



# THE JUDICIARY



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**  
**ELCLA E020 OF 2023**

MARGARET WANJIKU DANIEL .....1<sup>ST</sup> APPELLANT  
JOHN NJARAMBA WANYOIKE .....2<sup>ND</sup> APPELLANT  
SAMUEL MUGURO WANYOIKE .....3<sup>RD</sup> APPELLANT

**VERSUS**

FRANCIS MWANGI KIRUGU .....RESPONDENT

***(Being an appeal against the Judgement of the Chief Magistrate's Court at Murang'a in Environment and Land Court Case No. 15 of 2020).***

## **JUDGMENT**

(1) In the memorandum of appeal dated 26-10-2024, the Appellants seek three orders.

- (a) The judgment of the Chief Magistrate in ELC No. 15 of 2020 be set aside.**
- (b) An order be substituted in its place dismissing the Plaintiff's suit in its totality.**
- (c) The costs of this appeal and the costs in the lower court be borne by the Respondent.**

There are nine(9) grounds of appeal. In the first eight (8) grounds, it is stated as follows.

The learned magistrate erred in law and/or fact in,

- (i) not finding that the suit was incompetent for being brought against the Appellants who were not the personal representatives of Daniel Wanyoike(deceased)who was the registered proprietor of the suit land,**
- (ii) giving effect to an alleged contract for sale of land which on the face of it was patently illegal, null and void for offending both the Law of Contract Act and the Land Control Act,**
- (iii) not finding as a fact that the land that the Respondent was claiming did not exist in law and therefore the Respondent was non-suited,**

- (iv) not finding that there was no valid contract of sale of the suit land between Daniel Wanyoike and the Respondent,**
- (v) not finding the purported contract between the Respondent and Stephen Wachira Macharia was a nullity or was an illegal contract not capable of being given effect to,**
- (vi) awarding Kshs 300,000/= as damaged for alleged trespass as the Respondent was not the owner of the suit premises,**
- (vii) treating the suit like one of adverse possession and not one based on contract and**
- (viii) placing an unwarranted burden on the Appellants by requiring them to prove fraud when it was not their duty to do so.**
- (ix) The judgment is against the weight of evidence on record and is not borne out of any legal principles.**

(2) The case for the Respondent who was the Plaintiff in the lower Court was as follows. Firstly, Daniel Wanyoike Johana was the registered owner of Plot No. 211 Maragua Ridge Settlement Scheme. The land measured 19.8 acres. In the year 1982, Daniel sold 8 acres out of the suit land to Stephen Wachira Macharia. He remained with 11.8 acres. On 9-6-1982 Daniel obtained the consent of the Murang'a Land Control Board to subdivide the land so that Stephen could get his 8 acres. A surveyor was called by Daniel and he excised the 8 acres from the original suit vide mutation form No. 307899. Secondly, in October 1992, Stephen sold his 8 acres to the Respondent for Kshs. 256,000/= vide a sale agreement dated 22-10-1992. Since Daniel was still the registered owner of the land and had not transferred it to Stephen, he attended the land control which on 29-10-1992 gave its consent for him to transfer the 8 acres to the Respondent. The Respondent occupied the 8 acres on which he has been farming since then. He has also leased part of the suit land to Joseph Waweru Guchu. Thirdly, Daniel passed away on 15-8-2014 before transferring the 8 acres to the Respondent. Fourthly, the Appellants have been in good terms with the Respondent. He has lent them money occasionally and even paid fees for the 3<sup>rd</sup> Appellant's child. Fifthly in 2019, the Appellants entered into a lease agreement with one Daniel Njoroge Njogu over a portion of the Respondent's land. The said Daniel Njoroge and the 2<sup>nd</sup> Appellant planted fruit trees on the land, destroyed the Respondents property and claimed to own the land. This is what made the Respondent to file the suit in the lower court. In the suit he

sought to be declared the owner of the suit land and for the Appellants to be evicted and restrained from his 8 acres.

(3) The case for the Appellants in the lower court were as follows. Firstly, they are the widow and sons of the late Daniel Wanyoike. They have not yet been appointed as administrators of his estate. Secondly, they know that the deceased intended to sell part of his land to Stephen Wachira but the sale was never completed. Wachira used to cultivate the portion which he intended to buy. Thirdly, since the sale to Stephen Wachira was incomplete, they believe that he did not acquire title which he could pass to the Respondent. Fourthly, the alleged sale of the 8 acres to Stephen Wachira Macharia was against both the Land Control Act and the Law of Contract Act.

(4) In his judgment dated 5-10-2023, the learned trial magistrate found in favour of the Respondent.

(5) The learned counsel for the parties filed written submissions dated 19<sup>th</sup> March 2025 and 14<sup>th</sup> May 2025. The issues raised in the submissions are as follows.

