

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT**

**KERUGOYA**

**ELCA NO. E045 OF 2024**

**JAMES MAINGI KABIRU ..... 1<sup>ST</sup>**

**APPELLANT**

**PENINA WAIRIMU MAINGI ..... 2<sup>ND</sup>**

**APPELLANT**

**VERSUS**

**JAMES MUNENE NDUMBI .....**

**RESPONDENT**

*(Being an appeal against the Judgment of Hon. G.W.Kirugumi, PM, at Kerugoya in MELC Case No. 091 of 2023 delivered on 3<sup>rd</sup> April 2024.)*

**JUDGMENT**

1. This appeal arises from the judgment of **Hon. G. W. Kirugumi, PM**, delivered on **3<sup>rd</sup> April 2024** in **Kerugoya MCELC No. 091 of 2023**, in which the learned trial magistrate found that the Plaintiff (now the Respondent) had proved his case on a balance of probabilities and consequently entered judgment in his favour. The trial court ordered the eviction of the Defendants (now the Appellants) from **Land Parcel No. MUTIRA/KANGAI/5674** and awarded costs of the suit to the Plaintiff.

2. Aggrieved and dissatisfied with that decision, the Appellants lodged the present appeal vide a Memorandum of Appeal dated 26<sup>th</sup> April 2024, seeking to have the entire judgment and consequential orders set aside. In their Memorandum of Appeal, the Appellants raised the following grounds:

- 1) That the learned trial magistrate erred in law and in fact by failing to appreciate that the Appellants have always been in occupation of the original **Land Parcel No. MUTIRA/KANGAI/1187** and that the suit **Land Parcel No. MUTIRA/KANGAI/5674** is a resultant subdivision thereof.
- 2) That the learned trial magistrate erred in law and in fact in failing to consider that the 1<sup>st</sup> Appellant was born and raised on the suit land, which land belonged to his mother, Eunice Waruguru Kabiru, and that consequently the issue of implied trust arose.
- 3) That the learned trial magistrate erred in law and in fact in failing to consider that the Respondent acquired the suit land unprocedurally.

3. The record shows that the Respondent commenced the suit before the subordinate court by way of a Plaint dated 17<sup>th</sup> May 2023, seeking for orders that:

- 1) The Defendants be evicted from land parcel No. MUTIRA/KANGAI/5674;
- 2) All cautions and/or restrictions lodged over the said parcel be removed;
- 3) The OCS Kerugoya Police Station do provide security during the eviction exercise; and
- 4) Costs of the suit.

The Respondent pleaded inter alia that he was the registered proprietor of **Land Parcel No. MUTIRA/KANGAI/5674**; that despite demand and issuance of a notice of intention to sue, the Defendants had refused and/or neglected to vacate the suit property, thereby necessitating the filing of the suit.

4. The Defendants, now the Appellants, filed a joint Statement of Defence dated 12<sup>th</sup> June 2023, in which they substantially denied the averments contained in the Plaint. They contended that the Respondent had acquired registration of the suit land illegally as at the time of the transaction and registration, they had lodged a caution against the title which was still in force. They further averred that the Respondent had not made any

inquiries from them regarding their occupation of the suit property and that he ought to have sought clarification from the person who transferred the land to him. It was their case that they had lodged the caution so as to secure their interest in the land, asserting that their mother was expected either to transfer the land to them or allocate them alternative land. They maintained that in those circumstances, they were not in a position to vacate the suit property.

5. The matter proceeded to a hearing, during which each party tendered evidence in support of their respective positions. Upon evaluating the parties pleadings and evidence, the learned trial magistrate found that although the Defendants claimed ignorance of their mother's intention to sell the land, they admitted that their mother had previously sued them for removal of the caution they had lodged against the suit property.

The court noted that an order had been issued on 9<sup>th</sup> August 2021 directing the removal of that caution, and that the Defendants had not appealed against that decision. The trial court further observed that the 1<sup>st</sup> Defendant had not instituted any proceedings against his mother seeking a declaration of rights or a share in her property. The learned trial magistrate reasoned that the Defendants' mother, being the registered proprietor and an adult of sound mind, was legally entitled to dispose of

her land. The trial court found no evidence that the sale transaction was void, voidable, fraudulent, or subject to any proven overriding interest.

Relying on the decision in the case of **Oganga & another versus Orangi & 3 others**, the court held that in the absence of proof of trust or other legally enforceable interest, a registered proprietor is free to dispose of land without consulting the adult children. On that basis, the court entered judgment on the 3<sup>rd</sup> April 2024 in favour of the Plaintiff and granted the eviction orders sought.

