recorded on 18/3/2015 which existence was acknowledged by both parties.
4. In the said Consent, the late Mr Gachenga shared out the aforesaid property *inter-alia* among his 3 wives.
5. The suit land was to be surveyed out so that each party gets his share.
6. The terms of the Consent were in issue.
7. Whether the land surveyed was in dispute.
8. Was the land surveyed as envisaged?

9. There were several anomalies that were pointed out in the mutation Form in question which anomalies cannot be ignored.
10. It was not clear from the L.R. and the Surveyor whether or not a Surveyor went to the ground to survey and sub-divide the land.  
by the Courts.
11. There were too many glaring omissions and or mistakes on the Mutation Forms.
12. Parties should go back to the drawing board to ensure the spirit of Consent is achieved.
13. This Court will force them to do so. The land should be re-surveyed and shared out amongst themselves strictly in accordance with the Consent dated 18/3/2012.
14. The 22 parcels shall be cancelled since the patriarch is deceased in order to pave way for a fresh start in terms of making sure that a more transparent survey process is undertaken in accordance with the Consent.
15. This will cause no prejudice.
16. There is a succession cause which should give effect to the Consent.
17. This Judgment shall only apply to the 22 parcels which are the subject of this suit and the innocent 3<sup>rd</sup> parties shall not and should not be affected by this Judgment.
18. Each party shall bear its own costs.

After the Appellants were dissatisfied with this Judgment, they did appeal to this Court for the reversal of the said Judgment and prayed

that this Appeal be allowed and the Judgment of the learned Principal Magistrate dated 2/98/2024 be set aside in its entirety with costs and the Appellants be granted the prayers that they had sought in the Plaintiff. The grounds upon which they appealed are as follows: -

1. THAT the learned Principal Magistrate erred in law and in fact by ordering the cancellation of the parcels of land without any adverse finding that there was fraud in the manner in which the parcels of land were registered in favor of the Appellants.
2. THAT the learned Principal Magistrate erred in law and in fact by directing the cancellation of the 22 parcels of land yet he did not make any finding that the Appellants who were the registered owners of the parcels of land were guilty of and/or contributed to any fraud to have the parcels of land registered in their names.
3. THAT the learned Principal Magistrate erred in law in awarding Judgment in favor of the Defendant without making a finding as to whether or not the Defendants had proven their counterclaim to the required proof.
4. THAT the learned Principal Magistrate erred in law in holding that no survey was done before LR NO NYANDARUA/NJABINI/267 was sub-divided.
5. THAT the learned Principal Magistrate erred in law in holding that the Mutation Forms had glaring omissions without setting out that the said errors were enough to vitiate the registration process of the parcel of land.

6. THAT the learned Principal Magistrate erred in misconstruing the requirement set out in the consent order in Nakuru High Court Case No 232 of 2020 (O.S) that it is only the re-erection of new beacons that had to be done rather than the finding that no beacons existed before then.
7. THAT the learned Principal Magistrate erred in completely ignoring the testimony of the District Land Registrar and the Land Surveyor who both made an open declaration that the Title Deeds subject matter of the suit were properly and regularly registered.
8. THAT the learned Principal Magistrate erred in law by purporting to amend and insert new terms to the Consent Order dated 18<sup>th</sup> March, 2012 yet he had no power to do so as the same was an order issued by the High Court at Nakuru, the learned chief Magistrate purported to repeal Sections of the said Consent order yet he had no legal jurisdiction to do so.
9. THAT the learned Principal Magistrate erred in law in issuing directives that he was forcing parties to the drawing board yet he had no legal powers or justification to issue such orders.
10. THAT the learned Principal Magistrate erred in failing to appreciate the fact that the transfers of the 22 parcels of land to the Appellants were “gifts intervivos” made by the deceased and no grounds at all existed or were presented to him to recall the said gifts to the said Appellants.
11. THAT the entire Judgment by the learned Principal Magistrate was against the weight of the evidence presented by

the Appellants and was contrary to the mandatory provisions of Order 21 Rule 4 of the Civil Procedure Rules.

Having given both parties an opportunity to file and highlight their submissions in open Court, the Court then retired to write its Judgment.

