



REPUBLIC OF KENYA



**Nguru v Wainaina & another (Environment and Land Appeal
E005 of 2025) [2026] KEELC 2031 (KLR) (15 April 2026) (Judgment)**

Neutral citation: [2026] KEELC 2031 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT AND LAND APPEAL E005 OF 2025**

SM KIBUNJA, J

APRIL 15, 2026

BETWEEN

MARY NANDIVA NGURU APPELLANT

AND

ANN WANJIKU WAINAINA 1ST RESPONDENT

IBRAHIM WANJOHI KARANJA 2ND RESPONDENT

*(Being an appeal against the judgment of Hon. M.W.Mutuku, CM, in
Kerugoya in MELC Case No. E002 of 2024 delivered on 14th January 2025)*

JUDGMENT

1. This appeal arises from the judgment of Hon. M.W. Mutuku, CM, delivered on 14th January 2025 in Kerugoya MELC Case No. E002 of 2024.

In the impugned judgment, the learned trial magistrate found that the Appellant had failed to prove her case and consequently dismissed the suit for lack of merit. The court further dismissed the 1st Respondent's counterclaim. However, it found that the 2nd Respondent had proved his counterclaim, specifically holding that he had established the root of his title to the suit property. The trial court accordingly allowed the 2nd Respondent's counterclaim and awarded him the costs of both the suit and the counterclaim.

2. Aggrieved by the said decision, the Appellant lodged the present appeal vide a Memorandum of Appeal dated 30th January 2025, raising the following grounds:

1. That the learned trial magistrate erred in law and in fact in failing to consider the evidence tendered by the Appellant regarding ownership and interest over Land Reference No. Kiine/Thigirichi/1491.



2. That the learned trial magistrate erred in law and in fact in failing to properly appreciate and evaluate the facts presented by the Appellant, thereby arriving at an erroneous analysis in the judgment.
3. That the learned trial magistrate erred in law and in fact in disregarding the evidence of the 1st Respondent while over-relying on the evidence of the 2nd Respondent, thus arriving at a wrong finding.
4. That the learned trial magistrate erred in law and in fact in allowing the 2nd Respondent's counterclaim and dismissing the Appellant's suit against the weight of the evidence on record.

The Appellant therefore prays for inter alia that this appeal be allowed; that the judgment delivered on 14th January 2025 be set aside and substituted with an order dismissing the 1st and 2nd Respondents' counterclaims and allowing the Appellant's claim; and that the costs of this appeal be borne by the Respondents.

3. The record shows that the Appellant commenced the suit before the trial court vide a Plaint dated 18th January 2024, seeking, inter alia, a declaration that Land Reference No. Kiine/Thingirichi/1491 belongs to her; an order compelling its transfer into her name; consequential directions to the Land Registrar to dispense with the 2nd Defendant's completion documents for purposes of registration; and costs of the suit.

Her claim was anchored on an alleged land exchange agreement between herself and the 1st Respondent. She pleaded that she was the registered proprietor of Land Reference No. Kiine/Sagana/2274, while the 1st Respondent was the registered proprietor of Land Reference No. Kiine/Thingirichi/1491.

According to her, on 18th March 2020, the parties entered into a sale agreement relating to her parcel, but instead of monetary consideration, they agreed to exchange their respective parcels. She averred that the exchange was effected in 2020, whereupon she took possession of Land Reference No. Kiine/Thingirichi/1491, and the 1st and 2nd Respondents took possession of Land Reference No. Kiine/Sagana/2274, which they continue to occupy.

She further pleaded that on or about 14th March 2023, without her knowledge or consent, the respondents caused Land Reference No. Kiine/Thingirichi/1491 to be transferred and registered in the name of the 2nd Respondent. On the same date, the 2nd Respondent allegedly caused Land Reference No. Kiine/Sagana/2274 to be transferred into his name. She contended that these transfers were undertaken in disregard of the exchange agreement, and were the product of collusion between the Respondents intended to defeat her interest in Land Reference No. Kiine/Thingirichi/1491. She averred that the impugned transfer would render her destitute and homeless.

4. The 2nd Respondent filed a Defence and Counterclaim dated 8th February 2024, asserting that he is the registered proprietor of Land Reference No^s. Kiine/Sagana/2274 and Kiine/Thingirichi/1491. He pleaded that the 1st Respondent, his estranged wife, entered into the impugned sale agreement on his behalf. He averred that Land Reference No. Kiine/Thingirichi/1491 had been transferred to him by the 1st Respondent, who had held it in trust for him prior to their separation. He denied the existence of any land exchange agreement between the Appellant and the 1st Respondent. He maintained that he lawfully purchased Land Reference No. Kiine/Sagana/2274 from the Appellant for Kshs. 3,250,000, which he paid via RTGS from his Family Bank account, and that the Appellant and her daughters executed all requisite transfer documents in compliance with statutory requirements.



