

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC APPEAL NO. E032 OF 2024

**MOLYN CREDIT
LIMITED.....APPELLANT**

-VERSUS-

SABRINA WANJIRU MAINA AND

DOUGLAS GAKINYA MAINA (Suing as the Administrators

of the estate of JANE WARUIRU MAINA1ST

RESPONDENT

MOSES NDEGWA GITONGA.....2ND

RESPONDENT

JUDGEMENT

1. I begin by apologizing to the parties for the delay in delivering the judgement in this matter. The reasons have all through been explained to the parties.

2. On 5th June 2025 this court issued directions explaining that the original trial court file had not been availed yet the court considered it necessary to clarify on a number of issues which were unclear from the record of appeal, to allow a conclusive determination of the appeal. That necessitated the rescheduling of the judgment date.
3. When the original trial court file was finally availed, the court on 30th September 2025 scheduled the hearing of the appeal for 4th December 2025. On the 4th December 2025, judgment was not ready owing to pressure of work that had accumulated after the court was forced to take a sick leave for a whole week in the latter part of the month of November 2025. It was as a result of circumstances beyond the control of the court.

Background.

4. The appeal herein is against the judgment delivered by Hon. R.A. Oganyo (Mrs.) Chief Magistrate, Kajiado Law Courts, on 22nd August 2024, in Chief Magistrate ELC No. 66 of 2019. The appeal was commenced by way of the memorandum of appeal dated 29th August 2024 wherein the Appellant has listed 26 grounds of appeal. The Appellant prays that the judgment of the trial court

be set aside and in its place there be judgment in favour of the Appellant dismissing suit with costs.

5. In his submissions in support of the appeal, the Appellant condensed the 26 grounds of appeal into 6 and argued them as such classifying them into six key areas as follows:-

- (a) The existence, ownership and sale of Plot No. 11448.
- (b) The ownership of L.R. No. Ngong/Ngong/16054 and the relationship between John Keen and Moses Gitonga, the 2nd Respondent.
- (c) Misapprehension of the Appellant's evidence.
- (d) Cancellation of the Appellant's titles to the suit properties.
- (e) Possession of the suit properties.
- (f) The alternative remedies proposed by the trial court.

6. While at it, I must state that numerous and repetitive grounds of appeal do not enhance the chances of success of an appeal rather they tend to cloud the key issues in dispute.

History of Litigation before the Trial Court.

7. The 1st Respondent herein was the Plaintiff in the case before the trial court. Her case was premised on the further amended plaint dated 11th September 2019 whereby she had sought a variety of orders against the Appellant and the 2nd Respondent. The 1st Respondent's case was that she was the registered owner of Plot No. L.R. Ngong/Ngong/35057 and Ngong/Ngong/35058. The said plots according to the 1st Respondent had been purchased by her late husband, Stephen Maina who had entered into a sale agreement with the late John Keen and his sales agent, Simon Mugo Nyutu t/a Rainbow Properties for purchase of a plot known as Plot No. 11448, Ongata Rongai, which he paid for fully and additionally paid survey fees of Kshs. 6,000/- and Land Control Board fees of Kshs. 4,000/-.

8. According to the 1st Respondent, the 2nd Respondent however unlawfully and illegally resold Plot No. 11448 Ongata Rongai. The 2nd Respondent however, subsequently undertook to compensate the 1st Respondent with an alternative $\frac{1}{4}$ acre plot. When the 2nd Respondent delayed to act as he had promised, the 1st Respondent sued him and the vendor in Milimani CMCC 481 of 2004 which was settled by way of a consent, whereby the

Defendants (John Keen and the 2nd Respondent herein) undertook to and actually compensated the 1st Respondent with the suit properties herein; Ngong/Ngong/35057 and Ngong/Ngong/35058. The 1st Respondent asserts that she fenced off the 2 plots and took possession awaiting processing of titles in her name.

