



THE JUDICIARY



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANG'A
ELCA NO E013 OF 2025

KEZIAH WAMBUI THUO.....1ST APPELLANT
SAMUEL NG'ANG'A THUO.....2ND APPELLANT
VERSUS
GEOFFREY KIMURA MUGO.....1ST RESPONDENT
MARY WAMBUI KIMURA2ND RESPONDENT

(Being an appeal against the whole of the judgment delivered on 2nd April 2025 by the Honourable O. Wanyanga the Principal Magistrate in MCLEC CAUSE NO. E016 OF 2021 – Kigumo)

JUDGMENT

- 1) In the Memorandum of appeal dated 8-4-2025, the Appellants seek the following orders.
 - (a) **That the appeal herein be allowed and the judgment of the trial court delivered on 2-4-2025 be set aside and/or vacated and substituted with an order dismissing MCELC Case No. 016/2021 Kigumo.**
 - (b) **Costs be awarded to the Appellants herein.**
 - (c) **This Court be pleased to grant such other and/or further orders as it may deem just and and/or expedient.**
- 2) The appeal is based on eight grounds which are as follows.

The learned trial magistrate erred in law and fact by,

 - (i) **failing to address his mind on whether or not the Appellants had properly been enjoined in the suit as Defendants hence arrived at an erroneous conclusion,**
 - (ii) **not appreciating the purpose and/or purport for which the limited grant *ad litem* had been issued and to what extent the same was applicable hence arrived at the wrong conclusion,**
 - (iii) **failing to take cognisance of the fact that the subject land parcel comprised of an estate of a deceased registered owner hence subject to the law of succession thus arrived at an erroneous determination,**

- (iv) not making a finding as to the validity and/or authenticity or otherwise of the impugned sale agreements hence arrived at the wrong determination,**
- (v) shifting the balance (burden I presume) of proof to the Appellants in regard to the authenticity of the deceased's purported signatures in the sale agreements hence arrived at an erroneous conclusion,**
- (vi) not addressing his mind on the inconsistencies of the purported acreage bought *vis-à-vis* the claim made in the suit hence arrived at an erroneous conclusion,**
- (vii) not addressing his mind on the issue of the mandatory requirement of the consent of the Land Control Board consent in a land transaction hence arrived at an erroneous conclusion and**
- (viii) not making a finding as to whether the Respondents had met the threshold to warrant grant of orders for specific performance hence arrived at an erroneous conclusion.**

3) The facts of the case according to the Respondents who were the Plaintiffs in the lower Court case are as follows. Firstly, in the year 2014, Mwangi Thuo, the registered owner of land parcel No.Loc.2/Kanderendu/1061 approached Peter Kanini Mugo, a brother to the first Respondent, and informed him that he had financial problems at home and he wished to sell one acre out of the suit land. Peter informed his brother the 1st Respondent who became interested in the purchase of the land from the deceased. Secondly, on 4-12-2014 a sale agreement was recorded between Mwangi Thuo and the 1st Respondent. Mwangi Thuo sold 1 (one) acre out of the suit land to the 1st Respondent for Kshs. 1,250,000/=. On 23/7/2018, there was a second sale agreement for a further one quarter of an acre between the same parties and finally on 6-3-2019, there was a third agreement between the same parties for yet another one quarter of an acre. The 2nd and 3rd sale agreements have an error in that the size of the land is described as 0.4 acres instead of 0.25 acres. All the three agreements for sale are witnessed by the first Appellant and Peter Kanini Mugo and firms of Advocates. Thirdly, the 1st Respondent occupied the land that he bought upon purchase. He built a house, planted tea bushes and trees, but a kitchen and fenced the land. Fourthly, Mwangi Thuo died on 7-3-2020 before he could transfer the land to the Respondents. Upon his death, the Appellants promised to file a probate and administration cause and transfer the 1.5 acres to the first Respondent and his wife. Fifthly, the Appellants promised to add 0.2 acres to the 1st Respondent at a consideration