- (i) **Whether the lower court suit was competent or not.**
- (ii) **Whether the two agreements were null and void.**
- (iii) **Whether there was part performance of the contract.**
- (iv) **Whether the suit land measuring 8 acres exists.**
- (v) **Whether the Appellants had any burden of proof.**
- (vi) **Whether the damages of Kshs. 300,000/= were proved.**

(6) I have carefully considered the appeal in its entirety including the entire record, the grounds of appeal, the written submissions by learned counsel for the parties and the law cited therein. I find that the issues as identified by both sides align themselves with the grounds of appeal and by deciding on the issues, all the nine(9) grounds will have been covered. This being a first appeal, this court has a duty to review the entire evidence presented at the trial, reconsider and evaluate this evidence itself and draw its own conclusions. It is not bound by the findings of the lower court but must bear in mind that it does not have the advantage of the lower court of seeing and hearing the witnesses and make allowance for it. **See Selle and another vs. Associated Motor Boat Co. Ltd and Others [1968] EA 123.**

(7) I find that the lower court suit was competent. The Appellants could not claim that they were not the administrators of the estate of Daniel Wanyoike Johana when they were sued, yet act as administrators when attempting to evict the Respondent from the 8 acres of the land that he occupied. They should have waited until they were appointed administrators before taking any action against the Respondent over the land. Having purported to have capacity to evict the Respondent over the land, they surely must have capacity to be sued. By claiming not to have capacity to be sued when they are at the same time acting for the estate for their benefit is not equitable. It is unconscionable for a party to approbate and reprobate at the same time. It has been held by the Court of Appeal in the case of **Kitilit vs. Kibet Civil Appeal No. 51 of 2015(Eldoret)** that equity is now a constitutional value and principle of governance under **Article 10(2) (b)** of the Constitution and therefore above statutory law in the hierarchy of norms. Under **Article 10(1) (a)**, equity binds this court wherever it applies or interprets the Constitution.

If the Appellants can use their being the dependants of the estate of the deceased as a sword to attack the Respondent, they should not use their lack of capacity as a shield against the Respondents suit. “*Nullus Commodum Capere Potest de Injuria Propria*” No one can gain an advantage from his own wrong” They cannot be heard to say that they have no capacity to be sued if they can attempt to evict the Respondent.

**Section 120** of the **Evidence Act** provides as follows.

**“When one person has, by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing”.**

(8) It is my finding that the sale agreements between Daniel Wanyoike Johana and Stephen Wachira Macharia and the second agreement between Stephen Wachira Macharia and the Respondent are valid. They did not require to be in writing because the proviso to **Section 3(3)** of the **Law of Contract Act**, exempts some contracts from the requirement of being in writing and to be witnessed. It states-

**“Provided that this subsection does not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap**

**526) nor shall anything in it affect the creation of a resulting, implied or constructive trust.”**

I find that by accepting the purchase price from Stephen Wachira Macharia, putting him in occupation of the land, attending the Land Control Board twice to subdivide his land and later to transfer it to the two men, the late Daniel Wanyoike Johana created a constructive trust in favour of both men and his family members could not lawfully avoid the trust created by the registered owner.

In the case of *Willy Kitilit vs. Michael Civil Appeal No. 51/2015* it was held by the Court of Appeal at Eldoret that the equitable doctrines of constructive trust and proprietary estoppel override strict statutory formalities. They arise where one party in reliance on the agreement performs his part of the contract and it would be unconscionable for the other party to deny the interest. Equity prevents fraud or unjust enrichment. A party cannot rely on statutory formalities to defeat an arrangement after the other party has relied on it.

The facts of this case are similar to those of Kitilit’s case.

The finding in this issue covers the third issue.

- (9)As for the 4<sup>th</sup> issue, I find the 8 acres sold to Stephen Wachira by Daniel Wanyoike Johana exist both on the ground and in the mutation form No. 307899. Land being immovable property cannot be taken away. It is the land that both Respondent and Stephen Wachira Macharia occupied from 1982. It is not correct to say that the land does not exist. The size of the and bought and sold is clearly 8 acres and it is also captured in the letters of consent dated 9-6-1982 and 29-10-1992.
- (10) While it is true that the Appellants had no legal burden in the lower court case, they had the evidential burden especially regarding the occupation of the land by the Respondent with the consent of the late Daniel Wanyoike. They also had the burden to explain why the late Wanyoike attended the Land Control Board at Murang’a in 1982 and 1992 if he had not sold the land to both Stephen Wachira Macharia and the Respondent. The Appellants had an obligation to produce evidence to rebut the presumption that when Daniel Wanyoike visited the Land Control Board twice he did so because he was selling the 8 acres claimed by the Respondent. This shifting of the burden by the trial court was proper. It was held in the case of *Mbuthia Macharia vs. Anna Mutua Ndwiga and another Civil Appeal No. 297 of 2015* that while the legal burden
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remains constant on the party asserting a claim, the evidential burden may shift depending on the evidence presented during the trial. In this case the evidential burden shifted to the Appellants and they failed to discharge it.

- (11) Finally on the issue of damages of Kshs. 300,000/=, I find no reason to interfere with the award made by the learned trial magistrate. Looking at the record of 16-6-2022 when the Respondent testified before the trial magistrate, I see that he was not cross-examined on the damages. It is not correct to say that the Respondent needed a title deed to be entitled to damages for trespass and for destruction of his property on the land. It is my finding that he did not have to have a title deed to be awarded damages. His claim is based on having paid the full purchase price, occupied the 8 acres and developed the same. The trial court was right in awarding the damages of Kshs. 300,000/= which I find to be neither excessive nor parsimonious.
- (12) For the above stated reasons, I find **no merit** on the Appellants appeal and I **dismiss** it with costs to the Respondent.

**It is so ordered.**

**Dated, signed and Delivered virtually at Murang'a this 23<sup>rd</sup> day of March, 2026.**

**M.N. GICHERU  
JUDGE.**

**Delivered online in the presence of: -**  
Court Assistant – Magu  
Respondent's Counsel – Miss Anne holding brief  
Appellant's Counsel – Absent