



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELCL APPEAL CASE NO. E006 OF 2024

LYDIA KANARIO BENSON (*Suing on behalf of the estate of BENSON MBUURI alias BENSON M'BUURI M'NCHEBERE alias KATHAKAI BENSON M'BURI - DECEASED*)
APPELLANT

=VERSUS=

M'MWORIA M'MUKANGU.....1ST

RESPONDENT

THE MINISTRY OF LANDS AND PHYSICAL PLANNING.....2ND
RESPONDENT

LAND ADJUDICATION AND SETTLEMENT OFFICER, RUIRI/RWARERA, IMENTI NORTH & SOUTH, CENTRAL IMENTI & BUURI.....3RD
RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH
RESPONDENT

(An Appeal against the Judgment of the Chief Magistrate Court at Meru [Hon D W Nyambu - CM] dated 30/1/2024 in Meru CMC E & L Case No. 22 of 2019)

JUDGMENT

Introduction

1. This appeal challenges the Judgment of the Chief Magistrate Court at Meru [Hon D W Nyambu], rendered on 30/1/2024 in **Meru CMC E & L Case No 22 of 2019**. The key issue that fell for determination in the said suit was whether parcel number **Meru Central/Ruiri Rwarera/2107**, comprising of 13.80 acres, was a fraudulent excision out of the initial parcel number **Ruiri Rwarera/130** which comprised of 14 acres and which belonged to the late **Benson M’Buuri**. Invariably, this is one of the key issues that fall for determination in this first appeal. Before I analyse and dispose the issues, I will briefly outline the background to the appeal; the grounds of appeal; and the parties’ respective submissions in the appeal.

Background

2. The appellant [**Lydia Kanario Benson**] is a widow of the late Benson Mbuuri *alias* Benson M’Ibuuri M’Nchebere *alias* Kathakai Benson M’Mburi [*hereinafter referred to as “the deceased”*]. She brought this appeal on behalf of the estate of her late husband. The deceased died in 2014. During his lifetime, the deceased owned and was recorded as the

occupier and the demarcated owner of land **parcel number 130** within **Ruiru Rwarera Adjudication Section**, measuring 14 acres. Subsequent to the deceased's demise, the estate of the deceased caused the land to be vested in the name of Lydia Kanario. The 1st respondent subsequently sued **Lydia Kanario Benson** [*hereinafter referred to as "Lydia"*] and her six adult children in **Meru ELC Case No 285 of 2017**, seeking: (i) a declaration that the transfer of parcel number Ruiru Rwarera/130 to Lydia was fraudulent, null and void; (ii) a declaration that parcel number Ruiru Rwarera/130 belonged to him; (iii) an order of permanent injunction restraining Lydia and her children against entering into or interfering with parcel number Ruiru Rwarera/130; and (iv) an order awarding him costs of the suit.

3. It was contended by the 1st respondent that the said suit [Meru ELC Case No. 285 of 2017] was transferred to the Chief Magistrate Court at Meru and was registered as **Meru CMC E & L Case No 69 of 2018**. It was further contended by the 1st respondent that the said case was withdrawn by the 1st respondent in February 2019.
4. It does emerge from the record that the estate of the deceased [the late Benson Mbuuri] initiated succession proceedings relating to his estate in 2016 vide Meru CMC Succession Cause No 293 of 2016. A grant was issued on 10/4/2017. A certificate of confirmation of grant was issued on 22/11/2017, distributing the 14 acres comprised in parcel number Ruiru Rwarera/130 to the deceased's widow and children. The estate subsequently learnt in December

2017 that about 13 acres of the deceased's land had been hived to create parcel number **Meru Central/Ruiru Rwarera/2107** through superimposition and what remained in the land records as parcel number Ruiru Rwarera/130 was only 1.3 acres.

