

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC LAND APPEAL NO. E002 OF 2023

SAMUEL KIBATHI NJENGA sued as the administrator of the Estate
of the late **Joseph Kibathi Wabethi Alias**

Kibathi Mbethi

APPELLANT

VERSUS

ANTHONY CHEGE KIBATHI

RESPONDENT

(Being an appeal from the judgment and decree of Hon. W. Ngumi (Senior Principal Magistrate) delivered in Gatundu Magistrate's Environment and Land Case No. E015 of 2023 on 5th June 2023)

JUDGMENT

1. This appeal emanates from the Judgment of Hon. W. Ngumi, Senior Principal Magistrate in Gatundu CMELC Case No. E015 of 2023, where the Respondent filed suit against the Appellant claiming that he was the lawful owner of 1.2 acres of land (the suit property) being part of land parcel NGENDA/GATHAGE/197. It was his position that the suit property originated from land parcel NGENDA/GATHAGE/197, which belonged to his late father, Joseph Kibathi Wabethi (hereinafter referred to as the deceased). He stated that during his lifetime, the deceased had subdivided the land into three portions: one for his mother and two for his two other wives and their respective households. He further testified that on 14th

April 1962, the deceased convened a family meeting attended by all his children, during which it was disclosed that 1.2 acres belonging to the grandmother were to be sold in order to raise funds to purchase another parcel of land in the Rift Valley, and that no objection was raised by those present.

2. It was the Respondent position that on the same date, 14th April 1962, he entered into a sale agreement with the deceased for the purchase of 1.2 acres to be excised from NGENDA/GATHAGE/197 at an agreed consideration, and that a further agreement was later executed on 15th August 1967. He stated that he paid the full purchase price, took possession of the land, and began utilizing it, including planting coffee thereon from as early as 1966, thereby demonstrating long occupation and use of the portion he had purchased.
3. The Respondent further stated that disputes later arose when some beneficiaries opposed the sale after the deceased's death. He stated that although the Appellant was issued with letters of administration in Succession Cause No. 281 of 2019, the dispute crystallized during discussions on the mode of distribution of the estate. He contended that a meeting held at the Chief's office on 24th November 2011 resolved that the sale transaction be taken into account during succession proceedings. It was his position that despite his lawful purchase and disclosure to all beneficiaries, the administrator declined to allocate him the 1.2 acres, prompting him

to seek a declaration that he was the rightful owner of the said portion.

4. The Appellant filed a Statement of Defence dated 11th May 2022 denying the Respondent's claims against him. He stated that he was the grandson of the deceased and an administrator of his estate. He denied that the deceased ever sold 1.2 acres excised from NGENDA/GATHAGE/197 to the Respondent and contended that there was no valid or known sale agreement between the Respondent and the deceased. He maintained that any occupation or use of the suit land by the Respondent was merely permissive, asserting that when the deceased relocated to Timboroa, he only allowed the Respondent to cultivate the land but did not sell it to him.
5. The Appellant further stated that disputes over the suit land had existed for many years within the family, with some members objecting to the Respondent's claim of purchase. He stated that several meetings were held at their local Chief's office, during which the Respondent orally alleged that he had bought the land, but no documentary proof of sale was produced. According to the Appellant, the Chief and elders were unable to resolve the dispute and consequently advised the family to pursue the matter through succession proceedings, as the land formed part of the deceased's estate.
6. The Appellant testified that succession proceedings were thereafter instituted, and that the Administrators proposed an equal

distribution of the estate among the houses of the deceased. He contended that it was the Respondent's side of the family that proposed an unequal mode of distribution in his favour, which proposal was rejected by the rest of the family. The Appellant maintained that, as an administrator, he could not lawfully allocate a portion of the estate to the Respondent to the exclusion or detriment of other beneficiaries, and urged that the Respondent's claim was unfounded and amounted to an attempt to unlawfully appropriate family land.

