

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC LAND APPEAL NO. E041 OF 2024**

**MARTHAS CLOTHING STORES LIMITED .....**

**APPELLANT**

**VERSUS**

**JOSEPH NGANDU RUGU ..... RESPONDENT**

(Being an appeal arising from the judgment and decree of Hon. Stella Atambo (C.M) delivered in Thika Magistrate’s Environment and Land Case No. E002 of 2021 on 2<sup>nd</sup> April 2024)

**JUDGMENT**

1. The genesis of this appeal lies in Thika CMELC Case No. E002 of 2021 where the Respondent (plaintiff in the lower court) filed suit against the Appellant (Defendant in the lower court) claiming that he was the registered proprietor of land parcel no. THIKA MUNICIPALITY BLOCK 11/1205 and that the Appellant had trespassed on his parcel of land. He sought a permanent injunction restraining the Defendant from entering , encroaching, constructing, blocking access to, trespassing on or in any way interfering with the quiet possession of the Plaintiff’s property known as L.R. NO. THIKA MUNICIPALITY BLOCK 11/1205, an eviction order and general damages for trespass.

2. The Appellant filed a Defence and Counterclaim denying the Respondent's claim. In his Counterclaim he prayed for a declaration that he was the legal and bona fide owner of the suit property and an order directing the Land Registrar , Thika to cancel the lease and certificate of lease issued to the Respondent for the property known as THIKA MUNICIPALITY BLOCK 11/1205.
3. After a full hearing the trial Magistrate entered judgment for the Respondent. She granted a permanent injunction against the Appellant, issued an order of eviction and/or demolition of the structures on the suit property and awarded the Respondent the sum of Kshs. 300,000 as general damages for trespass.
4. Aggrieved by the said judgment, the Appellant filed the instant appeal raising 15 grounds of appeal which can be condensed into 2 grounds as follows; The trial magistrate erred in law and in fact in
  - i. *Finding that the Appellant had not established the root of his title;*
  - ii. *Arriving at a decision that was against the weight of the evidence and material on record.*
5. Pursuant to the court's directions the Appellant filed their submissions dated 10<sup>th</sup> July 2025 while the Respondents filed theirs dated 15<sup>th</sup> September 2025.

### **Appellant's Submissions**

6. In his submissions learned counsel identified three issues for determination as follows;

- i) *whether the Appellant is the legal registered owner of the suit property known THIKA MUNICIPALITY BLOCK 11/1205;*
- ii) *Who was the first to be registered as the owner of the suit property*
- iii) *Whether the trial magistrate misdirected herself in denying counsel for the Appellant an opportunity to call the Land Registrar to cross-examine him on the letters*

7. On whether the Respondent is the lawful registered owner of the suit property, counsel submitted that the Respondent had only produced a certificate of lease, lease, allotment letter and subdivision scheme which emanated from the unsurveyed plot No. 12 Thika Municipality.
8. On the other hand, the Appellant produced letters dating back to 1987 showing how he acquired the suit property. He submitted that a lease had been prepared in favour of the Appellant but surprisingly, he was informed that it got lost under mysterious circumstances. However, the Commissioner of Lands had written to the Land Registrar, confirming that suit property belonged to the Appellant and advised him to register a new lease in his favour.
9. He placed reliance on the cases of **Dina Management Limited v County Government of Mombasa & 5 Others (Petition 8(E010) of 2021 (2023) KESC 30 (KLR) (Constitutional and Human Rights) 21 April 2023 ( Judgment)** where the Supreme Court cited the case of **Munyu Maina V Hiram Gathiha Maina Civil Appeal No. 239 of 2009 (2013) eKLR** for the proposition

that where the registered proprietor's root of title is under challenge, it is not enough to dangle the instrument of title and the owner must prove the legality of the title by showing that it was acquired legally.

10. The same position was adopted in **Daudi Kiptugen v Commissioner of Lands, Nairobi & 4 others (2015) eKLR.**
11. On who was the first to be registered as the owner of the suit property, counsel submitted that the inference that could be drawn from the correspondence produced by the Appellant is that the Appellant was the first one to be allocated the suit property and it was therefore not available for allocation to the Respondent. He relied on the case of **Gitwany Investment Limited v Tajmal Limited & 3 Others (2006) KEHC 2519 (KLR).**
12. Counsel faulted the trial magistrate for disallowing the Appellant's application to call the Land Registrar to attend court and produce the documents relied upon by the Appellant and for failing to rely on the said documents despite the fact that counsel for the Respondent indicated that he did not dispute their contents.

