

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA**  
**ELC APPEAL CASE NO. E008 OF 2025**

**PETER NDUNG’U GEORGE KINUTHIA.....1<sup>ST</sup>**  
**APPELLANT**  
**WAIREGI NDUNGÚ.....2<sup>ND</sup>**  
**APPELLANT**  
**REUBEN WAWERU KARANJA.....3<sup>RD</sup>**  
**APPELLANT**  
**LEAH WAMBUI GAKUU.....4<sup>TH</sup>**  
**APPELLANT**  
**JANE NJOKI WAKIBI.....5<sup>TH</sup>**  
**APPELLANT**

**VERSUS**

**SAMUEL MBURU GICHANGA.....**  
**RESPONDENT**

*(An Appeal from the Judgment of Hon. N S Lutta, Chief Magistrate, delivered  
in Naivasha on 30<sup>th</sup> April, 2025)*

**IN**

**REPUBLIC OF KENYA**  
**IN THE CHIEF MAGISTRATE COURT AT NAIVASHA**  
**MCELC NO 21 OF 2018**  
**SAMUEL MBURU**  
**GICHANGA.....PLAINTIFF/RESPONDENT**

**-VERSUS-**

**PETER NDUNG’U GEORGE KINUTHIA.....1<sup>ST</sup>**  
**DEFENDANT**

**WAIREGI NDUNG’U.....2<sup>ND</sup>**  
**DEFENDANT**

**REUBEN WAWERU KARANJA.....3<sup>RD</sup>**  
**DEFENDANT**

**LEAH WAMBUI GAKUU.....4<sup>TH</sup>**  
**DEFENDANT**

**JANE NJOKI WAKIBI.....5<sup>TH</sup>**  
**DEFENDANT**

**JUDGEMENT.**

1. Before me for determination on appeal is a matter which was heard and determined by the Hon. N S Lutta, Chief Magistrate in Naivasha, in MCELC No. 21 of 2018. Upon considering the evidence of both parties, vide his Judgement delivered on 30<sup>th</sup> April, 2025, the Trial Court found in favour of the Plaintiff/Respondent and entered judgement as prayed in the Plaint, declaring him the registered owner of land parcel No. Maela/Ndabibi Block 3/69 (Ngati).
2. The Defendants/Appellants/Appellants, being dissatisfied with the said Judgement, have now filed the present Appeal based on the following grounds in their Memorandum of Appeal:
  - i. That the learned Trial Magistrate erred in law by shifting the evidential burden to the Appellants to disprove trespass when the Respondent had not established the fact of trespass.
  - ii. That the Learned Trial Magistrate erred in fact by failing to take into account DW1’s and PW2’s testimony, leading him

to the erroneous conclusion that the Respondent was the sole Owner of the suit land.

iii. That the Learned Trial Magistrate erred in fact by accepting the validity of the Appellant's title No. Maela/Ndabibi Block 3/871 from which the Appellants' interests arose, thus leading him to the erroneous conclusion that the Appellants' presence on the suit land amounted to trespass.

3. The Appellant thus prayed for the following orders:

i. That the judgement of the Trial Court be vacated and, in its place, the Honourable Court make an order dismissing the Respondent's suit in the Trial Court.

ii. That the Appellants have the costs of the Appeal.

4. In his Replying Affidavit dated 30<sup>th</sup> January 2026, the Respondent deposed that on 14<sup>th</sup> October 2014, he had been issued with title No. Maela/Ndabibi Block 3/69 (Ngati). No documents indicated that he had consented to the subdivision of the said parcel of land, which had been subdivided without his knowledge and/or consent while he was bedridden in hospital. All the documents produced by the Appellants confirmed him as the rightful owner of the suit land, and thus the Trial Magistrate did not err in so concluding. The Appellants' Appeal has no prospect of success and was merely intended to delay the conclusion of the long-standing matter.

5. Directions were given for the disposal of the Appeal by way of written submissions, and the parties complied and filed their respective submissions, which I shall summarise as set out below.

### **Appellants Submissions.**

6. In their Submissions dated 16<sup>th</sup> February, 2026, the Appellants summarised the factual background of the matter and grounded their submission on the decided case of **Selle & Another -vs- Associated Motor Boat Co. Ltd & Others [1968] EA 123**, which sets out the duty

of the first Appellate Court to review the evidence adduced before the Lower Court and to satisfy itself that that Court's decision was well-founded.

7. They submitted that a cursory glance at the averments in Paragraphs 13, 14, 15, 16, 17, 18 and 19 of the Plaint confirmed that the Respondent's cause of action against them was for trespass. They further submitted that, since they had denied all the material averments asserted by the Respondent in the Plaint in their Statement of Defence, the Respondent bore the legal burden of presenting evidence in support of the allegations levied against them. They placed reliance on the Court of Appeal's decision in **Nairobi CACA Nos 5 and 48 of 2002 [Consolidated]; Antony Francis Wareham T/A AF Wareham & 2 Others -vs- Kenya Post Office Savings Bank** to urge the Court to find that, to succeed in his case, the Respondent bore the legal burden of presenting evidence in support of the averments made in the said Paragraphs, to the requisite legal standard.
8. They submitted that the Respondent had failed to prove his allegations against them to the requisite legal standard. Following the division of the Suit Land between the Respondent and his brother, Josphat Gitau Gichanga, the latter became the proprietor of Land Title No Maela/ Ndabibi Block 3/871 (Ngati). In support of this position, DW1, one Lucy Wanjiku Gitau, produced a Title, a Deed Plan for Maela/ Ndabibi Block 3, and the Official Search issued on 5<sup>th</sup> August, 2023, in relation to No Maela/ Ndabibi Block 3/871 (Ngati), confirming that it had been excised from the Suit Land and registered to Josphat Gitau Gichanga.
9. They invited the Court to peruse Page 99 of the Record of Appeal, which showed proceedings of 26<sup>th</sup> September, 2017, before Hon Mr Justice Sila Munyao, showing a Consent between the Respondent and the Counsel for the Appellants. Under Clause 2 of the said Consent, the Land Registrar was to issue the Parties with the Green Cards for Land Title Nos. Maela/ Ndabibi Block 3/69 and Maela/ Ndabibi Block 3/871(Ngati). They wondered