5. Subsequent to that, the estate through Lydia filed Meru CMC E & L Case No 22 of 2019 - the suit that culminated in the present appeal. The estate sought, *inter alia*: (i) an order cancelling the land register and the title relating to **Meru Central/Ruiru Rwarera /2107** and rectifying the acreage relating to parcel number Ruiru Rwarera/130 to reflect 14 acres; and (ii) an order of permanent injunction restraining the 1st respondent and his agents against interfering with the 14 acres.
6. The case of the estate [the appellant] was that Ruiru Rwarera/130 measured 14 acres. The Land belonged to the deceased and was demarcated in 1971. The deceased's family had been in occupation of 14 acres since 1971. In 2017, the 1st respondent sued Lydia Kanario and her children in **Meru Environment and Land Court Case No 285 of 2017** claiming ownership of Ruiru Rwarera/130 and seeking a cancellation of the registration of the parcel in the name of **Lydia Kanario**. The said suit was transferred to the Chief Magistrate Court and was registered as **Meru CMC E & L Case No 69 of 2018**. The suit was subsequently withdrawn in 2019.
7. The estate [the appellant] further contended that in December 2017, the 1st respondent served on them an eviction notice. It was at that point that the estate's

representative visited the Land Registry and discovered that a new parcel, Meru Central/Ruiru Rwarera/2107, measuring 13.8 acres had been created out of parcel number Ruiru Rwarera/130 and had been introduced in the lands records under the name of the 1st respondent. They further discovered from the newly introduced map that the new parcel, Meru Central/Ruiru Rwarera/2107, had been superimposed in the place of Ruiru Rwarera/130 and what remained in the new lands records as Ruiru Rwarera/130 was only 1.3 acres. The estate termed the creation of Meru Central/Ruiru Rwarera/2107 out of the original Ruiru Rwarera/130 as irregular and fraudulent. It denied the allegation that the deceased sold any of the 14 acres to the 1st respondent.

8. The 1st respondent filed a statement of defence dated 28/3/2019 in which he admitted that land parcel number Ruiru Rwarera/130 was demarcated and registered in the name of the deceased who took possession of the land in 1971 but denied the allegation that the deceased's estate was still in possession of the land. The 1st respondent averred that he bought a total of 14 acres out of Ruiru Rwarera/130 from the deceased through different sale transactions and the 14 acres were subsequently registered in his name as **Meru Central/Ruiru Rwarera 2107** and he took possession of the 14 acres in the 1970s (sic).
9. The 1st respondent further admitted that in 2017, he filed **Meru ELC Case No 285 of 2017** against Lydia Kanario and her children, adding that the said suit became **Meru CMC E & L Case No 69 of 2018** and was withdrawn in

2019. It was the case of the 1st respondent that parcel number Meru Central/Ruiri Rwarera/2107 was acquired legally for value. He urged the trial court to reject and dismiss the estate's claim.

- 10.** The 2nd - 4th respondents filed a defence dated 11/11/2019 in which they faulted the deceased for failing to challenge the adjudication register to address the errors when the adjudication register was published.
- 11.** During trial, the estate led evidence by **Lydia Kanario Benson [PW2]** and **Washington Kamari [PW3]**. The 1st respondent testified as **DW1** and led evidence by **Japhet Muriungi Kamakia [DW 2]** and **Moses Munene Kariti [DW3]**. The 2nd - 4th respondents did not tender evidence during trial. Their subsequent attempt to re-open the trial and tender evidence was rejected by the trial court.
- 12.** Upon concluding trial, the trial court rendered the impugned judgement in which it found that the appellant [the estate] had failed to prove that the 1st respondent obtained registration and title number **Meru Central/Ruiri Rwarera/2107** fraudulently. The trial court further found that the 1st respondent had demonstrated that he was a purchaser for value. The trial court concluded thus:

"I am not satisfied that the plaintiff proved on the above stated degree that the transfer to the 1st defendant was obtained on the ground of fraud or misrepresentation to which the person is proved to be a party; or that the certificate

of title has been acquired illegally, procedurally (sic) or through a corrupt scheme”.

