

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA**

**ELCA NO E017 OF 2024**

**WANGUI JOHN KIMUHU.....1<sup>ST</sup>**

**APPELLANT**

**PHYLIS NJERI KIMUHU.....2<sup>ND</sup>**

**APPELLANT**

**SAMSON NJOROGE KIMUHU.....3<sup>RD</sup>**

**APPELLANT**

**HARON KIBUNJA.....4<sup>TH</sup>**

**APPELLANT**

**MWITHAGA KIBUNJA.....5<sup>TH</sup>**

**APPELLANT**

**VERSUS**

**JOHN WAMBU WAWERU.....1<sup>ST</sup>**

**RESPONDENT**

**LYDIA WAIRIMU NGANGA.....2<sup>ND</sup>**

**RESPONDENT**

**JUDGMENT:**

This is an Appeal emanating from the Decision of H.O Barasa in the Senior Principal Magistrate’s Court at Engineer dated 28/8/2024 where the Respondents were the Plaintiffs in ELC suit No. 23 of 2021 dated 9/7/2016 they legally bought the parcel of land known as L.R.

No. NYANDARUA/NJABINI/9190 from one DAMARIS NYAMBURA KIMUHU and paid the full purchase price and after following all the due process had the land was transferred to themselves and the Title Deed registered in their name on 11/5/2016. They have since been in occupation of the land from May 2016 to date save from April, 2021 when the Appellants started trespassing onto the land and giving threats to evict them from their property, removing the beacons and fence therefrom. This in the opinion of the Respondent was not only manifestly malicious but also barbaric and high handed and caused the Respondents to suffer irreparable loss and damage yet the property is also their means of livelihood. This was as a result of malice from the Appellant whose particulars were:

- a. Threatening to evict the Respondent from the suit land.
- b. The Respondents would suffer irreparable loss and damages unless this Court gives restraining Orders.

The Respondents therefore prayed that the lower Court gives the following reliefs to them, the Respondents: -

- i. An Order of Permanent Injunction to restrain the Appellants, their servants, agents and/or employees or any other person from evicting, taking possession or interfering in any manner whatsoever with the Respondents' quiet possession of their property known as NYANDARUA/NJABINI/9190.
- ii. General damages and costs of the suit together with any other or further relief as the Court would deem fit to grant.

In their Statement of Defence filed in Court on 18/7/2022 same dated 13/7/2022, the Appellants denied the entire claim by the

Respondents and averred that the suit land i.e. NYANDARUA/ NJABINI/9190 was family land owned by the 1<sup>st</sup> Appellant's husband, one John Kimuhu and that they, the Appellants, had resided on the said parcel of land without any interference/ disruption and that the same had never been available for disposal, sale or transfer or at all, and therefore the alleged purchase by the Respondents was illegal, unprocedural, fraudulent and without any legality and that if ever the Respondents bought land, it was not from its *bona fide* owner(s).

They further said that this contest could not be determined unless the Court orders in Nakuru HCCC No. 232 of 2012 (O.S) where the Court in an Order dated 24/5/2015 directed how the division of the land the land should be done are observed. They also disputed that the Respondents had ever resided on the land and doubted the proper process of the purchase of the land and therefore the entire alleged transfer and registration and ownership of NYANDARUA/ NJABINI/9190 was exhibited by fraud and illegality whose particulars were said to be.

- (a) Conspiring to acquire the subject land of the Deceased illegally.
- (b) Illegally acquiring the subject land by acts of grabbing.
- (c) Failing to follow the law in the subject land sale and registration.
- (d) Acting fraudulently in all respect in the subject land.

They denied all the allegations of malice and sought for the cancellation and nullification of the Title to the Respondents and asserted the right of ownership. They urged the Court to hold the matter in abeyance awaiting the conclusion of the High Court matter in Nakuru.

In their counter-claim, the Appellants accused the Respondents of trespass and claimed mesne profits as a consequence alleging that the Respondents had no colour of right on the subject land. They therefore sought the following prayers against the Respondents:-

- a. Annulment and cancellation of the Title Deed of NYANDARUA/NJABINI/9190 illegally held/owned by the Respondents.
- b. A permanent restriction of the Respondents from entering, using and trespassing on the subject land.
- c. Costs of the suit.

At one stage, specifically on 13/12/2022 the suit was dismissed for non-attendance but then reinstated on 25/10/2023.