why the Respondent would enter into such a Consent if, indeed, the suit land had never been subdivided as alleged. It was their submission that, taken together, the Consent and their testimonies, together with those of their witnesses, lent credence to their case.

10. That, in cross-examination, the Respondent had confirmed that the Deed Plan showed that the suit land was situated next to Land Title No. Maela/Ndabibi Block 3/871 (Ngati). That it had been their testimony that they had purchased portions of Land Title No Maela/Ndabibi Block 3/871 (Ngati) from Josphat Gitau Gichanga, who unfortunately passed away on 22<sup>nd</sup> November, 2014, before completing the transfer of their respective parcels of land. That they had produced in evidence the Death certificate of Josphat Gitau Gichanga and their respective Written Sale Agreements with him.
11. The Respondent neither produced a mutation nor a Surveyor's Report to confirm any encroachment onto his land or the extent of each of the five [5] Appellants' acts of trespass. There was no evidence tendered to confirm that the Respondent's land was distinct from Josphat Gitau Gichanga's land and had proper boundaries. Further, the Respondent did not tender any evidence to confirm the damages, if any, which he had suffered as a result of the Appellants' purported encroachment. They thus submitted that the Respondent was not entitled to the orders sought in the Complaint and urged the Court to find as much. Reliance was placed on the Court's decision in **Kajiado ELC Case No 417 of 2017; Silantoi Ene Santa Nkoipiyia & another -vs- Natasha Ene Santa Ngopia.**
12. In conclusion, they urged the Court to find that they had proffered a coherent, concrete and unassailable explanation of the Respondent's Claim, and that the Respondent had failed to prove his case against them to the requisite standard. They thus urged the Court to overturn the Judgment of the Lower Court and substitute it with an Order dismissing the Respondent's Suit, with costs.

### **Respondents Submissions.**

13. The Respondent, vide his submissions dated 18<sup>th</sup> February 2026 framed four (4) issues for determination as follows:

- i. Do the Appellants have any proof or agreement stating or proving which parcel of land they had bought?
- ii. Does the Respondent have the original title deed that was subdivided into the land they had bought?
- iii. Does the Respondent know who had registered the title they intend to have bought from the Respondent?
- iv. Who should be condemned to meet the costs of the claim?

14. The Respondent then proceeded to submit that the Appellants had failed to provide the court with any agreement drawn between him and them confirming that he had sold to them (Appellants) any portion of land to be excised from parcel No. Maela/Ndabibi Block 3/69 (Ngati).

15. That the Appellants failed to adduce evidence of how the land was subdivided and from which mother title the subdivision had been made, nor did they produce any original documents or explain how their land had been registered at the Land Registry. He thus submitted that the Appellants' Appeal was intended to delay their eviction from the suit property, given that the suit had been filed in 2018. The Appellants had sufficient time to prove their ownership, which they did not. He thus urged the court to dismiss their Appeal with costs.

### **Analyses of the evidence.**

16. In a Complaint dated 22<sup>nd</sup> September 2015 and filed in Naivasha CMCELC No. 21 of 2018, Samuel Mburu Gichana, the Plaintiff/Respondent/Respondent herein, instituted suit against Peter Ndung'u George Kinuthia, Wairegi Ndung'u, Reuben Waweru Karanja, Leah Wambui Gakuu and Jane Njoki Wakibi, the 1<sup>st</sup> to 5<sup>th</sup> Defendants/Appellants/Appellants, seeking the following orders;

- i. A declaratory order declaring that land parcel No. Maela/Ndabibi Block 3/69 (Ngati) belongs to the Plaintiff/Respondent absolutely.
  - ii. An order of eviction of the Defendants/Appellants from land parcel No. Maela/Ndabibi Block 3/69 (Ngati).
  - iii. Permanent injunction restraining the Defendants/Appellants by themselves, their agents, servants or any other person acting on their behalf from entering, encroaching, alienating or interfering with land parcel No. Maela/Ndabibi Block 3/69 (Ngati).
  - iv. Mesne profits.
  - v. Costs of the suit and the interest thereon a court's rates.
  - vi. Any other relief that the Honourable Court may deem fit to grant.
17. Following the filing of the suit, the Defendants/Appellants/Appellants filed their Statement of Defence dated 26<sup>th</sup> September, 2017, denying the contents of the Plaint and putting the Plaintiff/Respondent to strict proof. They argued that the Plaintiff/Respondent had been registered as a trustee and shareholder of Ngati Farmers' Co-operative Society, share Certificate No. 448, on behalf of his extended family, and that the suit land had been shared between him and the late Josephat Gitau Gichanga, with both of them awarded portions measuring 1.113 Ha.
18. Accordingly, on various dates between 2004 and 2013, they had bought the portion of the land parcel now referred to as LR Maela/ Ndabibi Block 3/871(Ngati), which they were in possession of, from the late Josephat Gitau Gichanga, who was the registered owner of the land parcel known as LR Maela/Ndabibi Block 3/69 (Ngatia). Unfortunately, the late Josephat Gitau Gichanga died on 22<sup>nd</sup> November 2014, before the completion of the survey and transfer process. They had thus contended that they were not trespassers but were lawfully and legally in possession

of the suit land. And sought the dismissal of the Plaintiff/Respondent's suit, with costs.

