

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA**  
**ELCL APPEAL CASE NO. E013 OF 2025**

**ZACHARIAH** **MATOKE.....**  
**.....APPELLANT**

**VERSUS**

**JONES** **COSMA** **LONGECHELE.....1<sup>ST</sup>**  
**RESPONDENT**

**MWIRUKAMA** **COMPANY** **LTD.....2<sup>ND</sup>**  
**RESPONDENT**

**THE LAND REGISTRAR - NAIVASHA.....3<sup>RD</sup>**  
**RESPONDENT**

**THE HON. ATTORNEY GENERAL.....4<sup>TH</sup>**  
**RESPONDENT**

(Being an Appeal from the Ruling and orders in Naivasha MC ELC No.  
E017/2024 delivered on 30<sup>th</sup> July 2025 by Honourable N.S. Lutta).

**JUDGEMENT.**

1. The matter was heard and decided by N. S. Lutta, Chief Magistrate, who, after analysing the evidence on record, in his Ruling delivered on 30<sup>th</sup> July 2025, found that the 1<sup>st</sup> Defendant/Respondent’s Notice of Preliminary Objection dated 4<sup>th</sup> March 2025 (sic) was meritorious and upheld it, with costs.
2. The Plaintiff/Appellant, being dissatisfied and aggrieved with the said Ruling, has now filed the present Appeal based on the following grounds in his Memorandum of Appeal:
  - i. That the learned Trial Magistrate erred in law and in fact by allowing the preliminary objection dated 4<sup>th</sup> April 2025.
  - ii. That the Trial Magistrate erred in law and fact in finding that there is no cause of action brought against the 1<sup>st</sup>

Respondent, yet he is the genesis of the issues that brought about the filing of the suit thereon.

- iii. That the learned Trial Magistrate erred in law and fact in failing and/or ignoring to consider the weighty issues pleaded in the Plaint against the 1<sup>st</sup> Respondent and the supporting evidence (on fraud) thereon that would require the 1<sup>st</sup> Respondent's input to enable the court arrive at substantive justice hence arriving at an erroneous decision in the circumstance.
- iv. That the Trial Magistrate erred in law and fact by failing to totally address his mind as regards the gravity of the issues raised by the Appellant in the Plaint, his submissions to the preliminary objection and the totality of the evidence in the court record, hence arriving at an erroneous decision.
- v. That the Trial Magistrate's decision, albeit a discretionary one, was plainly wrong in the circumstances.

3. The Appellant thus prayed for the following orders:

- i. That the appeal herein be allowed with costs to the Appellant.
- ii. The Honourable Court be pleased to find the Preliminary Objection dated 4<sup>th</sup> April 2025 lacking merit and dismiss it.
- iii. This Honourable Court be pleased to find that there is a cause of action as against the 1<sup>st</sup> Respondent and for him to continue being a party in Naivasha MCELC No. E017 OF 2024 until its determination in full.
- iv. The costs of the appeal shall be borne by the 1<sup>st</sup> Respondent.

4. In response and vide their grounds affirming the Decision dated 20<sup>th</sup> January 2026, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents sought to have the impugned decision affirmed on the following grounds:

- i. That in Nakuru Succession Cause No 131 of 2018, Hon. P. Nyotah vide order issued on 26<sup>th</sup> July, 2023, had canceled and/or revoked the Title Deed issued to the 1<sup>st</sup> Respondent herein in respect to property Oljorai Phase II Settlement Scheme No. 495.
- ii. The Complaint does not disclose any cause of action against the 1<sup>st</sup> Respondent, noting that he is not the registered and/or beneficial owner of the property known as Oljorai Phase II Settlement Scheme No. 495 and therefore orders sought cannot be enforced against him.
- iii. The orders sought against the 2<sup>nd</sup> Respondent for cancellation of the Title Deed issued in its name being Naivasha/Oljorai Phase II/5836 lacks merit for the reason that the property was a resultant subdivision of the property known as Oljorai Phase II Settlement Scheme No. 495.
- iv. That by virtue of the cancellation of the Title Deed that had been issued to the 1<sup>st</sup> Respondent, the resultant subdivision was also deemed as cancelled including, the property known as Naivasha/Oljorai Phase II/5836.