- 13.** Ultimately, the trial court dismissed the appellant’s suit for lack of merit. The appellant was decreed to bear costs of the 1st respondent.

Appeal

- 14.** Aggrieved by the judgment of the trial court, the appellant [the estate] brought this appeal vide a memorandum of appeal dated 14/2/2024. The appellant advanced the following 10 verbatim grounds of appeal:

1) That the Learned Trial Magistrate erred in law and in fact in failing to find that the respondents fraudulently, secretly, irregularly and unlawfully colluded and caused excision and registration of part of the appellant’s land parcel Ruiriri/Rwarera/130 to be registered in the name of the 1st respondent as land parcel Ruiriri/Rwarera/2107.

2) That the Learned Trial Magistrate erred in law and in fact in misapprehending the law especially on the sanctity of title where fraud and illegality has been demonstrated hence arrived at the impugned judgement.

3) That the Learned Trial Magistrate erred in law and in fact in failing to find that the 1st respondent failed to demonstrate how he obtained transfer and registration over the

said land Ruiru/Rwarera/2107 from the appellant's deceased husband who was a deceased person in the year 2017 yet the 1st respondent had a suit against the appellant in Meru CMC ELC No 69 of 2018 (formerly Meru HC ELC No 281 of 2017 claiming the suit.

- 4) That the Learned Trial Magistrate erred in law and fact by misinterpreting and misdirecting her mind on the content of the land sale agreements adduced in light of the Law of Contract and Limitation of Actions Act hence arrived at an erroneous judgement.**
- 5) That the Learned Trial Magistrate erred in law and fact by disregarding the documentary and oral evidence adduced by the appellant and her witnesses hence arriving at a biased and discriminatory impugned judgement.**
- 6) That the Learned Trial Magistrate misdirected her mind on the principles of the law applicable in cases of fraud and illegality in obtaining a title deed as this one is hence the impugned decision.**
- 7) That the Learned Trial Magistrate erred in law and in fact in upholding the 1st respondent's evidence despite the glaring contradictions and the fact that the 2nd, 3rd and 4th respondents admitted the claim as prayed.**
- 8) That the Learned Trial Magistrate considered and was weighed down by extraneous issues in arriving at the decision instead of applying**

substantial justice by considering the totality of evidence adduced hence the impugned erroneous decision.

9) That the Learned Trial Magistrate erred in failing to find that the respondents had not fronted any evidence to controvert the appellant's evidence

10) That the impugned judgement is against and contrary to the law, facts and weight of evidence adduced before the trial court hence erroneous decision.

15. The appellant urged the court to set aside the impugned judgement and grant orders allowing the estate's claim as per the plaint dated 25/2/2019.

Appellants' Submissions

16. The appeal was canvassed through written submissions filed by ***M/s Thangicia M David & Co Advocates***, dated 4/12/2024. Counsel for the appellant summarized the parties' respective evidence in the trial court. Making reference to various exhibits, counsel submitted that parcel number Ruri Rwarera/130, measuring 14 acres, was demarcated within Ruri Rwarera Adjudication Section as belonging to the deceased and was subsequently registered in the name of Lydia Kanario as the administrator of the estate of the deceased.

17. Counsel further argued that on **25/9/2017**, the 1st respondent instituted **Meru ELC Case No 285 of 2017** which later became **Meru CMC E & L Case No 69 of 2018**, challenging the registration of Lydia Kanario as a

trustee proprietor of the land. Counsel added that on 8/6/2017, the 1st respondent authored a request letter dated 8/6/2017 inviting the Land Adjudication Officer to transfer parcel number Ruiru Rwarera/130 to him. Counsel argued that subsequent to that, the 1st respondent fraudulently procured excision of 13 acres out of parcel number Ruiru Rwarera/130 to create parcel number Meru Central/Ruiru Rwarera/2107 measuring 5.59 hectares (13.8 acres). Counsel further submitted that the 1st respondent thereafter purported to issue an eviction notice to the family of the deceased and on realizing that the family was not ready to give vacant possession of the suit land, the 1st respondent tried to forcefully get into the land on 15/2/2019. Counsel contended that the 1st respondent withdrew his suit in 2019 after he fraudulently procured a registration and a title relating to parcel number Meru Central/Ruiru Rwarera/2107 in his name.