19. Subsequently, the case proceeded to a hearing, where the Plaintiff/Respondent, PW1, gave evidence to the effect that his mother had bought shares for him from Njoroge Kinyanjui, the original allottee for land parcel No. 448, and had paid Ksh. 1440/=. He further stated that he had paid Ksh. 560/= and had been issued with a certificate dated 8<sup>th</sup> March 1991 in respect of Phase 1. He later processed a title for Maela Ndabibi Block 3/69 (Ngati), measuring 5 ½ acres. He further stated that he was the owner of the land for which the Defendants/Appellants should be evicted. He adopted his witness statement as his evidence-in-chief.
20. In cross-examination, he testified that his mother had bought a share from someone else. They had lived in Ndeiya and had land in Kinoo, but his mother had sold that land and bought a parcel in Maela. He denied ever having had a case with his brother, but confirmed that they had gone to the District Officer in his absence, so the dispute was never heard.
21. The witness stated that his mother had purchased a share from another individual. He explained that they formerly resided in Ndeiya and possessed land in Kinoo, which his mother eventually sold before purchasing land in Maela. He clarified that he had never been in a legal dispute with his brother. He noted that although they had visited the District Officer (D.O.), the official was absent, and consequently, the dispute was never heard.
22. In cross-examination, the Plaintiff/Respondent testified that his uncle, Hosea Mutonyi, had come to Maela, though the witness had not brought him as a witness. He referenced a 1993 letter from his uncle, identified as DMFI 1, stating that the land belonged to Peter, Josephat, Edith, and himself.
23. Regarding a meeting in 1977, the witness stated he had no recollection of it. He denied knowledge of the contents of a specific letter (DMFI 2) and asserted that the signature on it was not his. He admitted to signing a

statement and an affidavit but pointed out that the signatures differed, stating that his signature on the statement dated 22<sup>nd</sup> September 2015 differed slightly from that on the affidavit.

24. He testified that he was issued a title deed on 16<sup>th</sup> October 2014, and claimed he was unaware whether his brother had held a previous title. He recounted that in February 1996, while he was hospitalised at Kenyatta National Hospital, he was informed that his brother had brought a surveyor to subdivide the land. He confirmed that he had lodged a complaint regarding the land with the District Commissioner (D.C.).
25. He stated that he had seen the title for Maela Ndabibi Block 3/871, issued on 11<sup>th</sup> March 1976, much later. He reported his brother to the police in 2014 and subsequently to the DCI in November 2014 after obtaining his own title deed, though no charges were filed. Following investigations, the titles were photocopied; he maintained that his title aligned with the official green card and alleged that the Defendants/Appellants lacked a valid title deed. He presented a map (DMFI 4) and noted that while parcel No. 69 was supposedly next to 871, his map showed only No. 69.
26. He stated that he was not present when the Chief wrote a letter on 18<sup>th</sup> December 1996, and did not agree to its contents (DMFI 6). He explained that his father's land in Kinoo had been sold by his brother independently. He clarified that the Kiambogo land had been allocated to his mother, who had lived in Maela in the 1960s. He noted that his mother later moved with his brother, Peter, while he and Josephat remained in Maela. He concluded by stating that Peter died around 2014 or 2015 and maintained that his own title deed was genuine.
27. In re-examination, he confirmed that in his map, there was only land parcel No. 69, but No. 871 was not there.
28. PW2, Edith Ngina, stated that she was a farmer and that Plot 69 was owned by Samuel Mburu, Josephat Gitau, and Samuel. She further testified that they had never agreed to subdivide the land and clarified

that the funds used to purchase it came from the sale of another piece of land in Kinoo.

29. Under cross-examination, the witness reiterated that the funds used to purchase the Maela land came from the Kinoo land sale. She noted that Josephat resides in Ndeiya and acknowledged a dispute between the two brothers over the land. The witness claimed she was unaware of any meeting held in 1977. She further stated that Josephat was given money and that Samuel decided to take the land, adding that Josephat was never issued a title deed.
30. Finally, she asserted that Josephat was not in possession of the land in question and stated that she was unaware of any third party being on the land.

The Plaintiff/Respondent had thus closed his case.

