



THE JUDICIARY



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANG'A
ELCLA E031 OF 2024

DORCAS WANGECHI MAINA.....PLAINTIFF/APPELLANT
VERSUS
JECONIAH MACHARIA.....1ST RESPONDENT/DEFENDANT
BONIFACE MWANGI MAINA.....2ND RESPONDENT/DEFENDANT
THE LAND REGISTRAR, MURANG'A.....3RD RESPONDENT/DEFENDANT

(Being an Appeal from the whole judgment made by Senior Principal Magistrate's Court at Kangema, Hon. Martin Mutegi)

JUDGMENT

1) In the Memorandum of Appeal dated 17-7-2024, the Appellants seek three orders.

- (a) This appeal be allowed with costs.**
- (b) The judgement of the Hon. Martin Mutegi (SPM) delivered on 21-6-2024 be set aside.**
- (c) Such further orders as may seem just be made.**

2) There are five (5) grounds of appeal upon which the appeal is based.

The learned trial magistrate erred in law and fact in,

- (i) failing to fully analyse and evaluate the evidence on record thus reaching the wrong decision,**
- (ii) totally failing to consider the submissions of the Appellant,**
- (iii) finding that the 1st and 2nd Respondent herein proved, on a balance of probabilities that the transfer of the subject property was fraudulent,**
- (iv) finding that the 1st and 2nd Respondents herein showed, on a balance of probabilities that they have adversely possessed the subject property and**

(v) failing to consider the authorities cited by the Appellant which are binding on a lower court.

- 3) The facts of the case according to the Appellant are as follows. Firstly, she and Hezekiah Maina Macharia were husband and wife and the joint owners of L.R. No. Loc.19/Nyakianga/199. The joint ownership dates back to 29-4-2003. Secondly, the Respondents have frustrated the efforts of the Appellant to occupy the half of the suit land that she is entitled to as the wife of Hezekiah Maina Macharia and a joint owner. The Respondents are Children of Hezekiah Maina Macharia and the Appellant's co wife who is deceased. Thirdly, the Respondents claim to own the suit land through adverse possession yet their occupation is through use of force.

- 4) The facts of the case according to the Respondents are as follows. One, their late mother Rose Njeri, wife of Hezekiah, and themselves owned the suit land as the registered and/or beneficial owners. The land had been given to them by their late father Hezekiah Maina Macharia. Two, in May 2018, they discovered that the suit property had been transferred to the Appellant and their father yet they did not execute any transfer instruments. Their consent was not sought before the transfer. Three, the transfer which had taken place on 29-4-2023 was fraudulent and unlawful. The requisite consent of the Land Control Board was not obtained. Four, after the death of their father, there was an illegal attempt by the Appellant to evict the Respondents from the suit land yet they were born and brought up on the suit land which is where they have constructed permanent homes. Fifthly, the Respondents having been in open, exclusive, hostile, notorious and continuous possession of the sit land for a period exceeding 12 years, they are entitled to the suit land by way of adverse possession. For the above and other reasons, the Respondents sought to be declared lawful owners of the suit land and for the Appellant to be restrained by way of permanent injunction from interfering with the Respondents' quite enjoyment of the suit property.

- 5) In his judgment dated 216-2024, the learned trial magistrate found in favour of the Respondents and revoked the title deed issued to the Respondent and the late Hezekiah Maina Macharia jointly on the ground that the transfer was unprocedural, fraudulent and illegal.

6) Counsel for the parties filed written submissions dated 23-7-2025 and 24-9-2025 respectively.

The Appellants counsel identified the following issues.

- (i) How an Appellate Court should adjudicate over an appeal.**
- (ii) Whether the learned magistrate gave due weight to the title deed as prima facie proof of ownership.**
- (iii) Whether fraud was proved to the required standard.**
- (iv) Whether the Appellant has proved to be entitled to the orders sought in this appeal.**
- (v) Who is the legal owner of the suit land.**
- (vi) Whether the Appellant stands to suffer substantial loss if the appeal is not successful.**

On the other hand, the Respondents' counsel identified the following issues

- (i) Whether the learned magistrate gave due weight to the Appellant's evidence and submissions**
- (ii) Whether the Respondents proved their case to the required standard.**

7) I have carefully considered the appeal in its entirety including the record, the grounds, the written submissions and the issues raised therein. I find that the six issues identified by the Appellant's do not align with the five grounds of appeal in the memorandum of appeal dated 17-7-2024. I also find the Respondents' issues do not align with the Appellant's issues or with the grounds of appeal. In these circumstances, I will frame issues which align with the memorandum of appeal. In so doing, I am guided by **Order 15 rule 2** of the **Civil Procedure Rules** which provides as follows.

“ 2. The Court may frame the issues from all or any of the following materials-

- (a) allegations made on oath by the parties, or by any persons present on their behalf, or made by the advocates of such parties;**
- (b) allegations made in the pleadings or in answers to interrogatories delivered in the suit;**
- (c) the contents of documents produced by either party.”**

In this case, I will be solely guided by the memorandum of appeal in framing the issues. The following issues arise.