18. Counsel argued that the appellant proved fraud, illegality and corrupt scheme in the procurement of the 1st respondent's registration and title. Counsel pointed out the inconsistencies in terms of the acreage of the land which the 1st respondent alleged to have purchased from the deceased, adding that the inconsistencies indicated fraud. Counsel further submitted that there was no evidence of payment of purchase price to the deceased nor transfer of the suit land to the 1st respondent.

19. Making reference to the letter dated 8/6/2017 requesting the Land Adjudication and Settlement Officer to transfer parcel number Ruiru Rwarera/130 measuring 14 acres to the

1st respondent, counsel submitted that the deceased having died in 2014, such a request could only be made by the duly appointed personal representative of the deceased, which was not the case. Counsel contended that the eviction notice would not have been issued if the deceased's family wasn't in occupation and possession of the suit land, adding that the 1st respondent lied to the court that he had been in possession of the suit land.

- 20.** Making reference to the 1st respondent's averments in Meru ELC Case No 285 of 2017 [*which became Meru CMC E & L Case No 69 of 2018*], counsel submitted that the suit land was not registered in the name of the 1st respondent as at 2017, adding that it was due to that fact that the 1st respondent sought court orders decreeing registration of the suit land in his name. Counsel argued that all the above evidence demonstrated that the title held by the 1st respondent was procured fraudulently and illegally.
- 21.** Counsel for the appellant further pointed out that the agreements which the 1st respondent relied on bore dates of 1990s, adding that the said agreements were unenforceable, *moreso* in a scenario where the 1st respondent never took possession/occupation/user of the suit land.
- 22.** Counsel faulted the trial court's observation that the acreage of parcel number Ruiru Rwarera/130 was not disclosed, adding that the 1st respondent admitted through his pleadings and through his evidence that parcel number Ruiru Rwarera/130 originally measured 14 acres and that the land belonged to the deceased. Counsel further faulted the

trial court for holding that the 1st respondent produced three sale agreements, pointing out that this was not true because the 1st respondent only tendered two purported sale agreements. Counsel submitted that the 1st respondent was unable to explain how parcel number Meru Central/Ruiru Rwarera/2107 was excised/created out of parcel number Ruiru Rwarera/130 and who transferred the excised 13 acres to him. Counsel urged the court to allow the appeal.

1st Respondent's Submissions

- 23.** The 1st respondent filed written submissions dated 11/3/2025 through ***M/s Kiautha Arithi & Co. Advocates***. Counsel outlined a summary of the evidence tendered in the trial court and the tenor and import of the impugned judgment. Counsel submitted that the two issues that fell for determination in the appeal were: (i) Whether the appellant proved the allegation of fraud against the 1st respondent; and (ii) Who should bear costs of the appeal.
- 24.** Making reference to ground number 1 in the memorandum of appeal and to paragraphs 10 and 11 of the plaint, counsel for the 1st respondent submitted that the appellant was bound by her pleadings. Counsel added that the appellant was not truthful when she pleaded that parcel number Meru Central/Ruiru Rwarera/ 2107, measuring 13.5 acres, had been created as a superimposition in the place of the initial parcel number Ruiru Rwarera/130 which measured 14 acres. Citing various sections of the Evidence Act and various decisions on the standard of proof in claims of fraud, counsel submitted that the appellant failed to

prove fraud in the registration of the 1st respondent as proprietor of land parcel number Meru Central/Ruiru Rwarera/2107.