5. The Appeal was disposed of by way of written submissions.

**Appellant's Submissions.**

6. Vide his submissions dated 10<sup>th</sup> February 2026, the Appellant framed one issue for determination, namely, whether the trial court erred in upholding the preliminary objection. He then proceeded to argue that the current suit had been filed on the grounds of fraud, where the Respondents allegedly obtained title deeds to the subject matter fraudulently, thereby denying the Appellant peaceful possession and enjoyment of his property. He submitted that the primary title to the subject matter was Ol Jorai Phase II Settlement Scheme No. 495, which had initially been registered in

the name of the 1<sup>st</sup> Respondent's deceased mother before the fraudulent acts occurred. That he had purchased a portion of Ol Jorai Phase II Settlement Scheme No. 495 from the 1<sup>st</sup> Respondent's mother, but she had died before the transfer process was completed.

7. That subsequently, the 1<sup>st</sup> Respondent fraudulently transferred the entire portion of land into his name without following the due process of law relating to the estate of the deceased, as was evident in the ruling in Nakuru Succession Cause No. 131 of 2018, which had cancelled the said title. However, despite the findings in that ruling, the Appellant's portion was registered to the 2<sup>nd</sup> Respondent. Furthermore, the mother title of the subject property having been registered in the 1<sup>st</sup> Respondent's name and subsequently changed, as reflected in the Plaintiff's list of documents dated 21<sup>st</sup> August 2024, where a copy of the mother title Ol Jorai Phase II Settlement Scheme No. 495, mutation form dated 21<sup>st</sup> February 2023, green card, and letter of consent to subdivision dated 19<sup>th</sup> January 2023 all bear the 1<sup>st</sup> Respondent's name as a party in the transfer process, the 1<sup>st</sup> Respondent should be a party to the primary suit since he was the originator of the fraudulent title held by the 2<sup>nd</sup> Respondent. That the 1<sup>st</sup> Respondent had also fraudulently caused the subdivision, transfer and registration of the resultant parcels to other parties, which was the gist of the suit in the lower court.
8. That the 1<sup>st</sup> Respondent also sold land by claiming to be the rightful owner, even though he did not possess a legitimate title deed. Instead, he used a title deed that had been obtained fraudulently to effect subdivision and later transfer of the resulting parcels to other parties. The Appellant thus argued that there was a cause of action against the 1<sup>st</sup> Respondent, as he must explain in detail how he obtained the title deed to the suit land without a Grant and subsequently transferred it to other parties.
9. It was his prayer that the court overturn the ruling in Naivasha MCELC No. E017 of 2024, delivered on 30<sup>th</sup> July 2025, and dismiss the preliminary

objection, ultimately finding that there was a cause of action against the 1<sup>st</sup> Respondent herein.

**1<sup>st</sup> and 2<sup>nd</sup> Defendants' Submissions.**

10. In response, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, vide their Submissions dated 22<sup>nd</sup> January, 2026 summarized the factual background of the matter and then submitted that in his list of documents dated 26<sup>th</sup> July, 2023, the Appellant had attached a copy of an order issued in Nakuru Succession Cause No. 131 of 2018 by Hon. P. Nyota where the title deed in the name of Jones Cosmas Longechele (the 1<sup>st</sup> Respondent herein) had been cancelled and revoked. They thus submitted that the Appellant's attachment of a copy of the said order demonstrated that he was well aware, at the time of filing the suit, that the 1<sup>st</sup> Respondent was, and is, not the registered owner of the suit property.
11. Although the 1<sup>st</sup> Respondent remained the legal administrator of the estate of Eliman Jemosop Komen, he lacked any mandate to execute documents concerning the suit property for the purpose of transferring ownership to the Appellant, as he was neither the registered nor the beneficial owner. If the 1<sup>st</sup> Respondent was to be sued at all, it should have been in his capacity as the estate administrator and not in his personal capacity. It was therefore their submission that the suit filed did not disclose any cause of action against the 1<sup>st</sup> Defendant/Respondent, as he was not the legal or rightful owner of the suit property. Reliance was placed on the decided case of **Apex Finance International Limited & another vs Kenya Anti-Corruption Commission [2012] eKLR.**
12. In respect to the orders sought against the 2<sup>nd</sup> Respondent that *“there be a declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had obtained the registration of the land parcel Naivasha/OlJORAI Phase II/15836 fraudulently and an order do issue directing the land Registrar Naivasha to cancel the same”*, the Respondents submitted that it was important to note that the said property resulted from the subdivision of the property known as Ol Jorai Phase II Settlement Scheme No. 495, where the 1<sup>st</sup>