of Kshs. 400,000/=.The 1st Respondent advanced Kshs. 220,000/= to the Appellants. The balance of Kshs. 180,000/= was to be paid upon the transfer of the land which was now 1.7 acres. Sixthly, the Appellants reneged on all the agreements and instead invaded the portion of the suit land occupied by the Respondents, destroyed the property thereon and threatened the Respondents' workers. When the Respondents reported to the police, the Appellants pleaded to settle the matter amicably. The Respondents were agreeable to the Appellants' pleas but even after begging to be forgiven, the Appellants continued with their recidivism and dishonoring all the promises that they had made. It is this backsliding by the Appellants that resulted in the lower court suit at Kigumo, being Kigumo ELC Cause No. 16 of 2021, which was decided in favour of the Respondents.

4) The facts of the case according to the Appellants are as follows.

Firstly, the Appellants who were the Defendants in the lower Court case are wife and son of the late Mwangi Ng'ang'a Thuo, the registered owner of the suit land. Secondly, in the year 2014, the second Appellant learnt that his father was selling a portion of the suit land to Peter Kanini Mugo who is from their village. He cautioned the land immediately. All was quiet until 2019 when the 1st Respondent started to pick tea from a small portion of the suit land. Mwangi Ng'ang'a Thuo, the registered owner informed the Appellants that the 1st Respondent he had leased some tea bushes. Secondly, when the registered owner of the suit land passed away on 7-3-2020, instead of the Respondents confining themselves to the area where they were picking tea, they hived off and fenced a big portion of the land. They also put up structures on the land. The matter was reported to the area chief. When the Respondents produced the sale agreements, the Appellants became suspicious. The 1st Appellants was very clear that the signatures on the agreements were not hers. Finally the suit as filed against the Appellants is defective because they have not sold any land to the Respondents and they have also not filed for letters of administration for the estate of Mwangi Thuo, the registered owner of the suit land.

5) In his judgment dated 2-4-2025, the learned trial magistrate found in favour of the Respondents. He found that they were entitled to 1.5 acres which they had purchased in the lifetime of the registered owner Mwangi Thuo. As for the 0.2 acres purchased after the death of registered owner, the learned magistrate found that the Appellants had no capacity to sell because they had authority from the Court. He ordered that the

Appellants transfer 1.5 acres of the suit land Loc.2/Kanderendu/1061 to the Respondents. He also awarded the costs of the suit to the Respondents.

6) In her written submissions dated 28-8-2025, the Appellants' counsel treated the grounds of appeal as the issues for determination. The Respondents' counsel in his submissions of 5-9-2025 also treated the grounds as the issues.

7) I have carefully considered the record of appeal, the written submissions by the learned counsel for the parties and the law cited therein.

This being a first appeal and going by the holding in the case of **Selle vs. Another vs. Associated Motor Boat Co. Ltd and Others, [1968] EA 123**, I have a duty to do the following. **“Reconsider and evaluate the evidence on record and draw my own independent conclusions while bearing in mind that I did not see or hear the witnesses.”**

In doing the above, I must remember that an appeal to this Court is by way of a retrial and I am not bound by the trial court's findings of fact.

I will examine each ground of appeal separately. Looking at the grounds, the following issues arise in this case.

- (i) Whether the Appellants had the requisite capacity to be sued in the lower Court.**
- (ii) Whether there is need for a sale agreement for a party in occupation of land when such occupation is with the consent of the registered owner.**
- (iii) Whether the Appellants bore any burden of proof in relations to the facts to be proved.**
- (iv) Whether the inconsistencies in acreage were material to credibility of the Respondents.**
- (v) Whether the consent of the Land Control Board was necessary in a case where the Respondents had been put in possession by the Registered owner.**
- (vi) Whether this is a case of specific performance.**

8) My understanding of Sections 54 and 67 of the Law of Succession Act is that they provide for two(2) different types of grants. While Section 54 provides for limited grants, Section 67 provides for grants that require a published notice. The limited grants do not require a published notice. Sections 54 provides.