This being a first Appeal, Section 78 of the Civil Procedure Act, Cap 21 Laws of Kenya requires a first appellate court “to re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions. This court is under a duty to subject the entire evidence and the judgment to a fresh and exhaustive examination with a view to reaching its own conclusions in the matter. However, in carrying out this duty this court has to remember that it has no opportunity of seeing and hearing the witnesses who testified during the trial and to make an allowance for the same. It is also worth noting that the trial court has had the singular opportunity of reaching its conclusions based on a combination of the evidence adduced and observation by the court of the demeanor of witnesses.

**In Peter M. Kariuki -vs- Attorney General [2014] eKLR** the court held that:-

***“We have also, as we are duty bound to do as a first appellate court [to] reconsider the evidence adduced***

***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 consistent with the evidence.***

Accordingly, as pointed out above, a first appellate court must of necessity proceed with caution in deciding whether or not to interfere with the findings of a trial court but of course where such findings are not supported by the evidence on record or where they are founded on a misapprehension of the law, the axe must fall on the impugned judgement.

I have considered the Submissions before putting this Judgment into pen and paper and I wish to commend both Counsel for articulating their clients' cases and interests in a mature manner, full of decorum, dedication and seriousness. I will begin by examining the counter-claim and the attendant conclusion of the lower court in respect to the same.

The Appellants are accused of obtaining Titles in their names in complete disregard of the consent order recorded in court on 18/3/2015 in Nakuru High Court Civil Case No. 232 of 2012 (O.S.). On this, I believe the Title Deeds mentioned are L.R. Nos. NYANDARUA/NJABINI/9187,9130,9149,9131,9132,9165,9150,9151,9163,9164, 9137,9186,9167,9168,9134,9152,9166,9133,9172,9182,9177 and 9191. The 1<sup>st</sup> Appellant gave uncontroverted evidence that in 2015

the family, including the 1<sup>st</sup> Respondent sat down and agreed that NYANDARUA/ NJABINI/267 be sub-divided into 68 parcels to be distributed among 4 parties as follows:-

1. 1<sup>st</sup> wife and her children.
2. The 1<sup>st</sup> Respondent and her children.
3. The deceased's 3<sup>rd</sup> wife.
4. The deceased himself.

The Onus of proof in fraud cases is very high.

Stephen Waithaka Githinji, Land Registrar of Nyandarua and Samburu counties produced the green card in respect of parcel No. NYANDARUA/NJABINI/267 and the resultant sub-divisions. He testified that the land was first registered on the 28/8/1978 under Settlement Funds Trustee. It was then transferred by the Settlement Funds Trustee to John Kagai Gachenga. On 14/7/1998 and on 8/5/2015 it was sub-divided with some of them in the name of John Kagai Gachenga.

All the other parcels were registered on 8/5/2015 and a caution registered against them on 3/7/2012 pursuant to a restriction dated 2/7/2012 in Nakuru High Court Civil Suit No 232 of 2012 had been lifted on 30/4/2015. The Land Registrar admitted that although the Title Deeds given to the Appellants had a few anomalies such as missing dates the Title Deeds in question emanated from his office and that as they were, the Title Deeds were issued after a regular transaction and that there was no objection, no restriction and no injunction to restrain any registration of the sub-divisions and that

there was a thumb print alongside the name of John K. Gachenga (the transferor) and there was nothing to suggest that the thumb print was not his. You cannot punish parties who followed all the processes from going to the Land Control Board to seek consent, preparation of mutation forms and filing documents at the Lands office just because of some inadvertent mistakes of the Land Registrar who in any case testified that such small anomalies are common and not fatal to defeat the authenticity of a Title Deed.

The deceased allocated to the 1<sup>st</sup> Respondent and her children 23 parcels of land and 24 parcels were given to the 1<sup>st</sup> Appellant's mother and her children. This was before he died on 17/12/2015 and by which time the 23 parcels of land given to the 1<sup>st</sup> Respondent and her children were already registered as L.R No MUKEU/NJABINI/T49. The 1<sup>st</sup> Respondent and her children's portions were not transferred to them because they failed to reimburse the deceased the money he had spent for the survey work, registration and all other sub-division expenses amounting to Kshs. 176,470/=.

