

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT VOI

ELC APPEAL NO. E017 OF 2025

DIDAS MSAFIRI MKOTA.....
.....APPELLANT

=VERSUS=

ONESMUS KIRIGHISA SAGIROI.....
RESPONDENT

***(Being an appeal from the judgment of C. K. Kithinji -
SPM delivered on 31st July 2025 in respect to Taveta ELC
no. E004 of 2024 Onesmus Kirighisa Sagiroy =Versus=
Didas Msafiri Mkota)***

JUDGMENT

1. This appeal concerns a classic contest in Kenyan land jurisprudence between the sanctity of a registered title protected under the Land Registration Act, 2012, and claims of ancestral or long-standing occupation said to pre-date the registration of that title. At its core lies the question whether the Appellant's assertion of occupation of Land Parcel No. Kimorigo/Mboghoani/1366 from time immemorial or at least before 1972 by himself and his

father, coupled with allegations of fraud in the registration process, can successfully impeach the Respondent's indefeasible title acquired through succession from his late father who, according to the evidence, purchased the land in or about 1972 for one cow and eight goats and took possession thereof. The trial court answered this question in the negative and upheld the Respondent's title. The Appellant now invites this Court to reverse that finding.

2. The Appellant being aggrieved by the said decision filed the instant appeal vide a Memorandum of Appeal dated 20th August 2025. The grounds raised were as follows:-

(i) That the Learned Trial Magistrate erred in law and in fact by failing to appreciate that the Appellant and his father have been in occupation of the suit land from time immemorial or at least before 1972.

(ii) The Learned Trial Magistrate erred in law and in fact by dismissing the evidence tendered by the Appellant in respect of fraud on the part of the Respondent and the Wundanyi Land Registry.

- (iii) The Learned Trial Magistrate erred in law and in fact by relying on the evidence that the suit land had been purchased by the Respondent's father from the Appellant's father without any written agreement as required by law.**
- (iv) The Learned Trial Magistrate erred in law and in fact by failing to make a finding that the suit by the Respondent was an abuse of court process since a similar and/or related matter TAVETA ELC NO. 15 of 2019 is still pending in the same court.**
- (v) The Learned Trial Magistrate erred in law and in fact by failing to consolidate Taveta Magistrates Court ELC Cases Nos. E15 of 2019 and E004 of 2024 at the time of hearing.**
- (vi) The Learned Trial Magistrate erred in law and in fact by ignoring her own finding that there was unresolved dispute in respect of the suit land between the Appellant's father and the Respondent's father since 1998.**

(vii) The Learned Trial Magistrate erred in law and in fact by misdirecting herself on the analysis and therefore arrived at the wrong decision.

(viii) The Learned Trial Magistrate erred in law and in fact by summarily dismissing the Appellant's counter-claim.

3. The Appellant thus sought for the following reliefs:-

(a) That the Appeal be allowed.

(b) That the judgment of the Lower Court be set aside.

(c) That the costs of this Appeal and the Lower Court be awarded to the Appellant.

Directions of the Court

4. On the admission of the appeal, this court directed that the same be canvassed by way of written submissions and parties were granted timelines to comply. The Respondent filed written submissions dated 2nd March 2026 and no written submissions were filed by the Appellant. Be that as it may this court is still mandated to consider the entire

Record of Appeal and the evidence tendered before the trial court before rendering its decision.

The Respondent's submissions

5. The Respondent submitted on the following issues:-

(i) Whether the Appeal is merited.

(ii) Costs of the Appeal.

6. It was argued that the Respondent is the conclusive owner of the suit plot. During trial he had tendered sufficient evidence to prove the same. He produced a certificate of official search which showed that the property belonged to his deceased father Luka Kirighisa Sagiroi. He also produced letters of administration issued on 26th September 2022 and a Certificate of Confirmation of Grant issue don 21st September 2023.

7. It was submitted that he had therefore proved that he acquired the said property through succession. Hence therefore he was entitled to protection of the same under Sections 24, 25 and 26 of the Land Registration Act.