- 25.** Counsel faulted the appellant for failing to lead evidence by the Director of Land Adjudication and Settlement to shed light on whether the 1st respondent tampered with the adjudication records. Counsel further faulted the appellant for failing to produce the original adjudication records to verify the initial size of the deceased's land. Counsel contended that the appellant made vague, wild and general allegations of fraud but failed to lead evidence by the Land Adjudication and Settlement Officers to support the allegations.
- 26.** Counsel further faulted the appellant for failing to subject the sale agreements tendered by the 1st respondent to forensic examination, adding that it was not the duty of the 1st respondent to prove that there was no fraud. Counsel added that the burden of proving fraud was that of the appellant.
- 27.** On costs, counsel cited the principle in Section 27 of the Civil Procedure Act and urged the court to dismiss the appeal and award the 1st respondent costs of the appeal.

2nd, 3rd and 4th Respondents' Submissions

- 28.** The 2nd, 3rd and 4th respondents opposed the appeal through written submissions dated 28/3/2025, filed by **Ms E. Wairimu**, Senior State Counsel. The Learned State Counsel identified the following as the two issues that fell for determination in the appeal: (i) Whether the 2nd, 3rd

and 4th respondents admitted the appellant's claim; and (ii) Whether the respondents fraudulently, secretly, irregularly and unlawfully colluded and caused the excision and registration of part of the appellant's land, parcel number Ruiru Rwarera/130 to be registered in the name of the 1st respondent as parcel number Ruiru Rwarera/2107.

- 29.** Counsel pointed out that the 2nd, 3rd and 4th respondents filed a statement of defence dated 11/11/2019 in which they denied the appellant's claim, adding that the defence attracted a reply to defence dated 23/1/2020 by the appellant. Counsel submitted that the appellant's contention that the trio admitted the appellant's claim was erroneous and could not hold water.
- 30.** On the second identified issue, counsel submitted that it was not in dispute that the land in dispute arose from adjudication within **Ruiru Rwarera Adjudication Section**. Counsel added that land adjudication was an elaborate process that involved land gathering, demarcation, and resolution of ownership disputes at various stages, including committee stage; arbitration board stage; adjudication register objection stage; and the stage of appeal to the Minister/Cabinet Secretary.
- 31.** Counsel submitted that the appellant's claim amounted to an admission that they never inspected the adjudication register when it was published to confirm the acreage of land parcel number Ruiru Rwarera/130. Counsel contended that the appellant chose to forego the redress avenues entrenched in the statute. Counsel submitted that in the circumstances, the allegations of fraud and collusion were

not proved to the required standard. The Learnt State Counsel urged the court to reject and dismiss the appeal.

Analysis and Determination

32. I have read and considered the entire record of the trial court; the record filed in this appeal; the grounds of appeal; and the parties' respective submissions. I have also considered the relevant legal frameworks and the prevailing jurisprudence relevant to the key issues in this appeal. The following are the two key issues that fall for determination in the appeal: (i) Whether the 2nd, 3rd and 4th respondents admitted the appellant's claim in the trial court, and (ii) Whether the appellant proved that parcel number Meru Central/Ruiru Rwarera/2107, comprising of 5.59 hectares (13.80 acres) and registered in the name of the 1st respondent, was an illegal and fraudulent excision/creation out of the initial parcel number Ruiru Rwarera/130 that measured 14 acres and that was registered in the name of the late Benson Mbuuri alias Benson M'Mbuuri M'Ncebere alias Kathaka Benson M'Mbuuri [hereinafter referred to as "the deceased"]. Before I analyse and dispose the two issues, I will outline the principle that guides this court when exercising appellate jurisdiction.

33. The task of a first appellate court was summarized by the Court of Appeal in the case of ***Susan Munyi v Keshar Shiani (2013) eKLR*** as follows:

“As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate,

assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”

- 34.** The principle was similarly outlined in ***Abok James Odera t/a A J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates [2013] eKLR*** as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reason either way.”