The hearing of the case commenced on the 30/4/2024 when PW1, John Wambu Waweru took to the witness stand and adopted his statement dated 9/7/2021 as his evidence in chief and which was adopted by the Court. In the said witness statement Appellant No. 1 testified that the 2<sup>nd</sup> Appellant was/is his wife. In the statement, the witness also adduced evidence to the effect that his wife and himself bought the suit land NYANDARUA/NJABINI/9190 and paid the full purchase price for the same from one DAMARIA NYAMBURA KIMUHU and were issued with Consent to transfer from the Land

Control Board and then they were issued with the Title Deed in respect to the land on 11/5/2016 and they have been in occupation of the land ever since until April, 2021 when the Appellants started to trespass on the land and threatened to evict them and removing beacons and the fence surrounding the land which they had to have a surveyor replace. He produced the following Documents to strengthen their case.

1. Copies of sale agreements.
2. A copy of the Title Deed.
3. A copy of official search.

On cross-examination, the witness who said he lives in kikuyu said he doesn't live on the suit land and that he was prevented from developing the land and therefore he has not constructed thereon. He said that he knew that the vendor, Damaris Nyambura was related to the Appellants but that the land was hers. She was the wife of Kimuhu Gachenga (Deceased).

The map showed the land belonged to Damaris. She had a Title Deed in her name and that he did no forgery. He did an official search that showed Damaris Kimuhu to be the registered proprietor of the land. He finally said the purchase price, first Kshs. 800,000/- and later Kshs. 200,000/- which was paid by transfer through Equity Bank.

In re-examination, Wambu Waweru said he didn't know there was another case in Nakuru because the earlier one had been finalized and that Wangui's (first Appellant's) name was not on the Title Deed and that is why he could not have involved her in the transaction

and nobody lived on the land. He said they have suffered because they have never used the land and that the Appellant had dug a pit where they were dumping rubbish and that's why they were seeking Damages.

After the close of the Respondents' case, the 1<sup>st</sup> Appellant, Wangui John Kimuhu testified and claimed that she lives on the suit land NYANDARUA/NJABINI/9190 which she claimed was given to her together with her late husband John Kimuhu Gachenga by the late Jomo Kenyatta, first president of Kenya.

She then adopted her statement dated 13/7/2022. She said the other Appellants are her children who knew the history of the land. She said she has lived on the suit land all her adult life. She prayed that the Title held by the Respondents be nullified and cancelled for being fraudulent and the Respondents' suit dismissed. She then produced a Court Order dated 29/4/2015 from Nakuru HCCC No. 232 of 2012 (O.S).

In cross-examination by Mr. P.K. Njuguna, Wangui said she didn't know how Damaris Nyambura Kimuhu (the vendor of the suit land to the Respondents) came to the land but that she used to live with her late husband in Naivasha in 2010 and that the land has never been distributed.

She said she has never sued Damaris for taking her land and that contrary to what the Respondents said, there was no rubbish hole. She had built a hall on the land where there are people living there and that her gate was on the land and she had built a house on the part that used to be parcel No. 267.

On re-examination, Wangui said she had a co-wife who had a son by the name George Koimburi and that she recognized Damaris as a co-wife who got married to Kimuhu her late husband in 2010. She had lived on parcel No. 267 since 1963 which is also claimed by the Respondents and the case was closed and Judgment delivered on 28/8/2024 in favour of the Respondents as prayed for under prayer (a) of the Plaint and dismissing the Appellants Counter-claim in its entirety. Costs for both were granted to the Respondents.

The learned Trial Magistrate gave Judgment as follows: -

*“.....Having said the above, I shall answer issues No. 2,3 and 6 in the affirmative while issues No. 4,5 and 7 shall be in the negative. As to whether the Plaintiffs are entitled to damages, no sufficient evidence was led and presented so as to enable this Court assess and/or award the same.....”*

The Court then went on to make its conclusion:

*“ .....In conclusion, I find that the Plaintiffs herein have proved their claim as far as prayer (a) in the Plaint is concerned and the same is hereby allowed. As per the Defendants’ counter-claim, I find no merit in the same and the same is therefore dismissed. The costs of the suit and counter-claim are hereby awarded to the Plaintiffs..... Judgment is entered accordingly”*

The Learned Trial Magistrate in reaching at the above rightly invoked Sections 107 and 108 of the Evidence Act on burden of proof which is upon the person who asserts the existence of facts

concerning his case. And if no evidence at all were given or such as does not satisfy the Court, he would fail. Damaris Nyambura was the owner of NYANDARUA/ NJABINI/9190 and a Title Deed was issued to her showing that the ownership became hers on 22/6/2015. A copy thereof was produced in Court. The same was opened on 8/5/2015 in her name. A Certificate of search dated 6/5/2016 further proved this fact of ownership.