#### **Respondent's Submissions**

13. On his part, learned counsel for the Respondent submitted that the appeal was incompetent and it ought to be dismissed for failure to file a copy of the decree appealed from.

14. He relied on Sections 65 of the Civil Procedure Act and Order 42 Rule 2 of the Civil Procedure Rules which emphasize that an appeal lies from any original decree, part of a decree or order.
15. In particular Order 42 Rule 13(4) of the Civil Procedure rules, 2010 sets out the documents that must be in the court record before an appeal is allowed to go for hearing which includes the judgment, order or decree appealed from. Reliance was placed on the case of **Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others (2015) eKLR** where the Supreme Court held that :
- “Without a Record of Appeal, a court cannot determine the appeal cause before it. Thus, if the requisite bundle of documents is omitted, the appeal is incompetent and defective for failing the requirement of the law. A court cannot exercise its adjudicatory powers conferred by law or the constitution where an appeal is incompetent. An incompetent appeal divests a court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues.”*
16. Additionally in **Paul Karenyi Leshuel v Ephantus Karithi Mwangi & Another (2015) eKLR** the court explained the essence of a decree and held that failure to include the decree appealed from in the Record of appeal renders the appeal incompetent.
17. With regard to the merits of the appeal he submitted that the trial court arrived at a sound judgment by holding that the Respondent had proved that he was rightfully allotted the suit plot after the Appellant failed to comply with the conditions in the letter of

allotment dated 1<sup>st</sup> October 1990 within 30 days. Conversely, the Respondent demonstrated that he had complied with the conditions of allotment and he was issued with a Certificate of lease.

18. Counsel relied on the case of **Mbau Saw Mills v Attorney General & 2 Others (2014) eKLR** and **Shadrack Kuria Kimani v Stephen Gitau Ng'ang'a & Another (2017) eKLR** where the court held that a letter of allotment does not confer any property rights unless there is acceptance and payment of the stand premium and ground rent.
19. It was his submission that the Appellant admitted that he did not meet the conditions of the allotment letter and a lease could therefore not be prepared in his favour.
20. It was further submitted that the Appellant did not prove his Counterclaim to warrant the cancellation of the Respondent's title as the counterclaim neither pleaded nor particularized the allegations of fraud. He placed reliance on the case of **Vijay Morjaria v Nansingh Madhusingh Darbar (2000) eKLR** where the court held that fraud must be pleaded and proved. He added that the appellant's reliance on **Dina Management** simply reinforced the Respondent's case.
21. On who was the first in time to be registered as the owner of the suit property, counsel submitted that the issue before the court was not one of double registration, as the Appellant was never issued with a certificate of lease, and therefore, the case of **Gitwany**

**Investment Limited v Tajmal Limited & Others** (supra) did not apply.

22. On whether the trial magistrate erred in denying the Appellant the opportunity to call the Land Registrar, counsel submitted that the request to call the Land Registrar was made rather late in the day and no appeal was filed against the denial.

### **ANALYSIS AND DETERMINATION**

23. Having considered the judgment of the lower court, the entire Record of

Appeal, the rival submissions and the applicable law, I am constrained to agree with counsel for the Respondent that this appeal is incurably defective for failure to include a copy of the decree in the Record of Appeal.

24. In the case **Paul Karenyi Leshuel v Ephantus Karithi Mwangi & Another (2015) eKLR** the court relied on **Civil Appeal No. 7 of 1997 Municipal Council of Kitale v Fedha ( 1983) eKLR** where it was held that:

*“Failure to include the decree appealed from in the Record of Appeal rendered the appeal incompetent. One may ask why so much importance is attached to this document; the answer appears to me that an appellate court can only uphold or overturn what has been demonstrated to exist... much as this requirement is contained in the rules, it is not in my humble view a requirement that can merely be dismissed as a procedural technicality that may be swept under the carpet; the question whether or not there is*

*indeed an appeal which calls for the appellate court to exercise its jurisdiction in that respect goes to the root of the appeal itself , for without an appeal , properly so called, any attempt to invoke and exercise that jurisdiction would be in vain.”*

25. This position was reinforced in the case of **Kilonzo David T/A Silver Bullet Company v Kyalo Kiliku & Another (2018) eKLR** where the court held that:

