



THE JUDICIARY



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT GARISSA
ENVIRONMENT AND LAND DIVISION
ELC APPEAL CASE NO E041 OF 2024

MAINA NDUGIRE.....1ST APPELLANT
ALICE MURINGI NDUGIRE.....2ND APPELLANT
MARY WANGARI KIMATA.....3RD APPELLANT
JENEFFER NYAMBURA TATUA.....4TH APPELLANT
VERSUS
SAMUEL MAINA MUYA..... RESPONDENT

*(Being an Appeal from the Judgment of the Court in Murang'a Chief Magistrate's M.C.E.L.C.
Number E041 of 2023 as Delivered by Hon. S.N. Mwangi on 25th September, 2024).*

JUDGMENT

- 1) In the Memorandum of appeal dated 27-9-2024, the Appellants seek the following orders.
 - (a) That the judgment of the lower Court dismissing the Plaintiffs' suit and claim while allowing the counterclaim be set aside.
 - (b) Judgment be entered in favour of the Appellants as per their suit and claim before the lower Court.
 - (c) The counterclaim in the lower Court be dismissed with costs.
 - (d) The costs of this appeal and the costs in the lower Court be awarded to the Appellants herein.
- 2) The Appellants have filed ten (10) grounds of appeal for seeking to set aside the judgment of the lower Court. The grounds are as below.

The learned Magistrate erred in law and fact in/by,

 - (i) **dismissing the Appellants' suit which was clear, cogent and proved to the required standard,**

- (ii) allowing a counterclaim which was not duly proved and placed undue weight to the inconsistent and contradictory defence evidence thus totally erred on the burden of proof,
 - (iii) proceeding to oust, contradict and trash the legal and final judgment of the Court in Murang'a Succession Cause No. 114 of 2013 thus purporting to sit on appeal in a judgment issued by a Court vested with concurrent jurisdiction,
 - (iv) allowing the Respondent (Defendant) to benefit from an illegal act of meddling with the unadministered estate of a deceased person criminalized under the Law of Succession Act,
 - (v) totally ignoring the provisions of the Land Control Act and the Law of Contract Act as relates to sale of land contracts,
 - (vi) her reliance on suspect, ambiguous, incredible and made up documents without properly interrogating the same and thus was indifferent to the evidence pertaining to those documents,
 - (vii) treating and holding the Respondent as a creditor of the estate of Ndugire Ndenyeka, deceased, in Murang'a Succession Cause No. 114 of 2013 against and contrary to the judgment of the Court in the Succession matter,
 - (viii) entertaining the counterclaim whereas the Respondent not only lacked legal capacity to sue the Appellants(Plaintiffs) but was as well non suited against them,
 - (ix) her interpretation of the Law and the principles that guide adverse possession and may have usurped jurisdictions she lacked in entertaining the counter claim,
 - (x) her finding and reasoning that there was a legal and valid sale of land agreement/contract enforceable in Law.
- 3) The facts of the case according to the Appellants (Plaintiffs) were as follows. One, the 1st Plaintiff was the legal representative of the estate of Ndugire Ndenyeka issue in **Murang'a Succession Cause No. 114 of 2013**. In that cause in the lower Court **L.R. No. Loc.14/Kamune/495** was distributed as follows.
- (a) Maina Ndugire to get 1.5 acres.
 - (b) Alice Muringi Ndugire to get 0.75 acres.
 - (c) Mary Wangari Kimata to get 1.5 acres.
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(d) Jeniffer Nyambura Tatua to get 0.75 acres.

Two, upon confirmation of the grant, the administrator attempted to register the documents and orders of the Court only to be informed that the Respondent had lodged a caution on LR. No. Loc.14/Kamune/495 claiming ownership as a creditor, thus inhibiting all dealings with and in the land. The Appellants were not aware of the claim and interest of the Respondent. Three, the Appellants prayed for the removal of the caution against the suit land and an order for the Respondent to vacate.

- 4) The facts of the case according to the Respondent are as follows. Firstly, on 15-1-1991, the deceased Joshua Ndugire entered into a sale agreement with the Respondent in which he sold the said land to the Respondent for Kshs. 238,160/= The Respondent paid the full purchase price between the years 1991 and 2000. These payments were acknowledged by Joshua Ndugire in writing and witnessed by several people. Secondly, the Appellants were all along aware of the sale and they secretly filed a succession without informing the Respondent. Their conduct in secretly filing the succession cause was fraudulent. Thirdly, the Respondent occupied the suit land upon purchase and at the time of the filing of the suit in the lower court, he had been on the land for over 30 years.
- 5) At the trial, the Appellants did not dispute that the Respondent is in occupation of the suit land and for long. According to them, he did not buy the land but merely leased it.
- 6) In her judgement dated 25-9-2024, the learned trial magistrate dismissed the Appellants' suit and allowed the Respondent's counterclaim.
- 7) In his written submissions dated 5-6-2025, the Appellants' counsel did not identify any issues for determination. In the absence of any issues, I will treat the ten(10) grounds of appeal as the issues for determination.
- 8) I have carefully considered the appeal in its entirety including the entire record and the submissions by learned counsel for the parties. On the first ground of appeal, I find that the trial Magistrate did not err at all. The Appellants did not prove their case to the required standard. In their plaint, they did not mention that the Respondent was in occupation of the suit land for many years and that he had made payments to Joshua Ndugire in his lifetime. It is only in cross-examination by the Respondent's counsel that