8. It was further submitted that the Appellant had filed a Counterclaim but did not adduce evidence to support the

same. The Appellant was a trespasser. He was farming on the land despite having been told to vacate.

9. As to whether or not the Respondent did not produce an agreement in writing and if the same can be used to fault the transaction, it was submitted that Section 3(3) of the Law of Contract Act cannot apply retrospectively. The transaction happened in the 1970s and the Respondent's father took possession. Reliance was placed in the case of peter **Mbiri Michuki vs Samuel Mugo Michuki (2014) KECA 342 (KLR).**

10. The court was urged to dismiss the appeal with costs.

Analysis and Determination

11. As a first appellate court, this Court is enjoined to re-evaluate the evidence afresh, draw its own conclusions, and make its own findings of fact and law. However, it must bear in mind that it neither saw nor heard the witnesses and must therefore be slow to interfere with the trial court's findings unless they are demonstrated to be perverse, based on no evidence, or reached upon a misapprehension of the law or the evidence.

12. Having considered the entire record of appeal, Memorandum of Appeal and the Respondent's submissions, the issues for determination are as follows:-

(i) Whether the appeal is merited.

(ii) Whether the Appellant's Counterclaim was proved to the required standard before the trial court.

(iii) What reliefs should issue in respect to this appeal.

13. I shall now address all the issues sequentially.

14. The Respondent's case before the trial court was that he is the registered owner of land parcel number Kimorigo/Mboghozi/1366 by virtue of inheriting the same from his father the late Lucas Kirigisha Sagiroi. The Appellant with no color of right and during the broad daylight encroached and trespassed on the suit property and is doing farming therein and that is why he sought for a permanent injunction, eviction orders among other reliefs.

15. The Appellant filed a defence and counter claim in response to the suit before the trial court. He denied the

matters pleaded in the Plaint. In the counter claim it was averred that Paul Mkota Meari is the lawful owner of the suit property and has owned the same from time in memorial and during the adjudication period he is the one who was picked to be registered as the rightful owner. The area is occupied by the Mzirai Mwizu clan and all the land belongs to them and that was how they were registered during adjudication. The Respondent is not a member of the Mzirai Mwizu clan, neither was his father a clan member and there is no way he could acquire land within the area. After the adjudication process Paul Mkota Meari and others were told to wait for titles to come out and he continued tiling his land while waiting for the title and in the meantime authorized his son Joseph Meari Mkota to be using the suit property. All along Joseph Meari Mkota used the land and Respondent's late father who was the person purportedly registered as the owner never at any time claimed ownership. The Respondent's late father Lucas Kirigasha Sagiroi was registered as the owner of the land fraudulently since he had no capacity, no right and no interest in the land and hence could not be accorded

registration by virtue of not being qualified. The Respondent and his father do not have a genuine title and Paul Mkota Meari claim is that the title was acquired contrary to the law by means of fraud and or misrepresentation and the Respondent and his father were party to it. It was also averred before the trial court that by virtue of the area where the land is and by virtue of the land system of the Taveta community, the Respondent's purported title was acquired illegally, un-procedurally and through corrupt scheme and therefore it cannot stand as a genuine one. Particulars of fraud as against the plaintiff were pleaded. The Respondent and his father were secretive such that he came to know about another title in existence in 2019 when they filed suit. The suit was dismissed on technicality.