As regards Land Reference No. Kiine/Thingirichi/1491, he pleaded that he acquired it for value from a third party, Stephen Muriithi Githae, and was duly registered as proprietor. He further averred that the Appellant's occupation of Land Reference No. Kiine/Thingirichi/1491 was permissive and temporary, extended on humanitarian grounds to enable her secure alternative accommodation, but that she had refused to vacate. On that basis, he denied that the Appellant was entitled to the declaratory and transfer orders sought and prayed for dismissal of the suit. In the Counterclaim, the 2nd respondent sought for eviction of the Appellant from Land Reference No. Kiine/Thingirichi/1491 with police assistance; a permanent injunction restraining her from interfering with his ownership and possession thereof; costs and such further relief as the court deemed fit.

5. In her Reply to the 2nd Defendant's Statement of Defence and Counterclaim dated 14th February 2024, the Appellant denied the 2nd Respondent's assertions in their entirety. She maintained that Land Reference Nos. Kiine/Thingirichi/1491 and Kiine/Sagana/2274 were fraudulently transferred to the 2nd Respondent without her knowledge or consent. The Appellant reiterated that she and the 1st Respondent had agreed in 2020 to exchange Land Reference No. Kiine/Sagana/2274 with Land Reference No. Kiine/Thingirichi/1491, and that the exchange was effected pursuant to that agreement. She maintained that her occupation of Land Reference No. Kiine/Thingirichi/1491 was consequent upon that agreement, and not by permission of the 2nd Respondent. She denied that the 2nd Respondent had any lawful claim over Land Reference No. Kiine/Thingirichi/1491 and asserted that his registration as proprietor was tainted by fraud. She therefore prayed that the 2nd Respondent's Defence and Counterclaim be dismissed with costs.

6. The 1st Respondent filed a Defence and Counterclaim dated 13th February 2024, inter alia confirming that she was married to the 2nd Respondent but they separated in March 2023. She averred that the 2nd Respondent had threatened her and taken possession of the original title documents for Land Reference Nos. Kiine/Thingirichi/1491 and Kiine/Sagana/2274. She denied executing any transfer documents in favour of the 2nd Respondent and maintained that the registration of the two parcels in his name was undertaken without her knowledge or consent.

In her Counterclaim, she sought for among others a declaration that Land Reference No. Kiine/Sagana/2274 lawfully belongs to her; an order directing its transfer into her name; consequential directions to the Land Registrar to dispense with the 2nd Respondent's completion documents for purposes of registration; and costs.

7. In response to the 1st Respondent's Defence and Counterclaim, the 2nd Respondent reiterated that he lawfully acquired Land Reference No. Kiine/Thingirichi/1491 from Samuel Muriithi Githae for Kshs.450,000/=, which he paid in full, and that the 1st Respondent subsequently transferred the parcel to him after complying with all statutory formalities. He further maintained that he was the purchaser for value of Land Reference No. Kiine/Sagana/2274, having paid the full purchase price of Kshs.3,250,000. He averred that although the 1st Respondent appeared in the sale agreement dated 18th March 2020, this was solely because they were then husband and wife, and that he was the person who financed the transaction. He denied that the transfers were irregular and instead alleged that the Appellant and the 1st Respondent had colluded to file the suit with the intention of unlawfully depriving him of his property. He therefore prayed that the 1st Respondent's Defence and Counterclaim be dismissed with costs.

8. It is upon assessment of the pleadings as summarized above, the evidence tendered, and the respective positions taken by the parties that the learned trial magistrate delivered the impugned judgment on 14th January 2025, that is subject matter of this appeal.