“ A Court may, according to the circumstances of each case limit a grant of representation which it has jurisdiction to make, in any of the forms described in fifth

schedule. The fifth schedule itself provides for sixteen different instances where limited grants may issue. The 13th instance fits the facts of this case. It is headlined as follows. **Administration Limited to property in which a person has beneficial interest.**

“ where a person dies, leaving property of which he was the sole or surviving trustee, or in which he had no beneficial interest on his own account, and leaves no general representative, or one who is unable or unwilling to act as such, letters of administration, limited to that property, may be granted to the person beneficially interested in the property, or to some other person on his behalf.”

The limited grant issued in Kigumo Succession Cause No. E065/2021 and dated 15-4-2021 was properly issued under Section 54 of the law of Succession Act and rule 13 of the Fifth schedule. It gave the Appellants the requisite capacity to be sued. The Appellants have pleaded lack of capacity to be sued. If they were not happy with the limited grant, they should have approached the court that issued it to revoke it.

It is not just or fair for the Appellants to refuse to take out letters of administration and yet seek to evict the Respondents from the land that they had occupied during the lifetime of the registered owner.

The doctrine of “*nullus commodum capere potest de injuria sua propria* “ applies against the Appellants. It means,

“No one can benefit from their own wrong”.

Equity will not permit a person to benefit from their own wrong.

The above principle is behind Section 54 and rule 13 of the Fifth schedule. It cures the mischief of refusal to take out letters of administration in an effort to avoid creditors to the estate of the deceased.

9) Section 3(3) of the Law of Contract Act (Cap 23) provides as follows.

(3) No suit shall be brought upon a contract for the disposition of an interest in land unless

(a) the contract upon which the suit is founded-

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who was present when the contract was signed by such party.”

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the measuring of the Auctioneers Act (Cap 526) **nor shall anything in it affect the creation or operation of a resulting, implied or a constructive trust.**

In brief, the proviso to Section 3(3) of the Law of Contract Act exempts some contracts for the disposition of an interest in land from the requirement of being in writing. We shall revisit this issue when dealing with the fifth issue of consent of the Land Control Board.

- 10) Regarding the fourth issue, I find that the Respondents are not inconsistent at all. In the witness statement dated 4-5-2021 at paragraph 3, they explain the error and say that they do not demand 0.4 acres x 2 but 0.25 acres x 2 to make 0.5 acres. In other words, they are saying that their claim is for 0.5 acres instead of 0.8 acres. The Respondents are demanding less land than the land captured in the sale agreements of 23-7-2018 and 6-3-2019. This claiming less is honesty. If the Respondents were dishonest, they would not have revealed the error which is to the advantage of the Appellants. At the trial on 10-2-2025 the first Respondent was consistent in cross-examination repeating the same thing that is in his witness statement that he was purchasing a quarter of an acre in each of the two subsequent agreements.
- 11) As for the 5th issue, I find that the consent of the Land Control Board was not necessary because this is a case where the doctrines of constructive trust and proprietary estoppel apply. In the case of **Willy Kimutai Kitilit vs. Michael Kibet [2018] eKLR (Court of Appeal)** it was held to the following effect.

“ where a purchaser of land has paid the purchase price and has been put in possession, the doctrines of constructive trust and proprietary estoppel may apply, and these doctrines can override the Land Control Act even where the transaction lacks the consent of the Land Control Board. By accepting the full purchase price and allowing the Respondents to take possession, the Appellant created a constructive trust in favour of the Respondent. It would be therefore unjust and unequitable to allow the Appellant to rely on the absence of the consent of the Land Control Board to defeat the Respondent’s interest.