7. After hearing the parties, the trial magistrate delivered her judgment in which she found in favour of the Respondent. She held that the fact that the deceased neither gave the Respondent the original title deed nor transferred the parcel of land to him despite the passage of time could not be deemed to invalidate the sale.
8. It is the said Judgment that triggered this appeal, in which the Appellant cited the following 5 Grounds of Appeal:
 - i) *That the learned trial magistrate erred in law and fact and misdirected herself in finding that the Respondent herein is the legal and rightful proprietor of 1.2 acres of the land being part of parcel NGENDA/GATHAGE/197.*
 - ii) *That the learned trial magistrate erred in law and in fact and misdirected herself in finding that the alleged agreements dated 14th April 1962 and 15th August 1967 were valid and enforceable land sale agreements between the respondent and the deceased Joseph Kibathi Wabethi alias Kibathi Mbethi.*

- iii) The learned trial magistrate wholly erred in law and fact in arriving at her said decision and failing to consider that the deceased had left a written will and testament dated 26th December 1973 which directly controverted the existence or validity of the alleged sale agreements dated 14th April 1962 and 15th August 1967, which the magistrate relied on to arrive at her decision.*
- iv) The learned trial magistrate erred in law and in fact by failing to take into consideration the submissions of the appellant in the lower court.*
- v) The learned trial magistrate erred in law and in fact in arriving at her said decision.*

9. He urged the court to allow the appeal and set aside the Judgment and the Decree of the lower court. He also sought a declaration that there was no valid sale of part of land parcel No. Ngenda/Gathage/197 by the deceased, Joseph Kibathi Wabethi alias Kibathi Mbethi to the Respondent.
10. The appeal was canvassed by way of written submissions. The Appellant filed submissions dated 12th November 2025 while the Respondent filed written submissions dated 17th June 2025.
11. In his submissions, learned counsel for the Appellant identified the following four issues for determination: (i) Whether the trial court erred in holding that the sale agreement between the deceased and the Respondent was valid and enforceable; (ii) Whether the trial court erred in disregarding the Appellant's submissions and failing to consider the legal and factual deficiencies in the transaction; (iii)

Whether the trial court erred in holding that the disputed land did not form part of the free estate of the deceased; and (iv) Who should bear the costs of the appeal.

12. On whether the trial court erred in holding that the sale agreement between the deceased and the Respondent was valid and enforceable, counsel submitted that the trial court gravely erred in law and fact by finding that the alleged sale agreements dated 14th April 1962 and 15th August 1967 were valid and enforceable. He contended that the said agreements, which were written in Kikuyu, were never translated into the language of the court, and were produced without any certificate of translation. He pointed out that none of the alleged attesting witnesses were called to testify, despite one of them being an heir to the deceased's estate who expressly disputed the existence of the sale. Counsel argued that, although the trial court acknowledged these defects, it nonetheless relied on the agreements, thereby misdirecting itself.
13. Counsel further submitted that the learned trial magistrate erred in holding that there was no legal requirement for a contract for the sale of land to be in writing. He contended that section 3(3) of the Law of Contract Act was already in force at the time the alleged agreements were entered into and required such contracts to be in writing, signed, and duly attested. He maintained that the agreements failed to meet these statutory requirements and were therefore invalid. He also submitted that no proprietary interest could have passed to the Respondent since no transfer was ever

completed or registered during the lifetime of the deceased. Counsel pointed out that the Respondent admitted that the land had no title at the time and that no steps were taken to perfect the alleged purchase for many years. He contended that, in the absence of registration, the Respondent could not have lawfully acquired any interest in the disputed land.

14. On whether the trial court erred in disregarding the Appellant's submissions and failing to consider the legal and factual deficiencies in the transaction, counsel submitted that the trial court failed to properly consider the Appellant's evidence and written submissions, which clearly demonstrated the invalidity of the alleged sale. He contended that although the Appellant was allowed to file submissions, the trial court disregarded the same when arriving at its decision. Counsel pointed out that the court overlooked material contradictions in the Respondent's evidence, particularly regarding alleged family meetings and consent, despite admissions that not all beneficiaries of the estate were represented.
15. He further contended that the trial court relied on uncorroborated testimony of the Respondent and local administration officers while ignoring the legal deficiencies surrounding the alleged transaction. Counsel argued that this failure to evaluate all the evidence and submissions amounted to a violation of the Appellant's right to a fair hearing and occasioned a miscarriage of justice.