31. The Defence case proceeded with the testimony of Lucy Wanjiku Gitau, who gave evidence as DW1 and identified the Plaintiff/Respondent as the brother of her late husband, Josephat Gitau Gichanga, who died in 2014. She confirmed that she had filed for letters of administration. She stated that her husband owned land parcel 871 in Maella Ndabibi, Block 3, noting that a title deed for this parcel was issued on 11<sup>th</sup> March 1996, after it was excised from Plot 69. She clarified that although a title deed was issued for 2 <sup>3</sup>/<sub>4</sub> acres, the Plaintiff/Respondent obtained a title deed for 5 <sup>1</sup>/<sub>2</sub> acres much later, in 2015. She acknowledged there had been a prior dispute handled by the Provincial Administration and that the certificate was in the Plaintiff/Respondent's name.
32. She explained that her mother-in-law, Rebecca Wanjiru, sold their previous land because it was too small. The family, including Peter Ndungu, then moved to Maela in 1966. She testified that the land was divided into four portions for the three brothers and their mother. She recalled a boundary dispute between her and the Plaintiff/Respondent's wife that prompted their mother to intervene in 1977. The sons were

asked to resolve the matter, and it was determined that the Plaintiff/Respondent's wife was trespassing. Consequently, they entered into a written agreement with Peter Ndungu, signed by all parties, confirming that the land belonged to all of them.

33. She further testified that the land was purchased with proceeds from the sale of the family's Kinoo land. After Simon reported the matter to the Chief, the family summoned their uncle, Hosea, who wrote a letter to the Chief about the land. When the letter was read at the Chief's office, the uncle stated that their mother had left the land to Josephat Gitau and Samuel Mburu when she and Peter moved to Kiambogo. However, the witness clarified that they do not actually possess land in Kiambogo.
34. She stated that the Plaintiff/Respondent had admitted that the land belonged to both parties. She recounted that her husband demanded that the Plaintiff/Respondent repay 12,000/= Kenyan Shillings and that the slaughtering of a goat signified the formal settlement of their dispute.
35. Regarding the 1996 title deed, she stated that a surveyor visited the land while the Plaintiff/Respondent was present, but the Plaintiff/Respondent did not receive a title deed at that time. Her husband was allocated  $2 \frac{3}{4}$  acres, as shown on the map. She explained that they cultivated the land before eventually selling it to the first through fifth Defendants/Appellants. They were later summoned to the DCI in Naivasha and referred to the lands office.
36. She asserted that both parcels, 871 and 69, had official green cards and that the Maela records showed the land divided into two parts. She noted that while the Plaintiff/Respondent presented an old map, the defence provided a more recent one showing the  $2 \frac{3}{4}$ -acre size. She added that they were assigned "Phase B" after a ballot in which both names appeared. She maintained that the Defendants/Appellants are occupying their rightful portion and that the title deed is genuine, and proceeded to produce the documents filed by the defence as Df exh 1 through 7.

37. During cross-examination, the witness stated that the land had already been purchased when she arrived. She reiterated that her mother-in-law had sold the Kinoo land and insisted that she had witnessed the signing of the 1977 agreement, which she claimed the Plaintiff/Respondent had signed.
38. DW2, Reuben Karanja, the 3rd Defendant, testified that the Plaintiff/Respondent was his neighbour. He stated that he was in possession of a parcel of land purchased from Josephat Gitau, the Plaintiff/Respondent's brother. He confirmed that their Sale Agreement was Df exh 7 (sic), dated 1<sup>st</sup> May 2013, and noted that the Plaintiff/Respondent had been present when the beacons were placed. He identified his parcel as Maela Ngati Ndabibi 871 and stated that he had previously hired the land from PW 1's husband, who had promised to process the title.
39. During cross-examination, he maintained that Josephat possessed a title deed and reiterated that the Plaintiff/Respondent was present during the transaction.
40. Irene Wambui Gakuu, testifying as DW3, stated that Josephat had sold her a 3/4-acre parcel of land, for which they entered into a sale agreement on 1<sup>st</sup> May 2013, produced as Df exh 9 (sic). She explained that a surveyor had visited the site and shown them the beacons. She further clarified that she purchased the land on behalf of the Uthiru Women Group, of which she and the 5<sup>th</sup> Defendant, Jane Njoki, were registered members. She noted that the Plaintiff/Respondent's son often performed casual labour for them on that land and confirmed that Josephat had shown them his title deed (Df exh 3). She asserted that they continued to cultivate the land to date.
41. On cross-examination by the Plaintiff/Respondent, she confirmed that Josephat held the title deed. However, she denied knowing an individual named Kinjanjui Njoroge and stated that she had been hiring the land since 2009.

42. In re-examination, she stood by her statement that they had occupied the land since 2009.
43. DW4, Peter Ndungu Kinuthia, the 1<sup>st</sup> Defendant, adopted his witness statement as his evidence-in-chief and produced his Sale Agreement as Df Exh. 8 (sic). He denied trespassing on the Plaintiff/Respondent's land, arguing that the Plaintiff/Respondent's land was entirely distinct from his own. He noted that no survey had been conducted to verify the boundary and that he had never received any legal notice from the Plaintiff/Respondent. He requested that the court dismiss the Plaintiff/Respondent's suit.
44. During cross-examination, he maintained that he had not trespassed and insisted he was living on the piece of land he had rightfully purchased.
45. In re-examination, he confirmed that he had only bought a small portion and that the title was still in the process of being issued.
46. Joseph Wairegi Ndungu, the 2<sup>nd</sup> Defendant, testified as DW5, adopted his witness statement, and produced an agreement with DW4 as Df Exh. 9 (sic). He stated that he had not trespassed on the Plaintiff/Respondent's land, explaining that he had purchased only a small portion, the title to which was still being processed. He also prayed for the dismissal of the suit.
47. On cross-examination, he confirmed that he possessed a sale agreement for his land and maintained that his testimony to the court was truthful.
48. The Defence witnesses produced in evidence the documents as per their list of Documents dated 2<sup>nd</sup> October 2018, as follows, and closed its case:
- i. Letters of Administration issued on 21<sup>st</sup> September 2016.
  - ii. Death Certificate.
  - iii. Title Deed No. Maela/Ndabibi Block 3/871 (Ngati).
  - iv. Title Deed No. Maela/Ndabibi Block 3/69 (Ngati).