9. This Court directed that the appeal be canvassed through written submissions. The learned counsel for the Appellant filed their submissions dated the 9th January 2026 which the Court has considered. Although the 2nd Respondent indicated that submissions would be filed, none had been placed on record at the time of preparation of this judgment.
10. This appeal turns on the following three core issues for the court’s determinations:
- a. Whether the Appellant and the 1st Respondent validly entered into a land exchange agreement for Land Reference Nos. Kiine/Sagana/2274 and Kiine/Thingirichi/1491, and whether the trial court correctly evaluated the existence and effect of the said agreement.
 - b. Whether the 2nd Respondent lawfully acquired ownership of Land Reference Nos. Kiine/Sagana/2274 and Kiine/Thingirichi/1491, and whether the trial court properly found that he had established the root of his title.
 - c. Whether the trial court erred in dismissing the Appellant’s suit and allowing the 2nd Respondent’s counterclaim.
 - d. Who pays the costs?
11. I have carefully considered the grounds on the memorandum of appeal, record of appeal, the submissions filed and come to the following findings:
- 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. On the issue of whether the Appellant and the 1st Respondent validly entered into a land exchange agreement for Land Reference Nos. Kiine/Sagana/2274 and Kiine/Thingirichi/1491, and whether the trial court correctly evaluated the existence and effect of the said agreement, it is important to start by appreciating that the Appellant’s principal case was that she and the 1st Respondent agreed to exchange their respective parcels of land, Kiine/Sagana/2274 for Kiine/Thingirichi/1491, in or about 2020. She admitted there was no written exchange agreement. She relied on the equitable principle of part performance, contending that her taking possession of Kiine/Thingirichi/1491, and making improvements constituted part performance sufficient to enforce an unwritten agreement.

The appellant placed reliance on the cases of *Wanjiru Kamau versus Kamau Kania & Another* (2014) eKLR and *Peter Mbiri Michuki versus Samuel Mugo Michuki* (2014) eKLR.
 - c. The appellant produced copies of green cards for both parcels. The green card for Kiine/Sagana/2274 showed appellant was registered as trustee on 5th September 2016 for Lucy, Agnes and Grace, who later on 20th February 2023 became the registered proprietors. The respondent became the registered owner on 14th March 2023. The green card for Kiine/Thingirichi/1491 showed initial ownership by Samuel Muriithi Githae, later registered to Ann Wanjiku on 21st



February 2017, and then to Ibrahim Wanjohi Karanja on 14th March 2023. There was no RTGS evidence, no correspondence, and no documentary confirmation of an exchange.

In cross-examination, the appellant maintained that they agreed to exchange the land but conceded the absence of a written agreement and denied receiving any monetary consideration for Kiine/Sagana/2274.

- d. The 1st Respondent's testimony supported a sale transaction rather than an exchange. She said she purchased Kiine/Sagana/2274 from the Appellant, paying Kshs. 2,000,000/= initially and a later Kshs. 1.250,000/=, indicating a sale with payment of consideration amounting to Kshs.3.250,000/= She stated the Appellant was to sell that parcel and move to Kiine/Thingirichi/1491, which she took with the Appellant's permission. Crucially, she confirmed there was no agreement for exchange between herself and the Appellant.

The Appellant's daughters named Agnes Njoki Nandiva and Grace Wanja Ngunu, who testified as DW3 and DW4 respectively, gave evidence pointing to purchase rather than exchange. Agnes Njoki Nandiva stated that the 2nd Respondent bought Kiine/Sagana/2274 for Kshs.3,250,000/= and that payment was made into their mother's account. She confirmed attendance at the Land Control Board and transfer to the 2nd Respondent.

Grace Wanja Ngunu similarly confirmed that the Appellant's mother was a trustee of Kiine/Sagana/2274 and that the 2nd Respondent paid for the land. She stated that Kiine/Thingirichi/1491 was given to them to stay on temporarily before acquiring alternative land.

- e. The trial court evaluated the evidence holistically and found inter alia that no written exchange agreement was produced; that the daughters' evidence corroborated the 2nd Respondent's assertion that the appellant had been allowed occupation of Kiine/Thingirichi/1491 as a temporary arrangement while she sought alternative land; that the evidence pointed more consistently to a purchase transaction, for Kiine/Sagana/2274, rather than a mutual exchange; that no exchange agreement was proved on the required standard and that the alleged arrangement was not supported by credible evidence.
- f. Under our law, contracts for the disposition of land, including sales, exchanges, gifts, or transfers, are subject to the statutory requirement of writing. Section 3(3) of the [Law of Contract Act](#), Chapter 23 of the Laws of Kenya provides that:

“No suit shall be brought upon a contract for the disposition of an interest in land unless—

- a. The contract upon which the suit is founded—
- i. is in writing;
 - ii. is signed by all the parties thereto; and
- b. The signature of each party signing has been attested by a witness who is present when the contract was signed by such party: Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the [Auctioneers Act](#) (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.”



