



REPUBLIC OF KENYA



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**Mugenda v Mwai (Environment and Land Appeal 37 of 2023)
[2026] KEELC 385 (KLR) (28 January 2026) (Judgment)**

Neutral citation: [2026] KEELC 385 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 37 OF 2023**

**JM ONYANGO, J
JANUARY 28, 2026**

BETWEEN

JAMES WAWERU MUGENDA APPELLANT

AND

MARY GATHONI MWAI RESPONDENT

JUDGMENT

1. This appeal emanates from the judgment of Hon. C.A Otieno Omondi, Senior Resident Magistrate in Ruiru MCE & L Case No. E152 of 2021 delivered on 13th April 2023 in which she dismissed the Appellant's suit and the Respondent's Counterclaim.
2. In the suit filed in the subordinate court, Mary Gathoni Mwai, the Respondent herein filed suit against the Appellant claiming that she was the beneficial owner of Plot No. 1890 comprised in L.R No . 10901/32 Waungumu Ngeke Ranch having purchased the same from Huruma Corner Women Group on 10th February 2009, who in turn purchased it from Mwhoko Housing Company Limited. After the said purchase she was issued with an ownership certificate by the said company whereupon she took possession of the plot and erected a concrete fence as she waited to be issued with title deed.
3. It was her case that in 2015 the Appellant emerged claiming ownership of the suit property by virtue of a Certificate of Lease for land parcel number Ruiru/Kiu Block 4/1789. The Respondent entered the suit property, demolished part of the concrete wall and started utilizing the land thus depriving the Respondent of her right to peaceful and quiet possession thereto. She claimed that the Appellant had obtained the said certificate of lease by means of fraud.
4. She therefore prayed that she be declared as the rightful owner of the suit property and that the Appellant's title be cancelled. She also prayed for an eviction order against the Appellant and a permanent injunction to restrain the Appellant from entering, trespassing, alienating or interfering with the suit property.



5. In response to the Respondent's suit, the Appellant filed a Statement of Defence and Counterclaim denying the allegations in the Plaint. In the Counterclaim, he claimed that he was the legitimate, rightful and lawful registered owner of the suit property having acquired the same from one Vincent Mburu Kiarie, a member of Mbo-i-Kamiti Farmers Company Limited.
6. He claimed that the Appellant had continuously trespassed on the suit property hence disrupting the Appellant's quiet possession thereof. He prayed that the Respondent's suit be dismissed and that he be declared as the owner of the suit property to the exclusion of the Respondent. He also sought a permanent injunction restraining the Respondent from interfering with the suit property.
7. The case was set down for hearing and both parties testified and called their witnesses. The trial Magistrate subsequently delivered her judgment dismissing both the suit and Counterclaim on the grounds that none of the parties had proved their case to the required standard. She then ordered the cancellation of the Appellant's title.
8. Aggrieved by the said judgment, the Appellant filed this appeal raising the following 7 grounds of Appeal:-
 - i. The learned trial Magistrate erred in law and in fact in issuing orders for cancellation of the Certificate of Lease issued to James Waweru Mugenda in respect of L.R No. Ruiru/Kiu Block 4/1789.
 - ii. The learned trial Magistrate erred in law and in fact in disregarding lawful procedure used by James Waweru Mugenda in acquisition of the certificate of lease over L.R No. Ruiru/Kiu Block 4/1789.
 - iii. The learned trial Magistrate erred in law and in fact in failing to appreciate the fact that James Waweru Mugenda was the 1st registered owner of the suit property L.R No. Ruiru/Kiu Block 4/1789.
 - iv. The learned trial Magistrate erred in law and in fact in leaving ownership of the suit property L.R No. RUIRU/KIU BLOCK 4/1789 in limbo by deciding that both the Appellant and the Respondent are not entitled to ownership without further directions.
 - v. The learned trial Magistrate misdirected herself in disregarding the Appellant's submissions on record.
 - vi. The learned trial Magistrate misdirected herself in solely relying on the root source of the suit property in disregard of other surrounding circumstances.
 - vii. The learned trial Magistrate erred in law and in fact in failing to acknowledge the contents of an independent report by the DCI and other key documentary exhibits produced by the Appellant over ownership of L.R No. Ruiru/Kiu Block 4/1789.
9. He prayed that the decision of the trial court be reviewed, varied or set aside.
10. The appeal was canvassed through written submissions and both parties filed their submissions accordingly.