6. This Court directed that the appeal be canvassed by way of written submissions. The learned counsel for the appellants filed their submissions dated 15<sup>th</sup> July 2025, challenging the trial court's findings on three principal grounds.

Firstly, on occupation and subdivision, they submitted that they had always occupied the original **Land Parcel No. MUTIRA/KANGAI/1187**, and that the **Suit Land (No. 5674)** was a subdivision of that original land. They argued that the 1<sup>st</sup> Appellant had never been formally allocated land by his mother and therefore had a continuing beneficial interest. Mutation records were tendered to support this claim.

Secondly, on implied trust, the Appellants contended that, by virtue of birth and lifelong residence on the land, an implied trust arose in their favour. Counsel referred to the case of **Sirma versus Singoei [2022] KECA 708 (KLR), citing Warde versus Slater (2017) BCSC 274,** to explain that where property is gratuitously used or transferred, equity presumes the existence of an intention to hold it in trust. They argued that their mother's allowance of occupation and possession evidenced such an intention.

Thirdly, on procedural irregularity in the acquisition of title to the land, the Appellants argued that the Respondent acquired the Certificate of Title after a caution had been lodged against the title of the land. That the purchase of the land for **Kshs. 400,000/=** occurred while the caution was still in force. They contended that the Respondent failed to comply with due process and cited the cases of **Dina Management Ltd. versus County Government of Mombasa & 5 others [2023] KESC 30 (KLR) and Munyu Maina versus Hiram Gathiha Maina [2013] KECA 94 (KLR)** to support the proposition that a title acquired unprocedurally, or in violation of encumbrances is not indefeasible.

The appellants submitted that the appeal court should recognize the existence of overriding interests, implied

trust, and beneficial entitlement in their favour, and declare the Respondent's title unprocedurally acquired and void.

7. The learned counsel for the Respondent filed their written submissions dated 8<sup>th</sup> January 2026, inter alia focusing primarily on the lawfulness of his title and the absence of overriding interests in favour of the Appellants.
8. On lawful acquisition of title to the suit property, the Respondent submitted that he is the lawful proprietor of the suit land, having purchased it from the Appellants' mother. That the evidence at trial demonstrated that the sale was valid and that the Appellants had no legal or equitable claim preventing the transfer.

On parental right to dispose of land, the Counsel argued that a parent, as the registered proprietor, has the legal right to dispose of land without consulting adult children. Reference was made to **Oganga & Another versus Orangi & 3 Others (ELC Case 466 of 2015) [2023] KEELC 16348**, where it was held that adult children cannot impede a parent's free disposal of property.

On the pleadings and evidence, the Respondent emphasized that the Appellants had not pleaded any claim of trust, nor had they filed any counterclaim

against their mother, and the trial court was therefore justified in not considering alleged implied trust. **Section 26 of the Land Registration Act** was cited to underscore that a certificate of title is conclusive evidence of ownership, unless where it was procured through fraud or illegality.

The Respondent submitted that the appeal lacked merit and ought to be dismissed with costs.

9. This appeal raises the following three core issues for the court's determinations:
  - a. *Whether the Appellants had established any legally cognizable interest in **Land Parcel No. MUTIRA/KANGAI/5674** capable of overriding the Respondent's registered title.*
  - b. *Whether the Respondent's title was liable to impeachment under **Section 26(1) of the Land Registration Act.***
  - c. *Who pays the costs?*
  
10. I have carefully considered the grounds on memorandum of appeal, record of appeal, the parties' rival submissions, superior court decisions cited and come to the following determinations:
  - a. As this is a first appeal, the duty of this Court is to re-evaluate the evidence afresh and draw its own conclusions, while bearing in mind that it did not see

or hear the witnesses. This principle was stated in **Selle & Another versus Associated Motor Boat Co. Ltd & Others [1968] EA 123**, where the Court of Appeal held:

***“This Court is not bound necessarily to accept the findings of fact by the court below. An appeal to this Court is by way of retrial... this Court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”***

- b. The Appellants’ case on this appeal is that by reason of birth, occupation, and the subdivision of the original **Parcel No. MUTIRA/KANGAI/1187**, they possessed a beneficial interest in **Land Parcel No. MUTIRA/KANGAI/5674**, capable of overriding the Respondent’s title. They further relied on the fact that they had lodged a caution over the suit land. The starting point must be the pleadings before the subordinate court.