16. On whether the trial court erred in holding that the disputed land did not form part of the free estate of the deceased, counsel submitted that the trial court erred in failing to find that the disputed portion of land formed part of the free estate of the deceased. He contended that since no valid sale or transfer was proved, the deceased remained the lawful proprietor of the land at the time of his death. Counsel argued that the Respondent did not acquire any registrable or equitable interest capable of excluding the land from the estate.
17. He further submitted that, upon the death of the deceased, the suit land vested in the personal representatives for purposes of administration and distribution under the Law of Succession Act. Counsel maintained that the trial court wrongly removed the disputed land from the succession process, thereby usurping the jurisdiction of the succession court and undermining the lawful administration of the estate.
18. On costs, counsel submitted that the Respondent improperly instituted the suit in the trial court instead of ventilating his claim within the pending succession proceedings. He contended that this conduct occasioned unnecessary litigation and delay in the administration of the estate. Counsel argued that, in accordance with Section 27 of the Civil Procedure Act and settled jurisprudence that costs follow the event, the Appellant should be awarded the costs of both the appeal and the proceedings in the lower court.

19. In conclusion, counsel urged the court to allow the appeal in its entirety, set aside the judgment of the trial court, declare that the Respondent acquired no valid interest in the disputed land, find that the land forms part of the free estate of the deceased, and award costs to the Appellant.

Respondent's Submissions

20. Counsel for Respondent identified the following issues for determination; (i) Whether there was a valid sale agreement between the Respondent and the deceased entitling the Respondent to beneficial ownership of the 1.2 acres portion of NGENDA/GATHAGE/197; (ii) Whether the existence of a will negated the transaction between the Respondent and the deceased; (iii) Whether the trial court erred in excluding the disputed land from the free estate of the deceased; and (iv) Whether the appeal should succeed and who should bear costs.
21. On whether there was a valid sale agreement between the Respondent and the deceased entitling the Respondent to beneficial ownership of the 1.2 acres portion of NGENDA/GATHAGE/197, counsel for the Respondent submitted that the trial court correctly found that there existed a valid and binding sale agreement between the Respondent and the deceased. She contended that the evidence before the trial court demonstrated that the deceased voluntarily offered the 1.2 acres portion for sale to his family, and that the Respondent accepted the offer and paid the full purchase price of Kshs 1,000 pursuant to the agreements dated 14th April

1962 and 15th August 1967. She pointed out that following payment, the Respondent was given vacant, exclusive, and quiet possession of the land and had occupied, cultivated, and developed it continuously from about 1962, including during the lifetime of the deceased.

22. Counsel submitted that the trial magistrate properly evaluated the agreements and the conduct of the parties and correctly concluded that, although writing was not a legal requirement at the time, the agreements were nonetheless valid and created binding legal obligations. She argued that the essential elements of a contract offer, acceptance, consideration, and intention to create legal relations, were fully satisfied. She further pointed out that the authenticity of the agreements was not controverted and that the Certificate of Translation produced before the trial court confirmed that the documents were indeed sale agreements.
23. She further contended that, notwithstanding the absence of formal transfer, the Respondent acquired a beneficial interest in the suit land upon payment of the purchase price and taking possession. Counsel maintained that the deceased thereafter held the 1.2 acres portion under a constructive trust in favour of the Respondent. She relied on Supreme Court jurisprudence to argue that equity will intervene to prevent unjust enrichment and that constructive trusts may arise in land sale transactions where justice and good conscience so demand. On that basis, she submitted that the trial court correctly upheld the Respondent's beneficial ownership and

properly dismissed the Appellant's challenge on the validity of the sale.