- 35.** Did the 2nd, 3rd and 4th respondents admit the appellant’s claim? The three respondents were sued in the trial court as the 2nd, 3rd and 4th defendants. On 22/10/2019, ***Mbaikyatta Darlive***, a senior litigation counsel in the Office of the Attorney General, filed a notice of appointment dated 22/10/2019. On the same day, the notice of appointment was served on the appellant’s advocate, ***M/s Thangicia M. David & Co. Advocates***. On 18/11/2019, the Attorney General, through ***Mbaikyatta Darlive***, filed a statement of defence dated 11/11/2019 on behalf of the trio. Through the said defence, the trio contested the appellant’s suit against them and urged the trial court to dismiss the suit with costs. Indeed, the appellant filed a reply to the said defence. The reply was dated 23/1/2020.
- 36.** The trio did not attend trial hearings. Their subsequent formal plea to the trial court to re-open the trial hearing to

enable them tender evidence was rejected by the trial court vide a ruling dated 7/6/2022. The foregoing is the factual position as borne by the record that is before this court.

- 37.** In ground number 7 of the memorandum of appeal, the appellant faulted the trial court for upholding the 1st respondent's evidence despite the fact that the 2nd, 3rd and 4th respondents had admitted the appellant's claim as prayed in the plaint. The appellant reiterated the alleged admission in paragraph 7 of page 5 of their written submissions in this appeal. Clearly, the view taken by the appellant is factually incorrect because there was a defence on record by the 2nd, 3rd and 4th respondents. Failure to tender evidence during trial in a claim for land does not constitute an admission. Without belaboring, the finding of the court, based on the record before it, is that the 2nd, 3rd and 4th respondents did not admit the appellant's claim; they contested the appellant's claim by way of a defence dated 11/11/2019. However, they did not tender evidence during trial.
- 38.** Did the appellant prove that parcel number Meru Central/Ruiri Rwarera/2107 measuring 5.59 (13.8 acres) was an illegal and fraudulent excision/creation out of the initial parcel number Ruiri Rwarera/130 that measured 14 acres and belonged to the late Benson Mbuuri? The law on pleadings and proof of fraud is well settled. In ***Kinyanjui Kamau v George Kamau (2015)***, the Court of Appeal outlined the law as follows:-

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo

vs Ndolo (2008) 1 KLR (G & f) 742 wherein the court stated that: "...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."

- 39.** The case of the appellant was that the 1st respondent illegally and fraudulently procured registration of parcel number Meru Central/Ruiri Rwarera/2107 as an excision out of parcel number Ruiri Rwarera/130 which initially measured 14 acres. What were the pleadings that formed the basis of the trial hearing that culminated in the impugned judgment? At paragraph 6 of the appellant's plaint, it was pleaded as follows:

"6. That the plaintiff's husband Benson Mbuuri M'Ncebere now deceased was the registered owner of parcel number 130 Ruiri Rwarera Adjudication Section measuring approximately 14 acres".

40. In response to the above averment, the 1st respondent, at paragraph 3 of his defence, pleaded an admission to the above averment in the following verbatim terms.

“3. Paragraph 6 of the plaint is admitted”.

41. At paragraph 7 of the plaint, the appellant pleaded as follows:

“7. That the said land was first registered and initial entries made into the plaintiff’s husband’s name, survey work done, beacons placed and mapping done whereof the plaintiff and her deceased husband took occupation immediately around 1971 started cultivating the land and to date the plaintiff is in occupation”.

42. In response to the above averment, the 1st respondent, at paragraph 4 of his defence, pleaded as follows:

“Paragraph 7 of the plaint is admitted only as far as that the said land was first registered and initial entries made into the plaintiff’s husband’s name, survey work done, beacons placed and mapping done and afterwards the plaintiff’s husband took possession around the year 1971 but the defendant unequivocally denies that the plaintiff is in possession to date and hereby puts the plaintiff to strict proof thereof”.