Appellant's Submissions

11. In his submissions dated 2.8.24, learned counsel for the Appellant identified 3 issues for determination namely:



- a. Whether the trial Magistrate fairly issued orders for cancellation of the Certificate of lease issued to James Waweru Mugenda in respect of L.R No. Ruiru/Kiu Block 4/1789.
- b. Whether the trial Magistrate was justified in shifting the legal burden of proof to the Defendants
- c. Whether the trial Magistrate was justified in leaving the ownership of the suit property in limbo.

Cancellation of the Appellant's Certificate of Lease

12. It was counsel's submission that the court disregarded the procedure which the Appellant followed in the acquisition of his title as no fraud or misrepresentation was established to justify the cancellation of the Appellant's title. He faulted the trial Magistrate for ignoring the letter from the Director of Criminal Investigations which confirmed that the Appellant had genuinely purchased the suit property.
13. Furthermore, that the trial Magistrate failed to protect the sanctity of title as provided under section 24 (a) of the *Land Registration Act* by cancelling the Appellant's title which had been duly procured without making any orders as to whom the land should belong.
14. He relied on the decision of Dr. Joseph Arap Ng'ok v Justice Moiwo Ole Keiwa & 5 Others Civil Appeal No. CA 60 of 1997 where the court upheld the sanctity of title under Section 23 of the Registered *Land Act* (now repealed).
15. It was counsel's submission that the Land Registrar ought to have been summoned to confirm who was the lawful owner of the suit property.

Burden of Proof

16. Counsel faulted the trial Magistrate for shifting the burden of proof to the Appellant whereas the onus was on the Respondent to prove that the title was acquire by means of fraud or misrepresentation. He relied on section 107 of the *Evidence Act* which places the burden of proof in civil cases on the Plaintiff. He maintained that the Respondent failed to prove her case on a balance of probabilities that she was entitled to legal ownership of the suit property.

Ownership of the suit property in limbo

17. It was submitted that the trial Magistrate misdirected herself in coming up with a decision that left both parties in limbo as to the ownership pf the suit property. It was submitted that the Appellant was the registered owner of the suit property and his right to property was protected under Article 40 of the *Constitution*.
18. Relying on the case of Munyu Maina v Hiram Gaitha Maina Civil Appeal No. 239 of 2009, it was submitted that the Appellant went beyond producing the instrument of title to prove the legality of how he acquired the title by producing various documents. These include the letter from Mbo-i - Kamiti Farmers Company Limited confirming that the suit property had been sold to the Appellant; Letters requesting for sub-division approval addressed to the Department of Lands, receipts for processing title issued by the Department of Lands, a letter from DCI requesting the Land Registrar to remove the restriction placed by the Respondent after confirming the that the plot was genuinely purchased by the Appellant and an a application for registration indicating that the Appellant had formally applied for registration of the suit property.



Respondent's Submissions

19. The Respondent's brief Submissions are dated 28th January 2025. The main issue addressed in the said submissions is whether the trial Magistrate erred in cancelling the Appellant's certificate of Lease. It was submitted that a court cannot on the basis of indefeasibility sanction an illegality or give its seal of approval to an illegal or irregularly obtained title. Reliance was placed on the case of *Munyu Maina (supra)* where the Court of Appeal pronounced itself that where a registered proprietor's root of title is challenged, he needs to go beyond the title and prove that he acquired it legally and procedurally.
20. It was submitted that the Appellant was not a party to the sale agreement dated 14th October 2009 as the same was between Vincent Mburu Kiarie, Margaret Nyambura Njoroge and James Mwangi Mugenda. Secondly the Appellant did not produce any Certificate of Official Search to show that he had established the ownership of the suit property before purchasing it.
21. Thirdly, the Appellant did not call Vincent Mburu Kiarie to confirm that he had indeed sold the suit property to the Appellant. Fourthly Margaret Nyambura Njoroge and James Mwangi Mugenda did not execute the sale agreement dated 14th October 2009 and lastly, there was no proof that the two had purchased the suit property on behalf of the Appellant.
22. It was submitted that the absence of critical details left a doubt as to whether the Appellant had legally acquired his title.
23. He prayed that ownership of the suit property be vested in the Respondent.