- g. In short, the above provision of the law requires firstly, that any contract for the disposition of land must be in writing. This requirement is non-negotiable and is intended to prevent disputes and fraud in land transactions, which are high-value and involve enduring interests.
- Secondly, the provision requires all parties to sign the contract. This ensures that consent is documented, reducing the risk of claims based on alleged oral promises or coercion.
- Thirdly, the signatures must be attested by a witness present at the time of signing, adding a layer of verification and formal validity to the contract.
- Fourthly, the statute explicitly preserves contracts made in public auctions by licensed auctioneers and situations involving resulting, implied, or constructive trusts, which are equitable remedies recognized by law.
- The rationale is clear, that land is an immovable, high-value asset, and the set formalities protect parties, third-party purchasers, and the integrity of land registration. Without writing and attestation, the law treats the agreement as unenforceable.
- h. In the present appeal, the record reveals that the Appellant conceded there was no written exchange agreement between herself and the 1st Respondent. In light of this concession, Section 3(3) of the *Law of Contract Act*, is directly applicable. The statutory provision is clear and unambiguous that no suit shall lie on a contract for the disposition of an interest in land unless it is in writing, signed by all parties, and attested by a witness present at the time of signing. Given the absence of a written, signed, and attested agreement, it follows inexorably that the alleged oral land exchange is unenforceable as a matter of law. The trial court, therefore, correctly identified the statutory bar and appropriately dismissed the Appellant's claim to that effect.
- i. The Appellant sought to rely on the doctrine of part performance, invoking equitable principles to give effect to the alleged oral agreement. While the doctrine historically provided a narrow exception to the writing requirement, its applicability post-2003 is extremely limited. Even accepting, arguendo, that the court could entertain such a doctrine, the facts of this case do not satisfy the stringent threshold required for part performance to operate.
- The Appellant's principal acts of taking possession of LR Kiine/Thingirichi/1491 and making improvements thereon, cannot be said to constitute part performance.
- j. The evidence, including that of the Appellant's own daughters, establishes that the occupancy was temporary, permissive, humanitarian, and granted to allow the Appellant have a place to reside while alternative arrangements for her daughters were being made. Such an occupation does not amount to acts unequivocally referable to an exchange agreement, and therefore cannot invoke the equitable exception of part performance. It follows that the trial court was correct in concluding that no enforceable exchange agreement existed and that the Appellant's claim in respect of LR Kiine/Thingirichi/1491 could not succeed. The statutory mandate under Section 3(3) of the above Act renders the Appellant's claim legally unsustainable.
- k. On whether the 2nd Respondent lawfully acquired ownership of Land Reference Nos. Kiine/Sagana/2274 and Kiine/Thingirichi/1491, and whether the trial court properly found that he



had established the root of his title, it is imperative that the court restates the applicable legal provisions. Section 24 (a) of the Registration of *Land Act* No. 3 of 2012 provides that:

“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto...”

Section 25 of the said Act reinforces that position as follows:

“(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject”

Section 26 of the Act provides that :

“

“(1) The certificate of title issued by the Registrar upon registration, or 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 that 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; or
- b. where the certificate of title has been acquired illegally, unprocedurally, or through a corrupt scheme.”

Three principles emerge from the above statutory provisions that registration confers absolute ownership; that title is indefeasible, subject only to the statutory exceptions; that the burden of proving fraud or illegality rests upon the party challenging the title.

- l. This Court must therefore interrogate whether the Appellant discharged that burden. The inquiry cannot be abstract. The statute does not permit title to be impeached, on the basis only of suspicion, grievance, or perceived unfairness. It demands proof that the impugned registration falls squarely within the exceptions set out under Section 26(1) of the *Land Registration Act*, namely, fraud or misrepresentation to which the registered proprietor is proved to be a party, or acquisition that is illegal, unprocedural, or tainted by a corrupt scheme.
- m. Accordingly, three analytical questions arise. Firstly, was fraud properly pleaded? Fraud is not a matter of inference. It must be distinctly alleged, and the particulars must be set out with precision in the pleadings. A party that seeks to invalidate a registered title must identify the specific acts said to constitute fraud, whether forgery, impersonation, collusion, deliberate misrepresentation, or manipulation of the registry process. A general averment that a transfer was “fraudulent” does not meet the legal threshold.



Secondly, was fraud strictly proved? Even where pleaded, fraud must be established by cogent and credible evidence. The standard is higher than that of a mere balance of probabilities, though not beyond reasonable doubt. It requires proof of actual dishonesty or knowing participation in wrongdoing on the part of the registered proprietor. It is not sufficient to show that a party later regretted the transaction or did not appreciate its consequences.

Thirdly, was there evidence that the registration was illegal or unprocedural within the meaning of Section 26(1)(b) of the Registration of *Land Act*? This requires demonstration of a specific breach of statutory process, for example, absence of Land Control Board consent where required, forged instruments, lack of execution by the registered proprietor, or registration effected contrary to mandatory procedural requirements. The statute does not contemplate the invalidation of title merely because of a prior dispute between other parties. It is against this framework that the evidence must be measured.