- v. Documents from Ngati Farmers Co-op.(receipts and share certificate)
- vi. Court Order for green card in regard to Maela/Ndabibi/Block 3/69 and 871 (Ngati), dated 27<sup>th</sup> November 2019.
- vii. Deed Plan.
- viii. Official Search for Block 3/871 dated 5<sup>th</sup> August 2013
- ix. Sale Agreements:
  - a. Between Josphat Gitau Gichanga and Peter Ndungu Kinuthia.
  - b. Between Josphat Gitau Gichanga and Wairegi Ndung'u.
  - c. Between Josphat Gitau Gichanga and Reuben Waweru Karanja.
  - d. Between Josphat Gitau Gichanga and Leah Wambui Gakuu.
  - e. Between Josphat Gitau Gichanga and Jane Njoki Wakibi.
- x. Letter from the chief dated 7<sup>th</sup> September 2015.

### **Determination.**

49. I have considered the record of the appeal, the holding by the trial Magistrate, the written submissions by learned Counsel, the authorities cited and the applicable law. Conscious of my duty as the first Appellate Court in this matter, I have to reconsider the decision Appealed against, assess it and make my own conclusions as was stated by the Court of Appeal in **Paramount Bank Limited vs. First National Bank Limited & 2 Others (Civil Appeal 468 of 2018) [2023] KECA 1424 (KLR)** where the court held as follows;

*“A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. A first Appellate Court is the final court of fact ordinarily and therefore a*

*litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. While considering the scope of section 78 of the Civil Procedure Act, a first Appellate Court can appreciate the entire evidence and come to a different conclusion.”*

50. The summary of the Plaintiff/Respondent’s case was centered on a dispute over land ownership and the validity of title deeds for property in Maela Ndabibi Block. Based on the testimony, his claim was that his mother purchased the land with proceeds from the sale of family land in Kinoo, from its original allottee, and that he subsequently obtained a genuine title deed for the property on 16<sup>th</sup> October 2014. He relied on the official Green Card to validate his ownership.
51. He disputed his brother Josephat’s right to the land. Specifically, he denied the validity of a 1977 agreement or meeting concerning the subdivision of the land, asserting that the signature on the relevant documents was not his. He further alleged that while he was hospitalised at Kenyatta National Hospital in 1996, his brother brought a surveyor to illegally divide the land. He also claimed that his brother’s title deed, issued in 1976 for parcel 871, was invalid and did not match the official map, which alleged showed only Plot 69.
52. He contended that the Appellants, who were alleged to be the buyers, were encroaching on his land and argued that whereas his brother sold portions of the family land without authority, the Appellants did not possess valid title deeds. He had therefore sought intervention from the District Officer (D.O.), District Commissioner (D.C.), and the DCI in 2014 to resolve the trespass, although no criminal charges were successfully filed at that time.
53. The Respondent’s position was that as the holder of a genuine title deed supported by the land registry’s green card, any subdivisions or

sales made by his brother, particularly those involving Parcel 871, were fraudulent or based on an erroneous map that did not reflect the true boundaries of Plot 69.

54. The Appellants' case, led by Lucy Wanjiku Gitau (DW1) and supported by subsequent witnesses, is built on the argument that the land was a family asset intended for multiple beneficiaries and that the Plaintiff/Respondent was attempting to deny a long-standing, agreed-upon subdivision.
55. The Appellants contended that the land, originally Plot 69, was bought using proceeds from the sale of family land in Kinoo and was always intended to be shared among the three brothers and their mother. They relied heavily on a 1977 written agreement, which they claim the Respondent signed, acknowledging that the land belonged to all of them. This agreement was reportedly brokered by their mother and uncle, Hosea Mutonyi, to settle a boundary dispute.
56. They argued that Maela 871 was a legitimate parcel of land that was legally excised from Plot 69. They pointed to a title deed issued to Josephat, the Plaintiff/Respondent's brother, on 11<sup>th</sup> March 1996, a formal survey conducted in 1996 in the presence of the Plaintiff/Respondent and a balloting process in relation to "Phase B" where both the Plaintiff/Respondent's and Josephat's names appeared.
57. That the Plaintiff/Respondent had previously admitted that the land belonged to both brothers, wherein he had been paid Ksh 12,000/= and a goat was slaughtered, a traditional gesture signifying the formal and final settlement of the land dispute.
58. The other Defendants/Appellants, DW2-DW5, argued that they were bona fide purchasers who had acquired portions of the land from Josephat Gitau between 2009 and 2013. They verified that Josephat held a valid title deed and stated that they had been in open possession and cultivation of the land for years, some since 2009, without interference until recently. They noted that the Plaintiff/Respondent or his family

members, such as his son, were often present or even worked as casual labourers on the very land they now claim to own.