The Respondents produced a sale agreement dated 5/5/2016 between the said Damaris Nyambura Kimuhu (the vendor) on one side and the Respondents on the other (as purchasers). It was sold at Kshs. 1,000,00/= according to the said sale agreement.

Later, on 11/5/2016 a Title Deed produced in Court showed the land was transferred to the Plaintiffs. This requisition afforded the Respondents the protection under Sections 24, 25 and 26 of the Land Registration Act, No. 3 of 2012.

The Magistrate went further to say that it was the burden of the Appellants to prove fraud which they relied upon in their Defence and Counter-claim and which they failed to. The Respondents were bona fide purchasers for value. They also produced a Consent from the Land Control Board where an Application was made on 24/3/2016 and the same obtained.

The Trial Magistrate also held that the vendor, Damaris Nyambura Kimuhu did not have to attend Court to confirm that she sold the suit land to the Respondents for the Court to accept the latter's evidence. The sale agreement and the accompanying documents spoke it all.

The Consent entered in Nakuru HCCC No. 232 of 2012 (OS) was proof that Damaris Nyambura was also a wife to John Kagai Gachenga (Deceased) and that she had got land from the late Kagai capable of being sold.

The Mutation form, the Registry Index Map and all other documents that formed part of the Respondents' list of Documents were given in evidence. There was nothing to shake their authenticity. This showed that the land was surveyed.

The Court did not award to the Respondents any Damages for lack of sufficient evidence.

After the Court released its Judgment, the Appellants, being dissatisfied with the said Decision, filed a Memorandum of Appeal dated 25/9/2024 for the following orders: -

- a. The Appeal be allowed.
- b. The Judgment of the Honourable Harrison Barasa (Chief Magistrate) delivered on the 20<sup>th</sup> August, 2024 be set aside/nullified.
- c. The costs of this Appeal be awarded to the Appellants.

The said prayers were grounded on the following: -

1. That the Honourable learned chief magistrate erred in both law and fact in his Judgement of 28th August, 2024 by dismissing the appellants Defence and counter claim.
2. That the Honourable learned chief magistrate erred in his Judgment by not substantively considering the appellants' Defence, counterclaim and evidence in that the disputed land

was a freehold and it was and is a requirement that the Land Control Board consent as in law required be obtained for purpose of any sale or conveyance to respondents or at all.

3. That the Honourable learned chief magistrate erred in law by not considering the appellants Defence, evidence and counterclaim particularly that the appellants have all along occupied the suit land since 1960's and the respondents have never had occupancy of the same or at all.
4. That the Honourable learned chief magistrate erred in law by not recognizing that there was a superior court consent order in Nakuru High Court Civil Case No. 232 of 2012 (OS) hence the subject land herein cannot be owned by the plaintiff due to the fact that the same was never implemented.
5. That the Honourable learned chief magistrate erred in law and fact by recognizing that Damaris Nyambura Kimuhu had any stake or ownership of property known as Nyandarua/Njabini/9190 and or  
  
had legal capacity to sell the same at Kshs. 1,000,000/- or at all.
6. That the Honourable learned chief magistrate erred in law and fact for finding that the respondents bought the land from Damaris Nyambura Kimuhu who had not obtained land board consent to justify a transfer of title in her favour.
7. That the Honourable learned chief magistrate erred in law and fact by recognizing the respondents live and occupy property known as Nyandarua/Njabini/267.

8. That the Honourable learned chief magistrate erred in law and fact by not considering the fact that the respondents had blatantly disobeyed lawful court order to settle lawful costs, a disobedience of court order.
9. Any other reason to be stated at appeal.

As observed by the Learned Trial Chief Magistrate, Honourable Harrison Barasa, the Respondents produced a copy of Title Deed in respect to L.R No. NYANDARUA/NJABINI/9190 measuring 0.045 Hectares issued on 11/5/2016 in the names of John Wambu Waweru of ID No. 3109541 and Lydia Wairimu Ng'ang'a of ID No. 23745093, a sale agreement of 5/5/2016 between them and Damaris Nyambura Kimuhu ID No. 10643385 showing that the land was sold by the latter to the former for Kshs. 1,000,000/=. An official search for the same parcel of land dated 19/5/2021 shows that the land belonged to John Wambu Ng'ang'a and Lydia Wairimu Ng'ang'a. There is also an acknowledgement of the payment of the final balance to Damaris Nyambura by the Respondents herein dated 10/5/2016 signed by all the 3 before Mr. Rumba Kinuthia, Advocate. The above is a clear indication of due process having been followed.