24. On whether the existence of a will negated the transaction between the Respondent and the deceased, counsel submitted that the Appellant's contention that the deceased left behind a valid will negating the sale was without merit. She argued that the trial court rightly found that the deceased could not bequeath property which he had already sold during his lifetime. Counsel contended that once the deceased entered into a binding sale agreement and received the full purchase price, he was estopped from dealing with the 1.2 acres portion in any other manner, including through testamentary disposition.
25. She further submitted that, in any event, the alleged will produced by the Appellant was itself invalid for failure to comply with the mandatory requirements of the Law of Succession Act, particularly the requirement that a will be attested by at least two competent witnesses. Counsel maintained that the trial court, therefore, correctly disregarded the will and found that it could not defeat the Respondent's prior beneficial interest in the land.
26. On whether the trial court erred in excluding the disputed land from the free estate of the deceased, counsel submitted that the trial court properly excluded the 1.2 acres portion from the free estate of the deceased. She contended that, upon execution of the sale agreements, payment of the full purchase price, and delivery of

possession, the Respondent acquired a beneficial interest which removed the land from the pool of property available for distribution under succession. She argued that the deceased thereafter merely held the land in trust for the Respondent pending formal transfer and had no beneficial interest capable of transmission upon death.

27. She maintained that the Appellant's insistence on including the portion in the succession proceedings ignored the equitable interests arising from the sale and would result in unjust enrichment of the estate at the Respondent's expense. Counsel therefore submitted that the trial magistrate was correct in affirming the Respondent's entitlement to excision of the 1.2 acres portion prior to distribution of the remainder of the estate.
28. On whether the appeal should succeed and who should bear costs, counsel submitted that the appeal was devoid of merit and amounted to an attempt to overturn a well-reasoned judgment grounded in both law and equity. She argued that the trial court properly exercised its discretion and arrived at a sound determination based on the evidence on record. Counsel therefore urged the court to dismiss the appeal in its entirety and award costs to the Respondent, as the successful party, in accordance with established principles that costs follow the event.

ANALYSIS AND DETERMINATION

29. This being a first appeal, my primary role as a first appellate court is to re-evaluate, re-assess and re-analyse the evidence on record and

then determine whether the conclusions reached by the learned trial magistrate are sound or not and give reasons either way.

30. In ***Selle & Another vs. Associated Motor Boat Co. Ltd & Others*** [1968] EA 123, the court stated 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 retrial 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, 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..."

31. Therefore, the role of this court is not to merely echo the conclusions of the lower court but to re-examine the evidence in its entirety, all the while being ever mindful of the inherent limitations imposed by the reliance on the record alone.
32. Having considered the Memorandum of Appeal, Grounds of Appeal and the entire Record of Appeal, the following issues fall for determination:

- i) Whether the Respondent proved, on a balance of probabilities, that he purchased 1.2 acres excised from land parcel NGENDA/GATHAGE/197 from the deceased during his lifetime;***
- ii) Whether the learned trial magistrate erred in law and fact in holding that the disputed 1.2***

acres did not form part of the free estate of the deceased;

iii) Whether the learned trial magistrate failed to consider the Appellant's evidence, including the alleged will; and

iv) Whether the appeal is merited and who should bear costs.

Whether the Respondent proved purchase of the 1.2 acres

33. The Respondent testified as PW1 and adopted his witness statement dated 14th March 2022. He stated that in 1962, the deceased, his father, convened a family meeting and expressed his intention to sell 1.2 acres portion of land parcel NGENDA/GATHAGE/197 in order to raise money to purchase land in Timboroa. PW1 testified that he entered into a sale agreement with the deceased on 14th April 1962 to purchase the said property at a consideration of Kshs. 800, which was later varied to Kshs. 1200. He subsequently signed a further agreement dated 14th August 1967. He testified that he paid the full purchase price, took possession, and began cultivating the land, including planting coffee.

34. During cross-examination, PW1 remained consistent that the deceased appended his thumbprint on both agreements, that witnesses were present though they did not sign, and that the failure to transfer title arose because the deceased died in 1974 before effecting transfer. He denied that his occupation was permissive and maintained that he had been in exclusive possession since purchase.