59. The defence asserted that the Plaintiff/Respondent relied on an outdated map that did not reflect the legal subdivisions. They presented a more recent map that accounted for the 2 <sup>3</sup>/<sub>4</sub>-acre portions and the existence of parcel 871, and maintained that their occupation was lawful and within the boundaries of the title deed they held or were in the process of obtaining.

60. Having given a brief history of the matter herein, I have also considered the Consent that was adopted by the Court on 26<sup>th</sup> September 2017, and its effect in this case. The said consent stipulated as follows:

*“By consent;*

*1. Status quo be maintained. Each party to continue occupying the portions that they are currently in occupation.*

*2. The Land Registrar Naivasha do issue the parties with the Green Cards for the land parcel Maella/Ndabibi Block 3/69 (Ngati) and Maella/Ndabibi Block 3/871 (Ngati).*

*3. Parties to comply with pre-trials in 30 days.*

*4. The case be mentioned on 30/10/2017 to confirm compliance.”*

61. I find that the adoption of this consent stabilized the ground situation and compelled the Land Registry to provide the definitive paperwork that would ultimately determine who owns the land. Unfortunately, none of the parties herein deemed it fit to call the Land Registrar as a witness. Therefore, the court shall determine the matter based on the available evidence.

62. Having said that, I find the issues arising therefor for determination as follows:

- i. Whether the Plaintiff/Respondent is entitled to a permanent injunction restraining the Defendants/Appellants from the land.

- ii. Whether the Defendants/Appellants should be evicted from parcel No. Maela/Ndabibi Block 3/69 (Ngati).
- iii. Whether the Plaintiff/Respondent should be declared as the absolute proprietor of land parcel No. Maela/Ndabibi Block 3/69 (Ngati).

63. The first issue for determination, on whether the Plaintiff/Respondent is entitled to a permanent injunction, requires a careful balancing of the law on indefeasibility of title against the rights of occupants who claim to have purchased land legally. To succeed on this aspect, the Plaintiff/Respondent must prove that his ownership is absolute and that the Defendants/Appellants' presence constitutes an ongoing trespass.

64. It is trite that the registration of a person and Certificate of title held by a person as a proprietor of a property was conclusive proof that such a person is the absolute and legal owner of the property pursuant to the provisions of Sections 24, 25 and 26 of the Land Registration Act, which stipulate that the owner of a registered title attains indefeasible rights, and interests on the land vested in them by the law.

65. The law is very clear on the position of a holder of a title deed in respect of land. Indeed, Section 26(1) of the Land Registration Act provides as follows:

*“The Certificate of Title issued by the Registrar upon registration, 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 the 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*
- b. Where the Certificate of Title has been acquired illegally un-procedurally or through a corrupt scheme*

66. It will be seen from the above provisions of the law, that title to land is protected and the Plaintiff/Respondent's argument was that he holds a title deed issued in 2014, backed by a Green Card for Maela/Ndabibi Block 3/69, and that the Defendants/Appellants trespassed on his land and subdivided it without his consent. However, the defence argued that the Plaintiff/Respondent's brother, Josephat Gitau Gichanga, had title to Maela/Ndabibi Block 3/871 as far back as 1996, as evidenced by the title deed issued on the 11<sup>th</sup> March 1996 that showed that the land was on registry sheet 133/3/14, 15, 20, a certificate of search and by a confirmation of the chief's letter dated 7<sup>th</sup> September 2015. If the Plaintiff/Respondent obtained a new title in 2014 for the entire original block while knowing his brother had already been allocated a portion (as per the 1977 agreement, the title and the 1996 survey Plan), could it then be said that his title was genuine?
67. The Defendants/Appellants have further argued that they were bona fide purchasers for value without notice, having purchased their respective parcels of land from Josephat, who held a title deed and who had even put them in possession/occupation thereafter. The Defendants/Appellants' peaceful occupation of the suit land since 2009, with no interference from the vendor until his death, and prior to the transfer of the land, constituted an overriding interest over the property, thereby creating a presumptive and constructive trust in their favour.
68. The Supreme Court in the case of **Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 others (Petition 18 (E020) of 2022) [2023] KESC 106 (KLR) (28 December 2023) (Judgment)**, while deciding on whether a constructive trust can be imported into a land sale

agreement to defeat a registered title, held as follows:

*"...While sections 25, 26 and 28 of the Land Registration Act recognize that the rights of a registered proprietor of land are absolute and indefeasible, these are only subject to rights and encumbrances noted in the register and overriding interests. The overriding interests include trusts. In our view, and in the absence of any limitation as to the trusts, this includes constructive trusts. Applying the provisions of article 24 of the Constitution therefore, the limitation of the right to property is provided under law, and includes a constructive trust.*

*We have found that the doctrines of equity are part of our laws by virtue of section 3 of the Judicature Act. And while the Constitution entitles every person to the right to property under Article 40, this right is not absolute. Article 24 provides that a right cannot be limited except by law. We have also established that, while sections 25 and 26 of the Land Registration Act provide for the rights of a proprietor and that the certificate of title is conclusive evidence of proprietorship, section 28 provides that the registration is subject to overriding interests. One of these overriding interests is trust, which includes constructive trust.*

*We have also established that constructive trusts can arise in various circumstances, including in land sale agreements. Trust is an equitable remedy which is an intervention against unconscionable conduct. Where the circumstances of the case are such that it would demand that equity treats the legal owner as a trustee, the law will impose a trust. It is imposed by law whenever justice and good conscience require it. On this issue and for the reasons given above, we therefore find that a constructive trust can be imported into a land sale agreement to defeat a registered title."(my emphasis)*

69. From the above finding, it is trite that the law supports the importation of a constructive trust where required by equity and good conscience, which imposition acts as an overriding interest that defeats the claim of the registered proprietor under the framework of the Land Registration

Act and the Constitution.