By 28/6/2012 all the consents to sub-divide NYANDARUA/NJABINI/267 had been granted and consents to transfer also issued by the Land Control Board. The family sat down to agree on the sub-division of the land in 2015 long after the consents to transfer had been obtained. The suit land belonged to the late John Kimotho Gachenga. The evidence in Court is that the Deceased had already obtained consent for the sub-division of NYANDARUA/NJABINI/267 into NYANDARUA/NJAMBINI 9187 - 9191 long before the consent recorded in court.

Having had the land transferred by the deceased who was the registered owner of the land, any agreement(s) with other parties were immaterial. I do not buy the 1<sup>st</sup> respondent's argument that her husband, the 1<sup>st</sup> Appellant's father by the time he appeared before the Land Control Board in 2012 he was too old to put a thumb print on the transfer documents. For this the Court needed further (expert) evidence. The 1<sup>st</sup> Respondent wants this Court to believe that the Deceased was unable to put a thumb print and transfer Documents in 2012 but then 3 years later in 2015, the same person was able to put his thumb print in the consent that was filed in Court on 18/3/2015. She said her late husband was senile and on a wheel chair. But she still accompanied him to the Land Control Board to object to the issue of consent which objection was not successful. The witness does not tell us that at that time her husband was senile.

I am also of the view that her objection at the Land Control Board on 28/6/2012 is evidence that the Deceased went to the Land Control Board for consent to sub-divide and transfer the suit land to the Appellants. The process of transfer was then commenced long before the court recorded consent. And if her objection, as she claims, was not accepted then she ought to have appealed to the Provincial Land Control Board or even move the Court for *certiorari*. Having obtained consent from the Land Control Board, the Deceased did not require any other consent whatsoever from anybody to sub-divide and transfer his land as he wished. And the Respondents do not say that the land was matrimonial which could have changed the scenario.

Accordingly, I do not see any fraudulent dealings in the issuance of the Title Deeds to the Appellants. The same were applied for by the transferor and all that the Appellants did was to pay the requisite fees. I therefore dismiss the argument that the mutation forms were fatally defective as to allow a transfer to be effected since both the Land Registrar and the Surveyor admit that the same were regularly registered only that there were minor anomalies on their part and not on the part of the Appellants.

The Surveyor, Mr. James Macharia said that the mutation had been signed by the Land Registrar only that this date was missing which omissions must have been inadvertent. Survey work was done on 28/6/2012. Concerning the land being unsurveyed, the 1<sup>st</sup> Appellant said that the beacons placed on the land by the Surveyor were uprooted by the Respondents. In any case there is absolutely no way the land could be given new numbers and the mother Title closed without prior survey.

The Orders of 2/7/2012 issued *ex-parte* restraining the survey of the land were indeed lifted on the 30/4/2015 long after they were issued. In fact the said orders must have gone stale on 2/7/2013, one year after they were issued. The claim of fraud does not therefore hold water.

Looking now at the Appellants' case, in **Munyu Maina..Vs..Hiram Gathiha Maina, Civil Appeal No.239 of 2009**, the Appeal Court held that:-

***“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”***

The suit land was transferred to the Appellants by their late father during his lifetime. And by which the Surveyor had completed survey work. Consent to sub-divided was obtained on 28/6/2012. The transfers were effected on 15/6/2015. Their late father died about 6 months later on 17/12/2015. They therefore got clean Titles. Under section 24(a) of the Land Registration Act, 2012, the registration of a person as the proprietor of land vests in that person the absolute ownership of that land together with all rights and privileges associated with that status. Section 26(1)(a) &(b) of the Land

Registration Act, 2012 guides me on the need to protect the sanctity of a Title Deed but limits me where there is darkness: -

***“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.***

The onus of proving fraud in civil matters is very high and the same has not been proved in this case.

It has not been shown that the Appellants, the land officials or anybody else on behalf of the Appellants were involved in acts of fraud to have the suit lands pass over to the said Appellants and there is therefore no justification in cancelling their Title Deeds.

The mutation Form was properly executed on the part of the Proprietor - John Kagai Gachenga save for minor inadvertent omissions on the part of the Land Registrar. The letter of Consent to sub-divide was duly issued by the South Kinangop Land Control

Board on 28/6/2012. The same is duly signed by the chairman, District Commissioner, Kinangop District. It is for the sub-division of 8.1 Hectares into 46 sub-plots of 50X100, 19 portions of 1.26 Acres ( Dam), a portion of 0.5 Acres ( slaughter house) from John Kimuhu Kagai with a conclusion that an adequate road of access be provided.