Respondent had sold the said property to the 2<sup>nd</sup> Respondent. They further argued that, following the cancellation of the title deed issued in the name of the 1<sup>st</sup> Respondent, the resultant subdivisions were automatically deemed cancelled.

13. In conclusion, they submitted that the suit as filed in the Naivasha CMELC No. E017 of 2024 court did not disclose any cause of action against the 1<sup>st</sup> Respondent as he was not the legal and/or rightful owner of the suit property. They thus urged the Court to uphold the decision of the Hon. Nathan Shiundu and dismiss the appeal herein with costs.

### **Analyses of the evidence and determination**

14. Zachariah Matoke, the Appellant herein, instituted a suit against Jones Cosma Longechele, Mwirukama Company Ltd, the Land Registrar – Naivasha and the Hon. Attorney General as the 1<sup>st</sup> to 4<sup>th</sup> Defendants vide a Plaint dated 9<sup>th</sup> February 2024 seeking for the following orders:
- i. A declaration that the Plaintiff is the legal owner of the parcel of land measuring approximately 1.01 ha hived from Ol Jorai Phase II Settlement Scheme No 495.
  - ii. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants obtained the Registration of the Land Parcel Naivasha/Ol Jorai Phase II/15836 fraudulently and an order do issue directing the Land Registrar Naivasha to cancel the same.
  - iii. A declaration that the land parcel No. Ol Jorai Phase II Settlement Scheme No 495 or the resultant titles emanating therefrom in particular the portion belonging to the Plaintiff was held in trust (constructive trust) for the Plaintiff and the aforesaid trust be dissolved and the said land be transferred in favour of the Plaintiff and an order to issue to the Naivasha Land Registrar to amend the records held by them to reflect as such.

- iv. A mandatory injunction compelling the 1<sup>st</sup> Defendant to execute and hand over to the Plaintiff the completion documents required to effect the subdivision and transfer of the property comprised in the land known as Ol Jorai Phase II Settlement Scheme No. 495, measuring approximately 1.01 ha within 60 days from the date of the judgment in favour of the Plaintiff.
  - v. In case the 1<sup>st</sup> Defendant default in executing the necessary documents to effect the transfer, the Honourable court be pleased to order and direct that the Executive Officer or the Court itself to sign the requisite Application Forms for Land Control Board Consent and the Transfer Instrument and order the Land Registrar, Naivasha to register the Transfer Instrument and issue a Title in favour of the Plaintiff.
  - vi. A permanent order of injunction restraining the Defendants by themselves, their agents and/or servants and all other persons acting under them from entering, remaining on, cultivating, harrowing, ploughing, tilling, demolishing, dealing with or in any way interfering with the Plaintiff's portion measuring approximately 1.01 ha at Ol Jorai Phase II Settlement Scheme No. 495.
  - vii. Damages for loss caused by the 1<sup>st</sup> Defendant's trespass and demolition thereon.
  - viii. Costs of the suit be borne by the Defendants.
  - ix. Any other relief that the Honourable Court may deem fit to grant.
15. Upon service of the pleadings upon the Defendants, the 1<sup>st</sup> Defendant filed a Notice of Preliminary Objection dated 4<sup>th</sup> April 2025, raising the following grounds:

- i. That the Plaint as drawn did not disclose any cause of action against the 1<sup>st</sup> Defendant, noting that he is not the registered and/or beneficial owner of the property known as Ol Jorai Phase II Settlement Scheme No. 495 pursuant to the court order issued in Nakuru Succession Cause No. 131 of 2018 by Hon. P. Nyotah.
- ii. That the Plaintiff's suit was therefore incompetent, bad in law, barred in law and an abuse of the Court process.