70. The Plaintiff/Respondent did not call evidence to prove that parcel No. 871 does not legally exist, the 1996 title was a forgery and that no legal subdivision ever occurred. It is to this effect, and noting that a permanent injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered to perpetually restrain the commission of an act by the Defendant in order for the rights of the Plaintiff/Respondent to be protected, that I find that the Plaintiff/Respondent did not discharge this burden that I find that suit for an injunction should fail.

71. On the second issue for determination as to whether the Defendants/Appellants' title (or sales agreements) should be cancelled or upheld, the Plaintiff/Respondent's claim is anchored on a title deed issued in 2014. He asserts that the land was bought by his mother from Kinoo sale proceeds and that he is the sole legitimate proprietor. He denies the validity of any subdivision, specifically challenging the authenticity of a 1977 agreement and claiming he was hospitalized at Kenyatta National Hospital in 1996 when an alleged illegal survey took place. He maintains that the Defendants/Appellants are trespassers. On the other hand, the Defense, led by the widow of the Plaintiff/Respondent's brother (Josephat), argues that the land was a family asset which was divided among three brothers and their mother in 1977. They rely on a 1977 family dispute, which was resolved by an agreement that the land belonged to both the Plaintiff/Respondent and his brother Josephat, now deceased, and a title deed issued to the vendor, Josephat, for parcel No. Maela/Ndabibi Block 3/871 in 1996, which was eighteen years prior to the Plaintiff/Respondent's title.

72. The court notes that despite the Consent Order of 26<sup>th</sup> September 2017, which required the Land Registrar to produce Green Cards for both parcels, neither party considered it necessary to call the Land Registrar to give evidence. In the absence of the Green Cards, the court is deprived of

the ultimate mirror of registered interests. However, I must now decide this issue on the burden of proof and the preponderance of probabilities, as land litigation cannot be held in abeyance indefinitely due to the parties' failure to do so.

73. The Plaintiff/Respondent seeks the extreme remedy of a permanent injunction and eviction. Under Sections 107 and 108 of the Evidence Act, the person who desires the court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove those facts. The Plaintiff/Respondent asserts that Parcel 69 remains an undivided unit belonging solely to him. To succeed, he had the primary burden to produce the Green Card to disprove the legal existence of Parcel 871 noting that a title deed had been produced indicating that its register was opened on the 22<sup>nd</sup> November 1995, that the parcel No 871 measured 1.113 hectares and was found on Map sheet No. 133/3/14,15,20.

74. This court notes that a Consent Order was recorded on 26<sup>th</sup> September 2017, specifically directing the Land Registrar to produce the Green Cards. The Registry's failure to comply and the Plaintiff/Respondent's failure to vigorously seek that evidence, lead this court to draw an adverse inference. It is a settled principle of law that evidence which could be and is not produced is presumed to be unfavourable to the person who withholds it.

75. In the vacuum left by the missing Green Card, the court must look at the external manifestations of ownership in that, whereas the Plaintiff/Respondent relies on a Title Deed issued in 2014, the Defendants/Appellants rely on physical occupation, cultivation, and purchase agreements dating back to 2009, as well as a title deed issued in 1996. As earlier stated under Section 28 of the Land Registration Act, the rights of a person in actual occupation are overriding interests that subsist regardless of whether they are noted on the register. Even if the Plaintiff/Respondent's 2014 title is clean on its face, it is subject to the

rights of the Defendants/Appellants who were already on the land when he obtained it.

76. Applying the Supreme Court’s reasoning in **Dina Management Limited v County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment)**, where the Court observed as follows:

*“Indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible...*

*Article 40 of the Constitution entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired....”*

77. A title deed is not a sacred cow if its origin is questionable. The Plaintiff/Respondent’s claim that the land was never subdivided was contradicted by the long-term presence of third parties, namely the 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Defendants/Appellants; the testimony that his own family members acknowledging the subdivision in 1997; and the existence of a map showing Parcel 871. Indeed, the Plaintiff/Respondent’s claim that he was unaware of the Defendants/Appellants’ presence was contradicted by testimony that his own son worked for them as a casual labourer. This suggested acquiescence on the part of the Plaintiff/Respondent.

78. Without the Green Card to prove that Parcel 871 was created through fraud, the court cannot simply ignore its physical existence and the subsequent rights of *bona fide* purchasers. I therefore find that the Plaintiff/Respondent failed to discharge the burden of proof required to impeach the Defendants/Appellants' occupation as trespassers.