16. According to the Appellant, the Respondent had remained stubborn and refused to co-operate and hand over to the plaintiff the title to the suit property despite knowing that the property is rightly his by virtue of their being captured and identified during adjudication process. He sought the following reliefs in the counter claim:

- (i) A declaration that the suit property land parcel number Kimorigo/Mboghoni/1366 belongs to Paul Mkota Meari.
- (ii) A declaration that the plaintiff and his late father Lucas Kirigisha Sagiroy obtained title number Kimorigo/Mboghoni/1366 by fraud and or misrepresentation and they were a party to it.
- (iii) A declaration that the plaintiff's title to land parcel number Kimorigo/Mboghoni/1366 is illegal and was acquired through corrupt scheme.
- (iv) An order demanding that the land registrar Wundanyi to cancel the title to land parcel number Kimorigo/Mboghoni/1366.
- (v) An order directing the land registrar Wundanyi to issue Paul Mkota Meari with a title to land parcel number Kimorigo/Mboghoni/1366.
- (vi) An order for general damages for trespass.
- (vii) An order for exemplary damages.
- (viii) Cost of the suit and interest thereof.
- (ix) Any other remedy the court thinks fit in the circumstances.

17. In response to the counterclaim, the Respondent averred that he is the sole owner of the suit property which is registered in the name of the father Luka Kirighisa Sagiroy, as per the title deed. The suit property was purchased by his father in the year 1972. The purchase price was one cow and eight (8) goats.

18. From the record of the Appeal and the proceedings before the trial court, the Respondent testified as well as the Appellant and Joseph Meari Mkota. The Respondent tendered in evidence a copy of his identity card, title in respect of the suit property, letter dated 3/11/1998 and that of 27/10/2998, notice to compel attendance on 10/2/2017, receipt dated 27/1/2017, letter by the land registrar dated 27/3/2017, letter by the adjudication office 27/2/2020, search for suit property as at 6/2/2020, plaint in Taveta ELC No. 15 of 2019, letters of administration issued on 26/9/2023 and that as at 8/11/2023 and title to suit property issued on 7/9/2023.

19. The Appellant tendered in evidence a copy of the statement of defence dated 3/12/2019 in Taveta ELC No. 15 of 2019, and that dated 16/11/2020 in Taveta ELC No.

15 of 2019, witness statement of Matano Saruni Kirighisa dated 24/11/2021 in Taveta ELC No. 15 of 2019 and that of Bomani Kihaa Melewuni filed on 30/11/2021 in Taveta ELC No. 15 of 2019.

20. In the instant Appeal, the Appellant's grounds essentially challenge the trial court's appreciation of long occupation by the Appellant and his father from time immemorial or at least before 1972, the dismissal of allegations of fraud against the Respondent and the Wundanyi Land Registry, reliance on an oral purchase in the 1970s, failure to find abuse of process due to the pendency of Taveta ELC No. 15 of 2019, failure to consolidate the two suits, and the alleged misdirection leading to dismissal of the counterclaim.

21. **Sections 24, 25 and 26 of the Land Registration Act, 2012** are clear. A certificate of title is prima facie evidence of proprietorship and confers an absolute and indefeasible title, subject only to fraud or misrepresentation to which the registered proprietor is proved to be a party, or where the title was acquired illegally, unprocedurally, or through a corrupt scheme. The

Respondent produced uncontroverted documentary evidence establishing transmission through succession. The Appellant did not discharge the heavy burden required to impeach the title on grounds of fraud. Allegations of fraud must be specifically pleaded and strictly proved to a standard higher than the ordinary civil balance of probabilities as was held in the cases of **R.G. Patel v Lalji Makanji (1957) E.A. 314; Funzi Development Ltd v County Council of Kwale [2014] eKLR.** Mere assertions without cogent evidence are insufficient.

22. The Appellant's claim of long occupation from time immemorial does not, without more, defeat a registered title. Kenyan courts have consistently held that long occupation or ancestral claims cannot override indefeasible title unless adverse possession for the statutory period is properly proved under the Limitation of Actions Act (Cap 22), or fraud is established.