*“Despite the provisions of Article 159 (2) (d) of the Constitution of Kenya, 2010 that mandates courts to administer justice without undue regard to procedural technicalities, this court took the firm view that omission to include the decree or order to be appealed from in the Record of Appeal was not a procedural technicality for the reason that the word “shall” in Order 42 Rule 2 of the Civil Procedure Rule contemplates that the furnishing of the decree or order is mandatory and cannot be wished away.”*

26. Additionally, in **Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others (2015) eKLR** the Supreme Court held that :

*“Without a Record of Appeal, a court cannot determine the appeal cause before it. Thus, if the requisite bundle of documents is omitted, the appeal is incompetent and defective for failing the requirement of the law. A court cannot exercise its adjudicatory powers conferred by law or the constitution where an appeal is incompetent. An incompetent appeal divests a court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues.”*

27. Guided by the principles in the above decisions, I find and hold that the appeal herein is fatally incompetent.

28. Be that as it may, I will proceed to consider the merits of the appeal so as to bring this matter to a conclusive determination.
29. In my view that appeal turns on whether or not the Appellant proved that he had a better title to the suit property than the Respondent. It is common ground that the suit property is registered in the Respondent's name. However, the Appellant has challenged the Respondent's title and asserted that since his letter of allotment was issued before the Respondent's title, he has a better right to the suit property than the Respondent.
30. In the case of **Dina Management Limited v County Government of Mombasa & 5 Others (Petition 8(E010) of 2021 (2023 ) KESC 30 (KLR) (Constitutional and Human Rights) 21 April 2023 ( Judgment)** the Supreme Court cited the case of **Munyu Maina V Hiram Gathiha Maina Civil Appeal No. 239 of 2009 (2013) eKLR** where the Court of Appeal held as follows:

*"We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register."*

31. Additionally, in the case of **Daudi Kiptugen v Commissioner of Lands, Nairobi & 4 others (2015) eKLR**, the court observed as follows:

*“In order to determine the question whether the lease held by the plaintiff is valid, it must be demonstrated that it was properly acquired. It is not enough that one waves a lease or certificate of lease and asserts that he has a good title by the mere possession of the lease or certificate of lease. Where there is contention that a lease or certificate of lease held by an individual was improperly acquired, then the holder thereof must demonstrate through evidence, that the lease or certificate of lease he holds was properly acquired. The acquisition of title cannot be construed only in the end result, the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be said to be a good title. If this were not the position then all one would need to do is to manufacture a lease or certificate of title at a backyard or the corner of a dingy street and by virtue thereof claim to be the rightful proprietor of the land indicated therein. It is therefore necessary for this court to determine how the plaintiff ended up having a lease and certificate of lease in his name and further, determine if the Government did intend to issue the plaintiff with a lease over the suit land.”*

32. From the evidence on record, the Respondent was able to demonstrate that he was issued with a Letter of allotment dated 19<sup>th</sup> July 2007 for a residential plot no. 22 Thika Municipality, after which he made payment. The land was surveyed and he produced a copy of the Part Development Plan to show the number given to

his plot. He also produced a copy of the lease in respect of land parcel number THIKA MUNICIPALITY BLOCK11/1205.

33. In support of his case, the Appellant produced a letter of allotment dated 1<sup>st</sup> October 1990, a receipt dated 14.7.1997 being part payment of the stipulated charges and a letter dated 8<sup>th</sup> September 2020 indicating that two leases had been inadvertently prepared. However, he did not produce any lease as it was alleged to have got lost. In cross-examination, he admitted that he had not paid the balance of Kshs. 35,000.
34. Based on the testimonies of the Appellant and Respondent as well as the documents produced, the learned trial magistrate held that the Respondent was the lawful owner of the suit property. She also held that the Appellant had failed to prove any fraud on the part of the Respondent and proceeded to dismiss his counterclaim.
35. Having evaluated the evidence in totality, I am unable to fault the trial magistrate for concluding that the Appellant had failed to prove that the Respondent did not have a good title.
36. Flowing from the above analysis, the inescapable conclusion is that the appeal is not only incompetent but it has no merit and it is hereby dismissed with costs to the Respondent.

**Dated, signed and delivered virtually this 1st day of December 2025.**

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**J. M ONYANGO**

## **JUDGE**

### **In the presence of:**

1. Miss Mugo for Mr Karanja Kangiri for the Appellant
2. Mr Tumu for the Respondent

Court Assistant: Hinga

ORIGINAL