9. As it were, the 2nd Respondent fraudulently transferred the titles of the suit properties to himself and subsequently to the Appellant in May 2016. The 1st Respondent asserts that the Appellant never took possession of the suit properties since the 1st Respondent was in possession all through. It was only in 2019 that the Appellant trespassed into the suit properties and started digging the ground intending to erect a site structure and a toilet alleging ownership on the premises that it had been sold the properties by the 2nd Respondent.

10. The 1st Respondent particularized her allegations of fraud at paragraph 18 of the further amended Plaintiff and sought cancellation of the titles and entries in the register in favour of the 2nd Respondent and subsequently in favour of the Appellant.

11. The Appellant by an amended statement of defence dated 30th October 2019, denied the Plaintiff's (1st Respondent's)

allegations putting her to strict proof. The Appellant stated that it had entered into a land purchase agreement with the 2nd Respondent dated 14th April 2016 for five parcels of land including the suit properties at a total cost of Kshs. 6,000,000/- which transaction was duly concluded in terms of the provisions of the agreement after due diligence was carried out establishing that the titles were indeed in the names of the 2nd Respondent herein.

12. The Appellant acknowledged that as he conducted a search he came across a restriction by the DCI on Ngong/Ngong/35057 restricting any dealings on the property pending finalization of investigations.
13. The Appellant nonetheless insisted that it was a bona fide purchaser for value of the suit properties and that its title to the suit properties was lawful and indefeasible.
14. The case proceeded to hearing with each side calling one witness in support of their respective positions. The 2nd Respondent did not file any pleadings and did not participate in the trial.

15. The trial court found in favour of the 1st Respondent concluding that the 2nd Respondent did not have a clean title capable of being transferred to the 1st Respondent.

16. In the course of writing the judgment, the court being a first appellate court has taken its time to re-evaluate, reassess and re-analyze the evidence presented before the trial with a view to drawing its own independent conclusions and satisfy itself that the conclusions reached by the trial court were consistent with the evidence adduced before the court.

17. I note that the trial court in its impugned judgment placed heavy reliance on the alleged consent entered into by the parties in ***Milimani Civil Suit Number 481 of 2004***. The trial court invoked the provisions of Section 61 of the Evidence Act. The court stated that;

“The consent is an important factor in the determination of root of title to the Plaintiff’s case. The said consent actually is the basis upon which the Plaintiffs were settled on suit property for ten years.”

18. I have keenly perused the record of appeal as well the record of the trial court. I have not come across the referred consent

supposedly entered into in the case **Milimani Civil Suit Number 481 of 2004**. I am unable to tell what the terms of the said consent were.

19. Undoubtedly, the consent, if it really existed, is capable of influencing or impacting on the decision of this court and would remove vagueness and doubts over the case.

20. I consider it appropriate to take additional evidence as empowered under **Section 78(1)(d) of the Civil Procedure Act**, by calling for the file Milimani Civil Suit No. 481 of 2004 to confirm if indeed there was a consent recorded therein and the terms of that consent before delivering a final judgment in this appeal.

21. I am aware that this move will cause further delay in the final determination of this appeal but the parties must appreciate that the wheels of justice move slowly; but surely. This court is further enjoined under **Section 1A of the Civil Procedure Act** and **Article 159(3)(a)** to do substantive justice. The production of the court file will assist the court in delivering substantive and conclusive justice in this matter.

22. Consequently, the Deputy Registrar of this Court is directed to avail the said file, ***Milimani Civil Suit Number 481 of 2004*** in the shortest possible time to allow the finalization of this matter.

23. The court will give further directions once the file is availed.

It is so ordered.

Dated Signed and Delivered at Kajiado Virtually this 15th Day of December 2025.

M.D. MWANGI
JUDGE

In the virtual presence of:

Ms. Karuiru h/b for Mr. Githinji for the Appellant

Mr. Gitau Mwara for the 1st Respondent

N/A by the 2nd Respondent

Court Assistant: Mpoye

M.D. MWANGI
JUDGE