23. On the oral transaction in the 1970s, it is noteworthy Section 3(3) of the Law of Contract Act requiring writing for contracts for disposition of interests in land does not operate retrospectively to invalidate transactions

concluded before the strict formalities became rigidly enforced in modern registration systems. The amendment to Section 3(3) of the Law of Contract Act, which made written, signed and attested agreements mandatory, took effect on 1st June 2003 and cannot be invoked to invalidate pre-2003 transactions where the purchaser took possession pursuant to an oral agreement and part performance is evident through long, uninterrupted occupation. This position was authoritatively settled by the Court of Appeal in the recent decision of **Williams & Kennedy Limited & 3 others v Gicharu & 10 others [2026] KECA 130 (KLR) (23 January 2026)**, where the Court emphatically held that the 2003 amendment is prospective only and does not operate to nullify earlier dealings protected by equity and long possession. The Court of Appeal in **Peter Mbiri Michuki v Samuel Mugo Michuki [2014] eKLR (approving Public Trustee v Wanduru [1984] KLR 314)** had earlier recognized the same principle. In the present case, the Respondent's father took possession in the 1970s; the title was

subsequently registered and transmitted. The Appellant failed to prove any fraud in the registration process itself.

24. The Appellant's grounds concerning abuse of process and failure to consolidate Taveta ELC No. 15 of 2019 and E004 of 2024 are without merit. The Appellant did not demonstrate that the two suits involved identical parties and causes of action such that one was an abuse. Consolidation is discretionary and must be sought timeously. No application for consolidation or stay was apparently pursued successfully at trial. The mere pendency of a related suit does not render the present proceedings an abuse. This position was also applied in the case of **Oyaya & 2 others v Oyugi & 4 others [2025] KEELC 201 (KLR).**

25. The trial Magistrate did not misdirect herself. She properly evaluated the evidence, preferred the Respondent's registered title and succession documents over the Appellant's unsubstantiated claims of historical occupation and fraud and reached a decision supported by the law and evidence. As was stated in the case of **Selle v Associated Motor Boat Co. Ltd [1968] EA 123** an

appellate court will not interfere with findings of fact unless they are perverse or based on no evidence. No such perversity is disclosed.

26. The Appellant filed a counterclaim but adduced no evidence in support. It is trite that a party who pleads a claim including a counterclaim bears the legal and evidential burden of proving it on a balance of probabilities: Sections 107, 108 and 109 of the Evidence Act (Cap 80). Failure to call evidence means the counterclaim collapses. The trial court correctly dismissed it. A similar position was equally applied in the cases of **Rose Akello Otieno v Joseph Odote & another [2022] eKLR and Kariuki v Cheruiyot [2026] KEELC 183 (KLR).**

27. This Court has carefully and independently considered each of the eight grounds raised in the Memorandum of Appeal, together with the entire Record of Appeal, the evidence tendered before the trial court, the impugned judgment, and the Respondent's written submissions and it is the finding of this court that the trial magistrate's findings were neither perverse nor based on

any misapprehension of the law or facts. This Court is satisfied that the decision of the lower court was sound, just and fully supported by both the law and the evidence on record.

28. Having found that none of the grounds of appeal succeeds and that the trial court's decision was sound both in law and on the evidence, the appeal is devoid of merit and must be dismissed.

29. In respect to costs, costs follow the event under Section 27 of the Civil Procedure Act (Cap 21) and Order 22 of the Civil Procedure Rules. The Respondent has successfully defended the appeal. He is entitled to costs of the appeal, which this Court assesses at Kshs. 40,000/= (all inclusive), to be paid by the Appellant.

Final orders

30. In conclusion, the following orders are hereby issued in respect to this appeal:

i. The Appeal is hereby dismissed in its entirety.

ii. The judgment and decree of the Magistrates' Court delivered on 31st July 2025 in Taveta ELC No. E004 of 2024 is affirmed.

iii. The Appellant shall pay the costs of this appeal to the Respondent, assessed at Kenya Shillings Forty Thousand (Kshs. 40,000/=) all inclusive.

Dated, Signed and Delivered Virtually at Voi this 25th day of March, 2026.

**E. K. WABWOTO
JUDGE**

In the presence of: -

Mr. Wahome for the Appellant.

Mr. Mwakio h/b for Mr. Mwazighe for the Respondent.

Court Assistants: Mary Ngoira and David Ngoosa.