43. At paragraph 8 of the plaint, the appellant pleaded as follows:

“8. That in 2017, the plaintiff and her children were sued vide Meru ELC No 285/2017 by the 1st defendant claiming ownership of parcel number 130 Ruiru/Rwarera”.

- 44.** In response to the above averment, the 1st respondent [the 1st defendant in the trial court] admitted the above averment at paragraph 6 of the defence as follows:

“6. Paragraph 8 of the plaint is admitted save to add that Civil Suit No 285 of 2017 later became ELC No 69 of 2018 which the 1st defendant withdrew”.

- 45.** At paragraph 9 of the plaint, the appellant pleaded as follows:

“9. That on or around the month of December, the plaintiff and her children were served with notice of eviction from land parcel No. Ruiru/Rwarera/2107”.

- 46.** In response to the above averment, the 1st respondent made an admission in the following verbatim terms:

“Paragraph 9 of the plaint is admitted”.

- 47.** The court has taken time to reproduce the above excerpts from the parties’ pleadings because admitted facts do not constitute issues and do not require proof. The 1st respondent having expressly admitted the above facts, the appellant was relieved of the burden of proving them.

48. For clarity and for avoidance of doubt, the 1st respondent expressly admitted that parcel number Ruiru Rwarera/130 belonged to the deceased and measured 14 acres. He further expressly admitted that the 14 acres constituting parcel number Ruiru Rwarera/130 were demarcated and registered in the name of the deceased. He also admitted that in September 2017, he challenged the registration of the 1st respondent as proprietor of parcel number Ruiru Rwarera/130 measuring 14 acres. The 1st respondent having admitted the above critical facts, it was the duty of the 1st respondent to demonstrate how land that was part of parcel number 130 that measured 14 acres in September 2017 was excised from parcel number Ruiru Rwarera/130 to create parcel number Meru Central/Ruiru Rwarera/2107 in 2017 and to reduce parcel number Ruiru Rwarera/130 from 14 acres to 1.3 acres. It was the duty of the 1st respondent to demonstrate when and how the adjudication records changed culminating into the creation of a land register in 2017. It was also the burden of the 1st respondent to tell the trial court who in 2017 transferred to him part of the 14 acres that belonged to the deceased and were, at all material times, held by the deceased's estate. Did the 1st respondent tender the explanation?

49. The court has looked at the evidence tendered by the 1st respondent. No attempt was made to explain how the 5.59 hectares [13.8 acres] comprised in the title that the 1st respondent was waving were excised out of parcel number Ruiru Rwarera/130. Having admitted that parcel number Ruiru Rwarera/130 existed as a land parcel demarcated and registered in the name of the deceased and subsequently in

the name of the administrator of the deceased's estate, the 1st respondent was duty-bound to explain how the 13.8 acres were excised out of parcel number Ruiru Rwarera/130 to create land parcel number Meru Central/Ruiru Rwarera/2107 in 2017. Instead of tendering a proper explanation, the 1st respondent repeatedly contended that parcel number Ruiru Rwarera/130 [now measuring 1.3 acres] and parcel number Meru Central/Ruiru Rwarera/2107 [measuring 13.8 acres] existed as distinct parcels.

- 50.** The 1st respondent contended in his pleadings and witness statement that he purchased 6 acres from the deceased in 1988 at a consideration of Kshs 90,000 and a further 2 acres around 1995/1996 at a consideration of Kshs 60,000. He exhibited two purported agreements dated 13/12/1988 and 9/11/199 (sic) but he did not tender evidence of full payment of purchase price. The two agreements were disputed by the estate of the deceased. The 1st respondent's verbatim oral evidence during cross-examination contradicted his pleadings. He testified as follows:-

"I purchased my land from M'Tuburi. I purchased it in 1936. I bought 6 acres of land for Kshs. 500,000 in 1936. I paid him. The 5 acres of land was Kshs 500,000 per acre. I paid the entire purchase price. I purchased 13 acres in total. 6 acres plus 5 acres make 13 acres. I purchased the other 3 acres from M'Ibuuri. We recorded the agreement in an advocate's office. If you check in the agreement you will know who

the witnesses were. There were about five witnesses. They signed the agreement. A transfer was effected and signed by the vendor. All the 13 acres were transferred to me. The transfer was done in 1998. A son to M'Ibuuri was present when I executed the agreement. I don't recall his name. His wife was not there".