Through their Statement of Defence dated 12<sup>th</sup> June 2023, the appellants denied the Respondent’s claim and alleged that the Respondent acquired the land

illegally because a caution they had lodged was still in force.

It further stated that the caution had been placed so that their mother would transfer the land to them or give them alternative land. That statement of Defence, however, did not plead particulars of customary trust or implied trust, and did not contain a counterclaim seeking a declaration that their mother held the land in trust for them, and they did not seek any relief against her.

- c. It is settled law that parties are bound by their pleadings and that a court will not grant a remedy that has not been sought. A claim founded on trust, being a substantive proprietary assertion, requires to be specifically pleaded and proved. The trial court was therefore not called upon to determine a declaratory claim of trust, nor did such an issue crystallize for determination in the manner contemplated by law.

This Court, sitting as an appellate court, cannot assume original jurisdiction to determine at the first instance, a substantive claim that was neither properly pleaded nor adjudicated upon in the court below. To do so would be to venture beyond the

scope of the appeal and into matters not placed in controversy before the trial court.

- d. Even if one were to consider the substance of the Appellants' assertions as disclosed in the evidence, the material on record does not disclose proof of a legally enforceable interest. The land was registered in the name of their mother. There was no evidence that it was a clan or ancestral land held subject to pre-existing family obligations. Occupation, even from birth, does not of itself confer proprietary rights during the lifetime of a registered proprietor, nor does expectation of inheritance crystallize into an overriding interest. Therefore, the Appellants did not establish any legally cognizable interest in **Land Parcel No. MUTIRA/KANGAI/5674**, that is capable of overriding the Respondent's registered title.
- e. The Appellants further contend that the Respondent acquired registration of **Land Parcel No. MUTIRA/KANGAI/5674** unprocedurally, primarily on the basis that a caution had been lodged against the title at the time of the transaction. The governing provision is **Section 26(1) of the Land Registration Act No. 3 of 2012**, which provides that a certificate of title shall be taken as prima facie evidence that the person named therein, is the absolute and indefeasible owner, and such title shall

not be subject to challenge, except on the grounds of fraud or misrepresentation to which the proprietor is proved to be a party, or where the certificate has been acquired illegally, unprocedurally, or through a corrupt scheme. The burden of proof under **Section 107 of the Evidence Act Chapter 80 of Laws of Kenya**, lies upon the party seeking to impeach the title.

- f. The record shows that the Appellants had lodged a caution against the suit property. It is also admitted that their mother instituted proceedings for its removal and that, by an order issued on 9<sup>th</sup> August 2021, the court directed that the caution be removed. The Appellants did not appeal against that order, and the Respondent was subsequently registered as proprietor of the suit property. No evidence was placed before the trial court demonstrating that the removal of the caution was irregular, unlawful, or procured through fraud. There was likewise no evidence that the Respondent participated in any fraudulent or illegal scheme, or that the transfer process violated any statutory requirement. The mere fact that a caution against the suit property's title once existed does not, without more, render a subsequent registration after the caution has been lawfully removed illegal. A caution is a temporary protective measure, and it does not

permanently encumber the title in the absence of a subsisting legal interest.

The Appellants did not establish fraud, misrepresentation, illegality, or procedural impropriety within the meaning of **Section 26(1) of the Registration of Land Act**, and in the absence of such proof, the Respondent's title enjoys statutory protection.

Accordingly, this Court finds no basis upon which the trial court could have impeached the Respondent's title.

g. Under **Section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya**, costs follow the events unless where on reasonable cause being presented, the court directs otherwise. In this appeal, I find no reasons to depart from that edict and the respondent is awarded costs.

11. In view of the above conclusions, the court finds and orders as follows:

**a. That the appeal has no merits and is dismissed in its entirety.**

**b. That the Judgment of Hon. G.W.Kirugumi, PM, in Kerugoya MELC Case No. 091 of 2023,**

**delivered on 3<sup>rd</sup> April 2024, and the decree arising therefrom is hereby confirmed.**

**c. That the appellants to bear the respondent's costs in the appeal.**

Orders accordingly.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 15<sup>TH</sup> DAY OF APRIL 2026.**

**Kibunja**

**JUDGE**

**In the Presence of:**

Appellants -

Respondent -

Kinyua - Court Assistant

**S. M.**

**ELC**

**Kibunja**

**JUDGE**

**S. M.**

**ELC**

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