79. Secondly, it is trite that if the 1996 title for parcel 871 was legally excised from parcel 69, the Plaintiff/Respondent's 2014 title cannot retroactively swallow land that was already legally alienated. As far as the court is concerned, No. Maela/Ndabibi Block 3/871 (Ngati) was an independent parcel of land. The non-production of the Green Card was fatal to the Plaintiff/Respondent's prayer for eviction, as the court will not exercise its discretion to evict families from land they have settled on without definitive proof that their agreements based on an existing vendor's title were a nullity.
80. On the final issue for determination as to whether the Plaintiff/Respondent should be declared as the absolute proprietor of land parcel No. Maela/Ndabibi Block 3/69 (Ngati), upon consideration of the evidence adduced and the law, it is clear that there had been an issue of double titling where the Plaintiff/Respondent holds a title for the parent parcel being No. Maela/Ndabibi Block 3/69 (Ngati). issued in 2014, while the Defendants/Appellants rely on a title for an excised portion No. Maela/Ndabibi Block 3/871 issued in 1996.
81. The law on competing titles is governed by the principle of "First in Time, Stronger in Law" (*Qui prior est tempore, potior est jure*). In the absence of proof that the 1996 title was obtained through fraud, it holds priority over the 2014 title. A registrar cannot legally issue a title for a whole parcel in 2014 when a portion of that land had already been legally alienated and registered to another party eighteen years prior.
82. This issue being the needle in the haystack, the court shall, using Solomon's wisdom, further fall back on decisions on how the courts have pronounced themselves over the issue on competing titles, such as this case, to wit that, the first in time will prevail. This position was emphasized in the case of **Wreck Motors Enterprises vs. The Commissioner of Lands and Others Civil Appeal Civil Appeal No. 71 of 1997**, where the court held that:

*'Where there are two competing titles, the one registered earlier is the one that takes priority '*

83. The same position was held in the case of **Gitwany Investment Ltd vs. Tajmal Ltd & 3 Others (2006) eKLR**, where the Court held that:-

*'...the first in time prevails, so that in the event such as this one whereby a mistake that is admitted, the Commissioner of Lands issues two title in respect of the same parcel of land, then if both are apparently and on the face of them issued regularly and procedurally, without fraud save for the mistake then the first in time must prevail'*

84. I find that the Plaintiff/Respondent's brother's title was the first in time and as equity teaches in its maxim that; *"when two equities are equal, the first in time prevails"*, then the Plaintiff/Respondent's brother's title deed which was the first in time should prevail there having been no evidence called by the Plaintiff/Respondent to challenge the same.

85. Ordinarily, no land should be registered more than once, nor should two separate title deeds be held by separate persons. Therefore, in this case, there must be one genuine title deed and one that was issued either unlawfully or by mistake, resulting in a double allocation.

86. Balancing the two competing titles, it is my view that the Plaintiff/Respondent's brother held a good title to Maela/Ndabibi Block 3/871, while the Plaintiff/Respondent's title in my view, and in the absence of evidence to rebut the same, could only have been obtained either by the fraud, or by the mistake of the Land Registry, or both.

87. Under the precedent set by the Supreme Court in **Dina Management** (supra) the "sanctity of title" depends on the legality of its origin. Indeed, the Court of Appeal in **Korir v Njoki & another (Civil Appeal 34 of 2020) [2023] KECA 439 (KLR) (14 April 2023) (Judgment)**,

had held as follows:

*“In this case, the appellant’s title was being challenged on the ground that the proprietors of the suit land were not aware of the circumstances under which he allegedly acquired interest thereunder. It was that very title whose authenticity was in dispute. In those circumstances, he could not just come to court and place the very same title before the court and claim that the evidence was sufficient. He ought to have gone further and explained the process by which he obtained the said title. In this case there was no such evidence and since he was not physically involved in the transaction, he ought to have called the person who transacted on his behalf even if he could not call the alleged seller.”*

88. The Plaintiff/Respondent failed to produce the Green Card for Block 3/69 without which, there is no evidence to show that the 1996 subdivision was illegal or that the Plaintiff/Respondent’s 2014 title was procedurally correct. The Plaintiff/Respondent bore the burden of proof. By failing to provide the primary registry record, he had failed to demonstrate that his title was the singular, valid root of ownership for the entire acreage.
89. Secondly, evidence was led, and not successfully rebutted, that the funds used to purchase the Maela land came from the sale of family land in Kinoo and therefore he held the suit property in trust for himself and the other members of the family.
90. Third, under Section 28 of the Land Registration Act, a registered owner’s rights are subject to the rights of persons in actual occupation. The 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Defendants/Appellants have occupied and developed the land for over a decade. The Plaintiff/Respondent remained silent while these third parties purchased and moved onto the land. By his own admission, the Plaintiff/Respondent’s son worked for the Defendants/Appellants on the very land now in dispute. This constitutes acquiescence, and equity does not allow a party to sit silent while others

invest in land, only to emerge years later, claiming absolute proprietorship and seeking to evict them.

91. To grant such a declaration would be to sanctify a potential fraud as it would validate a 2014 title that ignored a pre-existing 1996 registration. Secondly, it would violate the Law of Trusts and allow one family member to dispossess his brother's family from land bought with shared family proceeds. Lastly, it would ignore overriding Interests and unjustly uproot bona fide purchasers who have established homes and livelihoods on the property. I thus reject this prayer.
92. In the end, I allow the Appeal and set aside the Judgment of the trial court, which is herein substituted with an order of dismissal of the Respondent's case in the trial Court. The Appellants shall have costs of both the trial court suit and the Appeal.

**Dated and delivered via Teams Microsoft at Naivasha this 16<sup>th</sup> day of April  
2026.**



**M.C. OUNDO**  
**ENVIRONMENT & LAND COURT- JUDGE**