- (i) **Whether the learned trial magistrate failed to fully analyse and evaluate the evidence on record.**
 - (ii) **Whether the learned trial magistrate totally failed to consider the Appellant's written submissions.**
 - (iii) **Whether the trial magistrate was wrong to find that the Respondents had proved fraud in the transfer of the suit land on a balance of probabilities.**
 - (iv) **Whether the learned trial magistrate found that the Respondents were entitled to the suit land through the doctrine of adverse possession.**
 - (v) **Whether the trial magistrate failed to consider the binding authorities cited by the Appellant .**
- 8) This being a first appeal, this court is not bound to follow the trial court's findings of fact if it appears that the trial court failed to properly evaluate evidence, took into account irrelevant factors, or failed to consider relevant factors. The duty of a first appellate court is to reconsider and re-evaluate the evidence afresh, draw its own conclusions and make allowance for the fact that it did not see or hear the witnesses “ **See Selle vs. Motor Boat Co. Ltd [1968] E.A. 123.**”
- 9) Looking at the first ground of appeal which is also the first framed issue, I find that the learned trial magistrate failed to fully analyse and evaluate the evidence on record. It is the Plaintiffs who are now the Respondents who alleged fraud and it was upon them to prove that fraud. To prove fraud, they ought to have shown that the signatures on the application for the consent of the Land Control Board, the transfer form and other documents were not made by their father Hezekiah Maina Njoroge. Those documents ought to have been filed in court by the Respondents, served on the Appellant and proved to have been forgeries. Since the Respondents are said to have been minors, their father was entitled to act for them. If the father acted for them in the transaction, fraud on the part of the Appellant was not proved. There is no evidence by an expert to prove that the instruments that caused the Appellant to become a joint owner of the suit land were forgeries.

10) Regarding the second ground, I find that Appellant's written submissions dated 9-5-2024 exhaustively analysed the question of the entries in the register of the suit land particularly entries numbers 6 and 7 and why the date of 29-4-2003 instead of 29-4-2004 was a clerical error. The Respondents were not merely expected to deny having appeared before the advocate known as T.M. Njoroge to sign the land conveyance documents. They were expected to prove by forensic evidence that the signatures on the documents were not theirs. The Respondents have not been forthright about their exact ages. Only Ann Wambui in her witness statement has stated that her mother Rose Njeri Maina was married in the late seventies. This is the statement dated 7-12-2022. In that statement she says that the Appellant was married by her father in the year 1957 and she gives the years of birth of her step-sisters Josephine Njeri, Esther Wairimu and Phyllis Wanjiru as 1961, 1964 and 1967 respectively. She does not state the year of her birth or the years of birth of her siblings especially the two Respondents. If their mother was married in the seventies, it is quite probable that some or all of them were aged 18 years in the year 2004. It was incumbent upon the Respondents to prove that they were minors in the year 2004. Without them filing evidence of their ages, they have not proved that they were minors. The question of the Respondents ages ought to have been resolved at the trial by the respondents adducing evidence. Since, no such evidence was adduced, it was not proved that the Respondents were minors in the year 2004.

11) As for the third issue of burden of proof, I find that it is the Respondents who had the legal burden to prove fraud not just on a balance of probabilities but to a higher standard but not as high as proof beyond reasonable doubt as in criminal cases. In the case of **Ndolo vs. Ndolo Civil Appeal No. 128 of 1995** it was held that where a party alleges fraud, then such fraud must be proved to a standard higher than the ordinary one of a margin of probabilities. As pointed out earlier, failure to present forensic evidence or forgery means that the legal burden was not discharged by the Respondents.

12) Fourthly, the learned trial magistrate did not make any finding on the issue of adverse possession. He stated as follows at page 12 of the judgment.

“ The prayer for adverse possession was made in the alternative and since I have found out that the said title was fraudulently and illegally acquired. I do not see any need of dwelling on the issue of adverse possession...”

The trial magistrate cannot therefore be faulted on this ground.

In order that this issue does not come back to the fore again, I find that it is proper to address it now. It is now trite that by virtue of **Section 38(1) of the Limitation of Actions Act** and the

Court of Appeal decision in the case of **Sugawara vs. Kivuti Appeal E141 of 2022** magistrates courts have no jurisdiction in adverse possession cases.

It is my finding that the parties did not sufficiently plead on adverse possession because none of them filed any evidence of the structures that they have put up on the suit land. The Respondents merely alleged that they have two houses on the land without filing photographs or the architectural plans of those buildings. As for the Appellant, she only filed pictures of people in what appeared to be a feast without any picture of a house or the drawings or even a report by a valuer.

If anything, a customary trust would be a more appropriate cause of action considering that the parties are family members of one Patriach.

13) The final issue is adequately covered in the finding regarding the Appellants written submissions. It would be superfluous to make a finding on this issue.

14) In conclusion and for the reasons already stated I find **merit** in the appeal. I allow it and order as follows.

(a) This appeal is allowed.

(b) The judgment in SPM Kangema Case No. E018 of 2021 is hereby set aside.

(c) The suitland, that is to say, Loc.19/Nyakianga/199 to remain registered in the names of Hezekia Maina Macharia and Dorcas Wangechi Maina as per entry No. 6 of the proprietorship section of the land register.

(d) Since the parties have been torn apart by long and tedious litigation and in order to foster harmony, there will be no order as to costs.

It is so ordered.

Dated, Signed and Delivered virtually at Murang'a this 24th day of March, 2026.

**M.N. GICHERU
JUDGE.**

Delivered online in the presence of: -
Court Assistant – Magu
Appellant’s Counsel – Miss Vuchocho
Respondents’ Counsel – Mr. Mugo