Analysis and Determination

24. This being a first appeal, section 78 of the *Civil Procedure Act* mandates this court to re-evaluate, re-assess and re-consider the evidence that was adduced before the trial court and arrive at its own findings.
25. In the case of *Selle and Another v Associated Motor Boat Company Ltd and Others (1968) E.A 123*, the court held as follows:

“This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this Court is by way of a re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, re-evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”
26. After examining the impugned judgment, the proceedings of the lower court, the Memorandum of Appeal and the entire Record of Appeal as well as the parties' submissions and relevant caselaw, the following issues emerge for determination:
 - i. Whether the Appellant the trial Magistrate erred in dismissing both the suit and Counterclaim.
 - ii. Whether the appeal should be allowed.

Dismissal of suit and Counterclaim

27. Having heard the case on its merits, the trial Magistrate arrived at the conclusion that neither the Plaintiff's nor the Defendant had proved that they were legally entitled to the suit property and proceeded to dismiss both the suit and the Counterclaim with the result that the ownership of the suit property was left in limbo.



28. The Respondent who filed the case in the lower court testified through her legal representative Joseph Waweru Mwai who testified as PW1 and produced a total of 21 documents. The Plaintiff then then called two other witnesses who testified as PW2 and PW3.
29. The gist of her case was that she had acquired the suit property from Huruma Corner Women Group on 10th February 2009 who in turn purchased it from Mwiwoko Housing Company Limited. After the said purchase she was issued with an ownership certificate by the said company whereupon she took possession of the plot and erected a concrete fence as she waited to be issued with title deed.
30. Sometime in 2015, the Appellant turned up with a Certificate of lease claiming that the suit property belonged to him and he proceeded to take possession of the suit property.
31. The Respondent claimed that the Appellant had acquired his Certificate of title fraudulently and the particulars of fraud were provided at paragraph 10 of the Plaint.
32. Although the Respondent did not adduce any evidence to prove the alleged fraud, the Appellant whose title was under challenge was unable to prove the he acquired his title lawfully and procedurally. The sale agreement produced by the Appellant did not bear his name as it was between Vincent Mburu Kiarie as the vendor and Margaret Nyambura Njoroge and James Mwangi Mugenda as the purchasers.
33. Nowhere in the said agreement is it indicated that they were purchasing the suit property on behalf of the Appellant.
34. Additionally, no evidence was produced to show that Vincent Mburu Kiarie got his title from Mboi-Kamiti Farmers Company as alleged by the Appellant since the said Vincent Mburu Kiarie was not called as a witness. Without evidence from Mboi-i-Kmiti or the Land Registrar to confirm the origin of the Appellant's title, the trial Magistrate cannot be faulted for failing to affirm the said title.
35. On the other hand, the Respondent was unable to prove that she was the beneficial owner of the suit property as the sale agreement dated 10th February, 2009 which she produced as Plaintiff's Exhibit 13 was not signed by the officials of Huruma Corner Women's Group (the alleged vendor). The trial Magistrate correctly observed that this was contrary to section 3(3) of the Law of Contract Act which requires that every contract for the disposition of an interest in land be in writing, signed by all parties and the signatures be attested by a witness who is present when the contract is signed.
36. In the end, the trial Magistrate held that neither the Respondent nor the Appellant could legitimately prove that they were entitled to the suit property. I am satisfied that the trial Magistrate analyzed the evidence in its entirety, considered the evidence and submissions on record, applied the law correctly and arrived at a sound decision.
37. The Appellant has lamented that the Land Registrar was not called to shed light on whether his title was genuine but in my view, nothing stopped him from requesting the court to summon the Land Registrar. He only has himself to blame for failing to have him summoned as a neutral witness.
38. The upshot is that the appeal lacks merit and it is hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 28TH DAY OF JANUARY 2026.

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J. M ONYANGO
JUDGE



In the presence of:

1. Mr Injairu for the Appellant
2. Ms Gatimu for the Respondent

Court Assistant: Hinga