Having come to this conclusion, Section 25 of the Land Registration Act which states that a certificate of Title issued to a proprietor shall be taken as prima facie evidence that the named proprietor is the absolute and indefeasible owner

subject to such encumbrances, easements, restrictions and conditions endorsed on the Title. It gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the titleholder under the Act.

The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto.....”

Appurtenant is derived from the Norman French word which means to belong to, anything corporeal or incorporeal which is an incident of, and belongs to some other thing as principal, an addition to, adjoining to, enjoyed with, an adjunct of, usually occupied with or attached to a more important thing and passing with it upon sale, transfer, or conveyance.

Section 26(1)(a) &(b) of the Land Registration Act, 2012 guides me on the need to protect the sanctity of a Title Deed but limits me where there is darkness: -

***“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—***

***(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or***

***(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.***

The proviso to this sacred Section has not been shown to have been the case herein. There are no particulars of fraud or unprocedural and/or illegal procedures in the transfer of the Title in respect to Nyandarua/Njabini/9190. The same was obtained from a person with a good Title, Damaris Nyambura Kimuhu, and who therefore could pass an equally good Title. And flowing from the foregoing provisions, a registered proprietor enjoys the statutory protection of Title as long as he can show that the Title was acquired procedurally which the Respondents have done.

As was held in the case of **Esther Ndegi Njiru & Another =vs= Leonard Gatei [2014] eKlr:**

***“the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which a person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme”.***

It is trite law that once a person is registered as a proprietor of land, he is to enjoy all rights and privileges appurtenant thereto. Having established that the Respondents were the registered owners of the suit property, I find that they were entitled to all the rights and privileges belonging or appurtenant thereto and hence to occupy, possess and do all that is legally appurtenant to their rightful ownership. The Respondents are therefore entitled to the protection of the law.

Section 80 (1) of the **Land Registration Act No. 3 of 2012** provides as follows:

***“Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”***

But such allegations must go beyond imaginations. They must be proved. In **RG PATEL VS LALJI MAKANJI (1957) EA 314** the court expressed itself as follows:

*“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require prove beyond reasonable doubt, something more than a mere balance of probabilities is required”*

Given the seriousness of the allegations, the onus was on the Appellants to provide evidence to the Court of the alleged fraud which evidence must meet the standard of proof as was underscored by the Court of Appeal in **Central Bank of Kenya Limited v Trust Bank Limited & 4 Others [1996] eKLR** as being beyond that of a balance of probabilities but not beyond reasonable doubt. In that case, the Court rendered itself as follows:

**“The appellant has made vague and very general allegations of fraud against the respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in an ordinary civil case.”**

In the case of **Urmila w/o Mahendra Shah v Barclays Bank International Ltd & another [1979] eKLR**, the Court of Appeal took the view that the onus to prove fraud in a matter is on the party who alleges it. Similarly, in cases where fraud is alleged, it is not enough to simply infer fraud from the facts.

The position that emerges is that evidence of especially high quality and strength is required to prove fraud in land cases. It is a daunting and burdensome task to prove fraud in any civil case. In the instant case, the Appellants needed to not only plead and particularize the fraud, but also lay a basis by way of credible evidence upon which the Court would make a finding that indeed there was fraud in the transaction leading to the transfer and registration of the suit land in the name of the Respondents.

Fraud is a quasi-criminal charge which must, as already stated above, not only be specifically pleaded but also proved on a standard though below beyond reasonable doubt, but above balance of probabilities. However, from the evidence tendered in Court, the Appellants did not prove fraud at all. No evidence was tendered to this end by the Appellants at least to verify their allegations.

In the absence of evidence, I am therefore unable to impeach the Respondents' Title Deed in respect to L.R. NO.

NYANDARUA/NJABINI/9190 or even find that it was acquired fraudulently and the Appellants then accordingly fail in their claim over the parcel of land L.R. No. NYANDARUA/NJABINI/9190 and I accordingly dismiss this Appeal with costs.

**Judgment read and delivered at Nyandarua this 19th Day of March 2026.**

**MUGO KAMAU  
JUDGE**

In the Presence of: -  
Court Assistant: Samson.

Mr. George Kimani for the Appellant.

Mr. P.K. Njuguna for the Respondent.