35. PW2, the Senior Chief of Mutati Location, and PW3, the Assistant Chief of Mutati Sub-Location, materially corroborated the Respondent's testimony. Both witnesses testified that family meetings were held to resolve the dispute; and that the elders confirmed the sale of the 1.2 acres to the Respondent; that the land on the ground was visibly divided into three portions; and that the Respondent's portion had a house and ongoing cultivation, with no graves, unlike the portions belonging to the two wives of the deceased. PW3 specifically testified that only one family member disputed the sale during the deliberations.
36. On the other hand, the Appellant (DW1) testified that he was not born in 1962 or 1967 and was not present when the alleged sale took place. His evidence was that he was unaware of the sale and that his objection arose during succession proceedings. Significantly, under cross-examination, DW1 conceded that the sale agreements were shown to him and were before court. He did not dispute their authenticity but stated that he did not personally verify the transaction.
37. DW2 similarly testified that he had not seen the agreements at the time of the alleged sale and was not present when the transaction took place. His evidence largely revolved around family understanding and subsequent disputes, rather than direct refutation of the transaction. He admitted that the Respondent had built and occupied a portion of the land.

38. Upon re-evaluating this evidence, I find that the Respondent's case was grounded on direct testimony of purchase, supported by documentary evidence, long possession, and corroboration from independent local administration officers. In contrast, the Appellant's case was founded on lack of personal knowledge and family disagreement rather than positive evidence disproving the sale.
39. Section 107 of the Evidence Act Cap 80 of the Laws of Kenya provides that:

“107 Burden of proof

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*
- (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.*

Additionally, sections 108 and 109 of the same Act provide that:

“108 Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”

40. I therefore find no error in the trial magistrate's conclusion that the Respondent proved, on a balance of probabilities, that he purchased the 1.2 acres from the deceased during his lifetime.

Whether the disputed land formed part of the free estate of the deceased.

41. Section 3 of the Law of Succession Act defines the free property of a deceased person as property which he was legally competent to freely dispose of during his lifetime and in respect of which his interest had not been terminated prior to death.

42. The evidence on record demonstrates that upon payment of the full purchase price and delivery of possession to the Respondent, the deceased divested himself of the beneficial interest in the 1.2 acres. What remained was a bare legal interest pending formal transfer. Equity regards as done that which ought to be done, and it would be unconscionable to allow the estate to reclaim land that had been sold and paid for decades earlier.

43. I therefore agree with the trial magistrate that the disputed 1.2 acres did not form part of the free estate of the deceased available for distribution under succession proceedings.

Whether the learned magistrate failed to consider the Appellant's evidence and the alleged will.

44. The Appellant faulted the trial court for allegedly disregarding his submissions and for failing to give effect to a will dated 26th

December 1973. The record, however, shows that the learned magistrate considered the defence evidence and expressly addressed the effect of the alleged will.

45. In any event, a testator cannot bequeath property which he no longer owns. Property sold during a person's lifetime does not revert to the estate merely because transfer was not completed. Further, the alleged will was not proved in accordance with the requirements of the Law of Succession Act through attesting witnesses. The trial magistrate cannot therefore, be faulted for declining to allow the will to defeat a prior completed sale.
46. I am satisfied that the trial magistrate evaluated the Appellant's evidence and submissions and that disagreement with the ultimate conclusion does not amount to failure to consider the same.

Whether the appeal has merit and costs

47. Having independently re-evaluated the evidence and the law, I find that the learned trial magistrate properly directed herself on the facts and applicable principles of law and equity. No misdirection, error of law, or miscarriage of justice has been demonstrated to warrant interference by this Court.
48. The appeal, therefore, lacks merit. It is hereby dismissed. The Appellant shall bear the costs of the Appeal.

Dated, signed and delivered virtually at Thika this 28th day of January 2026.

.....
J. M ONYANGO
JUDGE

In the presence of:

1. Ms Masheti for Mr Wageni for the Appellant
2. Ms Mwangi for Ms Wangui Kuria for the Respondent

Court Assistant: Hinga

ORIGINAL