- n. The trial court proceedings and green card in the list of documents that are in the record of appeal shows that Lucy Wanjiru Githinji, Agness Njoki Nandiva and Grace Wanja Ngunu, who are the appellant's daughters, were the registered proprietors of Kiine/Sagana/2274. Two of the said daughters testified and confirmed under oath that they executed the transfer in favour of the 2nd Respondent. They attended the Land Control Board with him. They acknowledged receipt of consideration. They did not dispute their signatures on the transfer instruments, and no handwriting expert was called to state otherwise. No registry officer was summoned to demonstrate irregularity, and no documentary inconsistency was pointed out. Crucially, no specific particulars of fraud were pleaded in the plaint. In these circumstances, the statutory burden of proof, resting upon the Appellant was not discharged. There is no pleaded fraud to examine and there is no proved fraud to evaluate. There is no demonstrated illegality in the transfer process. The evidence instead points to a voluntary transfer by the registered proprietors for value, followed by registration in accordance with the law.
- o. Indefeasibility under Section 26(1) of the Registration of *Land Act* is not ornamental, but a substantive protection. Once registration has been effected, the law presumes validity. That presumption can only be displaced by strict proof falling within the statutory exceptions. To unsettle title, absent such proof, would not be an exercise of judicial discretion, but a departure from the statute. The trial court expressly found that fraud had neither been pleaded nor proved. That finding is borne out by the record. An appellate court does not interfere with such a finding of the trial court unless it is plainly unsupported by evidence. Here, it is entirely supported by the pleadings and testimony.

This Court therefore finds that the Appellant did not bring herself within the narrow statutory gateways through which a registered title may be impeached. The 2nd Respondent's title remains protected by law.

- p. On whether the trial court erred in dismissing the Appellant's suit and allowing the 2nd Respondent's counterclaim, the court reminds itself of the following:
- i. That it has already resolved that the alleged oral exchange agreement not having been in writing, signed and attested, is unenforceable under Section 3(3) of the *Law of Contract Act*; and
 - ii. That the 2nd Respondent's title has not been impeached under Section 26(1) of the *Land Registration Act*.



It follows therefore that the fate of the Appellant's suit becomes legally inevitable, as the declaratory and transfer orders she sought were predicated entirely upon the alleged exchange agreement and her asserted entitlement to the suit properties. Once that alleged exchange agreement was found to be unenforceable, and the 2nd Respondent's registered title was upheld as indefeasible, there remained no juridical foundation upon which the reliefs sought by the appellant could stand.

- q. The Appellant did not plead any overriding interest, or a constructive or resulting trust, or proprietary estoppel, or seek relief grounded in any equitable doctrine independent of the impugned exchange agreement. Parties are bound by their pleadings, and a court cannot grant relief on the basis of a case not pleaded and not canvassed at trial. To do so would amount to determining a dispute not presented by the parties.

The trial court therefore, had before it a straightforward legal position that the Appellant had no enforceable contract, or registered interest over the suit property. She had not established fraud or demonstrated any legal or equitable basis to defeat the 2nd Respondent's title to the property in dispute. In those circumstances, dismissal of the suit was not merely justified, but it was compelled by law.

- r. Conversely, the 2nd Respondent, having proved purchase for value and registration in his favour, was entitled to protection of his proprietary rights. The counterclaim seeking recognition of his ownership and consequential relief was properly allowed.

This Court finds no misdirection in law, no misapprehension of evidence, and no improper exercise of discretion by the trial court in reaching that conclusion. The appeal is therefore without merit.

- s. Under Section 27 of *Civil Procedure Act* chapter 21 of Laws of Kenya, costs follow the event unless where for good cause the court orders differently. In this appeal, I find no compelling reason to order otherwise, and the appellant having lost in the appeal will pay the respondent's costs.

12. Flowing from the foregoing determinations, the court finds and orders as follows:

- a. That the appeal is without merit and is dismissed in its entirety.
- b. That the judgment of Hon. M.W. Mutuku, CM, delivered on 14th January 2025 in Kerugoya MELC Case No. E002 of 2024, and the decree arising therefrom is hereby confirmed.
- c. The appellant to meet the respondent's costs in this appeal.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 15TH DAY OF APRIL 2026.

S. M. KIBUNJA

ELC JUDGE

In the presence of:

Appellant -

Respondent -

Kinyua - Court Assistant