The relevant letter of Consent to sub-divide/portion the parcel is attached to the Appellants' list of documents. It was filled as follows:

- The proprietor wishes to sub-divide the parcel of land as shown by the dotted lines in the sketch.
- Date received for registration -13/7/2012
- Declaration book No -194.
- Registration fees - Ksh 500/-
- Receipt No. - 2807993.
- Date - 13/7/2012.
- RIM amendment fee - Kshs. 13,600
- Receipt No 9699149.

The Order of Temporary Injunction issued on 11/5/2012 at SPMC 89 of 2021 (Nyahururu) was vacated on 8/6/2012 before the registration.

The Consent of the Land Control Board was issued on 28/6/2012 before the Order of no dealing was issued.

On 3/7/2012 the Order from HCCC 232 of 2012, Nakuru was registered - no dealings over NYANDARUA/NJABINI/267.

In **North End Trading Company Limited (Carrying on the Business under the registered name of Kenya Refuse Handlers Limited v City Council of Nairobi [2019]** eKLR the Court held that;

***“It is settled law in civil cases, a party who wishes the court to give a judgment or to declare any legal right dependent on a particular fact or sets of facts, that party has a legal obligation to provide evidence that will best facilitate the proof of the existence of those facts. The party must present to the court all the evidence reasonably available on a litigated factual issue.*”**

It was therefore imperative upon the Respondents to prove that the Appellants either acquired the suit properties through fraud or through an unlawful process. This Court has already held and found that the evidence of the Appellants remains uncontroverted as the Respondents did not call any witness to controvert nor did they themselves controvert the evidence by the Appellants.

The learned Trial Magistrate Court having acknowledged that the Deceased had “shared out the aforesaid property *inter alia* among his 3 wive’s “.....and that the land was to be surveyed out so that each party gets his share.....”. ought to have pronounced how the sharing out was done which was there on record and by failing to pronounce the same and ordering for the cancellation of the 22 Titles in this suit to give way to a fresh process he was only

forcing the parties to incur more costs such as survey, repatriation and other attendant costs. This was also taking back the parties to where they were before coming to Court which should be an affront to the dispensation of justice. Further, by ordering that the orders made in this Judgment shall apply to the 22 parcels which are the subject matter of this suit and then going ahead to order that the innocent third parties (I believe the purchasers of part of the suit land) shall not be affected by this Judgment, the Court was asking for an oxymoron. If the prayer for cancellation of the 22 Titles in the Suit is granted “.....to give way to a fresh process.....” then nothing remains. Cancelling means that there is no ownership and there being no Title, nobody can pass to another, including the third parties, what he does not have Title to and if he has already passed it, the cancellation of the mother Title by necessary extension cancels the sub-Titles.

Coming now to the consent order recorded and filed in court on 18/3/2015 in Nakuru High Court Civil Case No. 232 of 2012 (O.S.), a lot of time was spent by both parties trying to explain in their own respective ways what the consent meant, its interpretation, translation from Kikuyu to English language. But this was not necessary. The Court has taken time to evaluate its relevance to the

case at hand. Due to the doctrine of **privity of contract**, a person who is not a party to an agreement or contract **cannot be bound** by its terms. This principle holds that a contract can neither confer rights nor impose obligations on anyone other than the parties involved. The doctrine of **privity of contract** is a **common law** principle which provides that a **contract** cannot confer rights or impose obligations upon anyone who is not a party to that contract. In legal proceedings, a consent order approved by the court, reflecting the agreement of the parties is typically binding only on the parties to the action. A non-party generally is not bound by such an order and he can challenge it if it affects his rights or interests in any way. In brief, for a person to be bound by a contract or consent agreement, they must generally have provided their own consent and consideration (or fall under a specific legal exception and in this case there is none).