The facts of the cases in Kitilit’s case are similar to the facts of this case. The Appellant Willy Kitilit was the owner of land in Kitale. On 8-8-2008, he entered into a sale

agreement with the Respondent, Kibet, to sell 2 acres out of the land for Kshs. 300,000/=. The Respondent paid Kshs. 150,000/= at the signing of the agreement and later completed payment through installments by the year 2010. The Appellant allowed the Respondent to take possession of the land in 2009, where he fenced it, planted trees and farmed on it. The transaction did not receive the consent of the Land Control Board which is normally required for transactions involving agricultural land under Section 6 of the Land Control Board . In 2012, the Appellant obtained title to the entire land in his name and sought to evict the Respondent via a suit. The Respondent filed a counterclaim seeking specific performance (transfer of the 2 acres). The ELC Kitale dismissed the Appellant's claim and ordered specific performance in favour of the Respondent. At paragraph 25 of the judgment dated 17-5-2018 the Court of Appeal had this to say in part.

“ Thus, since the current constitution has by virtue of Article 10(2) (b) elevated equity as a principle of justice to a constitutional principle and requires the courts in exercising judicial authority to protect and promote that principle, among others, it follows that the equitable doctrines of constructive trust and proprietary estoppel are applicable to and supersede the Land Control Act...”

The doctrines of constructive trust and proprietary estoppel applied in Kitilit's case apply in this case owing to the similarity of the facts in this case and those in Kitilit's case.

Due to the application of the two doctrines, Section 3(3) of the Law of Contract Act does not apply to this case because it falls within the proviso thereto. This means that it was not necessary for the two agreements for the two quarter acres to be reduced into writing. The Respondents are therefore entitled to the land that they paid for irrespective of any sale agreement and consent of the Land Control Board.

12) The case of Kitilit also concerned the issue of specific performance and since the facts are similar to those of this case, the doctrine applies in all its facets. The Respondents having paid for the suit land in full and having occupied it and not being at fault at all are entitled to the orders of specific performance.

The only question that remains to be answered is how much land the Respondents are entitled to.

I find that they are first and foremost entitled to the 1 acre in the 1st agreement dated 4-12-2014 and the two quarter acres in the agreements of 23-7-2018 and 6-3-2019. For the Kshs. 220,000/= paid towards the purchase of 0.2 acres at the cost of Kshs. 400,000/= on

a pro rata basis, I find that the Respondents are entitled to 0.11 acres. I arrived at this size by dividing Kshs. 220,000/= by Kshs. 400,000/= and multiplying by 0.2 acres. This is the land which is occupied by the Respondents but for which there is no sale agreement or consent of the Land Control Board. The doctrines of proprietary estoppel and constructive trust apply to this land as does not proviso to **Section 3(3) of the Law of Contract Act.**

13) As to whether the Appellants bore any burden of proof being Defendants in the lower Court case, I find that they did not bear the legal burden because that burden was on the Respondents who were the Plaintiffs. However, the Appellants had the evidential burden which is the obligation to produce evidence to support or rebut a particular fact in issue. Unlike the legal burden, the evidential burden can shift from one party to another during the trial depending on the evidence presented. This means that once a party produces evidence supporting their claim, the opponents must respond with rebuttal evidence. In this case, the Appellants were expected to produce evidence to prove that the signatures on the sale agreements were not made by the 1st Appellant. Instead of doing this, the 1st Appellant avoided the case altogether. She did not even record a witness statement. It was said that she was old without stating her age or providing any evidence of her inability to testify. This is where the Appellants failed. See **Mbuthia Macharia vs. Ndwiga [2017] eKLR.**

14) I find that the Appellants should transfer 1.61 acres of the suit land and it should be the land currently occupied by the Respondents. I direct that they should comply with the judgment and decree of the Lower Court save for the increase in the acreage of the land to be transferred.

15) In conclusion and for the reasons given, I **dismiss** the Appellants' appeal with costs to the Respondents.

It is so ordered.

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

**M.N. GICHERU
JUDGE.**

Delivered online in the presence of :-

Jackline - Court Assistant
Appellants' Counsel – Miss Waithira Mwangi
Respondents' Counsel – Mr Kirubi.