the Appellant's admitted that there was indeed money received for the land and that the Respondent was in occupation. The Appellants did not even bother to file a reply to the defence and counterclaim to rebut the overwhelming evidence of sale filed by the Respondent. In the absence of the above, it cannot be true to say that Appellants presented a clear and cogent case proved on a balance of probabilities.

- 9) Regarding the second ground of appeal, I find that the counterclaim was well proved and there was no inconsistency on the part of the Respondent whose case was simply that he bought the suit land from Joshua Ndugire. He did not waver from that position and I find no inconsistency or contradiction in his evidence whether filed or given as testimony in Court on 9-7-2024.
- 10) Looking at ground three of appeal, there is nothing on record to show that the trial Magistrate ousted, trashed, or contradicted the final judgment of Murang'a Succession Cause No. 114 of 2013. The Appellants who were the Plaintiffs in the lower Court case did not file the proceedings of the Succession Cause in that case. Such proceedings would have shown if the Respondent was heard by the Succession Court and if there was any determination of the issues that he raised. More importantly, the jurisdiction of the Succession Court is not identical to that of the Land Court. While the Succession Court is mandated to establish the Dependants of a deceased person and who is entitled to inherit his estate, the jurisdiction of the Environment and Land Court under **Article 162(2) (b)** is **“to hear and determine disputes relating to the environment and the use of and occupation of, and title to land.”**

The learned trial magistrate stuck to her lane and only decided on who was entitled to use, occupy and have title to the suit land. This finding covers the fourth ground of appeal which deals with meddling with the unadministered estate of a deceased person. It was not lost on the trial Court and this one too that the Respondent occupied the suit land in the lifetime of the deceased. He did not suddenly enter the suit land after the death of the deceased. The Appellants were clearly wrong to fail to disclose to the succession Court that the Respondent was in actual occupation of the suit land.

- 11) In relation to the fifth ground of appeal, it is my finding that neither the Land Control Act nor the Law of Contract Act apply to this case. The trial magistrate was spot on in finding that under the proviso to **Section 3(3)** of the **Law of Contract Act**, the requirement for

the sale agreement to be written and signed by witnesses for each party is exempted where a resulting, implied or constructive trust exists. In this case, a constructive trust was found to exist because the deceased owner of the land put the Respondent in possession of the suit land thereby creating a trust which his dependants could not overturn. In the case of **Willy Kimutai Kitlit vs Michael Kibet (Civil Appeal No 51 of 2015)** it was held that Section 6 of the Land Control Act cannot override Article 10 of the Constitution which elevates equity to a constitutional value and therefore higher in hierarchy than statutory law. The trial magistrate was right to find that since the Respondent had paid the entire purchase price for the suit land and occupied it, it was unconscionable for the Appellants to purport to refund the purchase price and evict the Respondent more than 30 years since the land was sold to him by the deceased.

- 12) Finally, it is my finding that grounds of appeal numbers **6,7,8,9** and **10** have been adequately dealt with in the first five grounds. For example ground six deals with the question of the credibility of the Respondents evidence. This was dealt with while dealing with the second ground of appeal. The seventh ground is also covered in the same finding. The eighth ground is covered in ground five which deals with the doctrine of constructive trust and property estoppel enunciated in the case of **Willy Kitilit (Supra)**. The judgment of 25-9-2024 did not mention adverse possession anywhere. Ground nine of appeal cannot therefore be correct as it is not factual. Ground 10 of appeal is covered in paragraph 11 of this judgment which has dealt with the issue of the validity of disposition of land where there is no written agreement signed by the parties and their witnesses. This is well taken care of by the proviso to the sub section which provides as follows.

“...provided that this subsection shall not apply to a contract ... nor shall anything in it affect the creation of a resulting, implied or constructive trust.”

- 13) For the above stated reasons, I **dismiss** the Appellants’ Appeal dated 27-9-2024 and direct that the judgement and decree of the lower Court be implemented in full.
Costs to the Respondent.

Dated, signed and Delivered virtually at Murang’a this 9th day of February, 2026.

**M.N. GICHERU
JUDGE.**

Delivered online in the presence of :-
Mwangi Njonjo - Court Assistant
Appellant's Counsel – Absent
Respondents' Counsel – Mr Ochieng holding brief

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