16. I have considered the record of 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."*

17. The summary of the core dispute is that after Zachariah Matoke (Appellant) had purchased from the 1<sup>st</sup> Respondent's deceased mother a 1.01-hectare portion of land, which was to be excised from the main parcel being Ol Jorai Phase II Settlement Scheme No. 495, the 1<sup>st</sup>

Respondent fraudulently registered the entire mother title in his own name without following proper succession procedures and proceeded to subdivide and transfer portions (including the Appellant's) to the 2<sup>nd</sup> Respondent (**Mwirukama Company Ltd**). The Appellant then filed suit against the Respondents, seeking a declaration of ownership, cancellation of fraudulent titles, and a mandatory injunction compelling the transfer of the land to him.

18. In response to the suit, the 1<sup>st</sup> Respondent filed a Preliminary Objection, arguing that the suit disclosed no cause of action against him for the reason that he was not the registered or beneficial owner of the property since a previous court order in Nakuru Succession Cause No. 131 of 2018 had already cancelled his title and therefore he had no legal capacity to execute transfer documents to the Appellant. He argued he should have been sued as the administrator of the estate, not in his personal capacity.
19. In the impugned Ruling of 30<sup>th</sup> July 2025, the trial court (Hon. Nathan Shiundu) upheld the Preliminary Objection, effectively striking out the case against the 1<sup>st</sup> Respondent. The Appellant is now seeking to overturn that ruling, arguing that the suit was centred on fraud. That even if the title was cancelled, the 1<sup>st</sup> Respondent was the "originator" of the fraudulent process as the documents, which include the mutation forms and letters of consent, still bear the 1<sup>st</sup> Respondent's name, proving his involvement in the subdivision and transfer to the 2<sup>nd</sup> Respondent. The 1<sup>st</sup> Respondent, therefore, was accountable to explain how he subdivided and sold land he did not legally own.
20. In response, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents maintained that the appeal should be dismissed because the Appellant knew the 1<sup>st</sup> Respondent's title was already cancelled by a different court and therefore, legally, one cannot be compelled to transfer land they do not own. They argued that because the "mother title" was cancelled, all subsequent subdivisions, including the 2<sup>nd</sup> Respondent's title, were automatically invalid, rendering

the current suit unnecessary or misplaced against the 1<sup>st</sup> Respondent personally.

21. Having given a brief history of the matter herein, I find the issues arising for determination as follows:

- i. Whether the trial court was correct in striking out the suit against the 1<sup>st</sup> Respondent via a Preliminary Objection.

22. In the precedent-setting case of **Mukisa Biscuit Manufacturing Co Ltd -vs West End Distributors (1969) EA 696**, the relevant principles on Preliminary Objections were set as follows:

*“A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”*

23. It is evident that a Preliminary Objection consists of pure points of law which, correctly understood, must not be blurred with factual details liable to be contested but to be proved through the processes of evidence. According to the Supreme Court in its holding in **Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others [2015] eKLR** at Paragraph 21:

*“... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as*

*a sword, for winning a case otherwise destined to be resolved judicially, and on the merits."*

24. In this case, the 1<sup>st</sup> Respondent's Preliminary Objection was based on the allegation that the *"Plaint as drawn did not disclose any cause of action against the 1<sup>st</sup> Defendant, noting that he is not the registered and/or beneficial owner of the property known as Ol Jorai Phase II Settlement Scheme No. 495 pursuant to the court order issued in Nakuru Succession Cause No. 131 of 2018 by Hon. P. Nyotah."*
25. In **D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another [1980] KECA 3 (KLR)**, Madan JA had observed as follows:

*"I would sum up. It is relevant to consider all averments and prayers when assessing under Order 6 rule 13 whether a pleading discloses a reasonable cause of action, and also the contents of any affidavits that may be filed in support of an application that a pleading is otherwise an abuse of the process of the court..."*

*The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not to deal with any merits of the case for that 'is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "without discovery, without oral evidence tested by cross-examination in the ordinary way". (Sellers, L.J. (supra)). As far as possible, indeed not at all, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks it right.*

*If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.*

*No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”*

26. When juxtaposing the decision in **D.T. Dobie & Company** (supra) with the holding in **Mukisa Biscuit Manufacturing Co Ltd** (Supra), I find the Preliminary Objection raised in the present case shaky because of how it interacted with the facts, in that while allegations of fraud are almost always questions of fact, one cannot decide if someone committed fraud just by looking at a Plaintiff, but the documents presented therein must be interrogated thorough hearing of the witnesses testimony through a trial.
27. The 1<sup>st</sup> Respondent argued that he was not the owner or proprietor of the relevant parcel of land, whereas the Appellant contended that he was either the owner or the initiator of the fraud. Deciding on this issue, which involves disputed facts, thus required a trial on the merits rather than a summary dismissal, as the trial Magistrate had done. Since the Appellant had pleaded fraud and constructive trust, it is well established that a court must examine facts or evidence—such as how a title was obtained

or the history of a land transfer—and therefore, a Preliminary Objection was not the appropriate procedural tool in this circumstance.

28. The Appellant's Plaintiff is anchored on allegations of fraud and constructive trust. He contends that the 1<sup>st</sup> Respondent, despite the death of the original owner, fraudulently moved the land into his name and subsequently subdivided it to the 2<sup>nd</sup> Respondent.
29. It is a well-settled principle that fraud is a fact-heavy allegation. To determine whether the 1<sup>st</sup> Respondent acted fraudulently, the court must examine the mutation forms, the letters of consent, and the circumstances under which the mother title was obtained. By upholding the Preliminary Objection, the trial court prematurely shut the door on this inquiry, essentially deciding that the 1<sup>st</sup> Respondent is not a necessary party without hearing evidence on his role as the alleged originator of the alleged fraud, which was the Appellant's strongest argument.
30. Even if the 1<sup>st</sup> Respondent no longer holds the title, he was a necessary party to the suit because the Appellant was seeking to cancel titles that had emanated from the 1<sup>st</sup> Respondent's alleged actions and therefore striking him out would become difficult for the court to prove the 'chain of the alleged fraud that led to the 2<sup>nd</sup> Respondent (Mwirukama Company Ltd) being registered as proprietor of the suit land. A cause of action is not solely dependent on current ownership; it arises from an act or omission that violates a right.
31. The 1<sup>st</sup> Respondent's argument that he should have been sued as an Administrator is a matter of procedural technicality. Under Article 159(2) (d) of the Constitution, this court cannot allow a suit involving serious allegations of land fraud to be defeated by a mere misdescription of the party's capacity, especially when the allegations touch on his personal conduct.
32. By upholding the Preliminary Objection, I find, the trial court prevented the Appellant from 'unmasking' the alleged fraud and it is for the above

reasons that I find in favour of the Appellant's Appeal, which is upheld with the following orders;

- i. The Ruling and Orders of the trial court delivered on 30<sup>th</sup> July 2025 are hereby set aside in their entirety, wherein the Preliminary Objection dated 4<sup>th</sup> April 2025 is hereby dismissed.
- ii. The suit is reinstated against the 1<sup>st</sup> Respondent and remitted back to the trial court for a full hearing on its merits and/or for further directions.
- iii. Costs of this appeal are awarded to the Appellant.

It is so ordered.

**Dated and delivered via Microsoft Teams at Naivasha this 9<sup>th</sup> day of April 2026.**



**M.C. OUNDO**

**ENVIRONMENT & LAND COURT- JUDGE**