As the law demands, the Appellants were not enjoined in the above suit at the time of the consent. The omission or deliberate refusal and/or failure to enjoin the Appellants as necessary parties to the suit means that any order, Decree, Consent and/or Directions emanating from the said suit cannot affect them. In entering into the consent herein on 18<sup>th</sup> March, 2012, it was foreseeable to the 1<sup>st</sup> Respondent and the Deceased and their respective counsel that this would substantially affect the interests of the Appellants in one way

or another since the Appellants had already been given the suit land. The consent goes to the root of the transfers in question. The said Consent Order was entered into without the knowledge, authority and/or consent of the Appellants as required by law and the same was done in flagrant breach of the terms and covenants contained in their rights over NYANDARUA/ NJABINI/ 9187,9130,9149,9131,9132,9165,9150,9151,9163,9164,9137,9186, 9167,9168,9134,9152,9166,9133,9172,9182,9177 and 9191 whose interests are contained in the said consent. The consent Judgment or order has contractual effect on the Appellants' interest on the suit property and since the Appellants were not privy to the aforesaid consent, they can therefore not be bound by it. They are excluded by the doctrine of privity of contract. The consent can therefore not have any legal force or effect on the Appellants' rights in the suit properties. In the premises, the consent must be disregarded otherwise the Appellants would unfairly suffer loss and damage. The dragging of the consent to what the Appellants had already acquired is unfair and unconscionable. A court of equity will not entertain this but it will intervene since such inclusion is unconscionable. If the parties in Nakuru High Court Civil Case No. 232 of 2012 intended to

have their consent affect the arrangement between the Appellants and the Deceased, then they should have applied Order 1 Rule 3 of the Civil Procedure Rules, 2010 to join the Appellants in the case:

“all persons may be joined as Defendants against whom any right of relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”

In our case herein, although the Consent talks of the “nyumba” i.e. the family, having consented, the same does not in any way suggest that the Appellants were present. In any case, they did not append their signatures to the consent.

Still on the issue of the Consent recorded in Nakuru HCCC No 232 of 2012, the same concerned the case in Court filed by the 1<sup>st</sup> Respondent against her late husband. It has no relevance to the parties not before the Court. The Certificate of translation is dated 10/3/2025. The same does not say anything about L.R No. NYANDARUA/NJABINI/267.

If the same was meant to affect the transfer of the Suit land nothing would have been easier to say. Likewise, nothing prevented the

parties to go to the Land's office for purposes of reversing these transfers or any attempt at the transfer to the Appellants herein. In any case the Appellants are not privy to this Consent.

Accordingly, and having found that the suit lands were transferred to the Appellants by the initial owner, John Kagai Gachenga during his lifetime amidst objections by the 1<sup>st</sup> Respondent and which objections at the Land Control Board were dismissed, it would be unjust to wait until the transferor dies and then follow the innocent beneficiaries who received gifts *inter-viros* from their father even as the Respondents also got their rightful shares from the same deceased. As the absolute proprietors of the suit properties, and having acquired them lawfully, the Appellants are entitled to enjoy rights and privileges associated with such ownership which includes exclusive use, possession and enjoyment thereof without interference by any third party.

I am not concerned about the intestate Estate of the late John Kagai Gachenga which is not before me. It is also interesting that the Estate of the late John Kagai Gachenga is not a party in this case. It is my prayer that the 2 homes should live in harmony with one another.

The upshot of the above is that this Appeal succeeds and the Judgment of the learned Trial Magistrate dated 2/9/2024 is hereby set aside in its entirety. In its place, I give Judgment in favour of the Appellants against the Respondents jointly and severally for: -

An Order of Permanent Injunction restraining the Respondents herein by themselves, their agents and/or servants from invading , trespassing , cultivating or in any way whatsoever interfering with the Appellants' quiet possession and use of all those parcels of known as NYANDARUA/NJABINI/9187,9130, 9149,9131,9132, 9165,9150,9151,9163.9164,9137,91869167,9168,9134,9152,9166,9133,9172,91829177 AND 9191 respectively.

I will not award any General Damages which were sought but not proved.

I will spare the parties any payment of costs in order to try and promote harmony in the family.

**Judgment dated and delivered at Nyandarua this 13th  
Day of November 2025.**

**MUGO KAMAU  
JUDGE**

In the Presence of: -  
Court Assistant: - Samson.  
Appellants- Mr. Wahome.  
Respondents- Ms. Njoroge.