- 51.** Clearly, there were glaring inconsistencies in the particulars of the alleged purchases. Secondly, the alleged "transfer" was never tendered. No evidence was tendered in relation to any adjudication proceedings [eg objection proceedings] which would be necessary if ownership of a demarcated and recorded parcel is to be altered.
- 52.** Besides the foregoing, other than the two contested sale agreements relating to the disputed sale of 6 acres and 2 acres respectively, no evidence of sale was tendered in relation to the other 5.8 acres that are comprised in title number Meru Central/Ruiri Rwarera/2107.
- 53. PW3** [Washington Kamari] was a critical witness. He was a past member of the Ruiri Rwarera Adjudication Section, and a resident of Nchoroiboro - Ruiri. He testified that where land had been demarcated and recorded in the name of an adjudicated owner and that owner sold it or sold part of it, an objection had to be filed and after conducting proceedings in a dully convened session, the adjudication records would be amended through an award of an organ established under the Act. The 1st respondent did not tender evidence of any such proceedings or award.

- 54.** The most glaring aspects of illegality and fraud emerge when one examines the gist of the suit which the 1st respondent instituted in September 2017 seeking to be registered as proprietor of parcel number **Ruiri Rwarera /130** which, as per the 1st appellant's pleadings, measured 14 acres in 2017. The suit was instituted in the ELC at Meru as case number 285 of 2017. In 2018, the suit was transferred to Meru Chief Magistrate Court and registered as Meru CMC E & L Case No 69 of 2018. Through the suit, the 1st respondent sought: (i) a declaration that the transfer of land parcel number Kiirua/Ruiri Rwarera/130 to Lydia Kanario Benson and all the other defendants in the suit was fraudulent, null and void; (ii) a declaration that the said land belonged to the 1st respondent; and (iii) a permanent injunction restraining Lydia Kanario Benson and all the other defendants against entering the suit land or interfering with the 1st respondent's possession of the suit land.
- 55.** In the said suit, the 1st respondent contended that in July 2017, the appellant went to the adjudication office and transferred the suit land to herself and to the other defendants. He further contended that the appellant and the other defendants were in the process of subdividing the land. It was his case that he owned 13 acres within parcel number Ruiri Rwarera/130. At what point did the acreage of parcel number Ruiri Rwarera/130 change from 14 acres to 1.3 acres? Who excised 13 acres out of parcel number Ruiri Rwarera/130 and conveyed the 13 acres to the 1st respondent after the 1st respondent had filed Meru ELC Case No 285 of 2017? That is not all.

56. On 8/6/2017, the 1st respondent wrote to the District Land Adjudication Officer a letter [*plaintiff exhibit 7*] requesting him to call the family of the late Benson Mbuuri to give consent and transfer parcel number Ruri Rwarera/130 measuring 14 acres to him. The 1st respondent did not tender any evidence demonstrating that the estate of the deceased subsequently gave the consent and effected a transfer in his favour. All the 1st respondent did was to wave the subsequent title dated 5/12/2017.
57. Our courts have umpteen times emphasized that when the legitimacy of a title has been challenged and the claimant has sufficiently discharged his burden of proof, the holder of the impugned title is obligated to tender evidence establishing the root [legitimacy] of his title. The Supreme Court of Kenya in ***Dina Management Limited v County Government of Mombasa & 5 others (Petition 8 (E010) of 2021 (2023) KESC 30(KLR)*** outlined this principle as follows:-
- “ As held by the Court of Appeal in Munyu Maina v Hiram Gathiha Maina Civil Appeal No. 239 of 2009 [2013] KLR, where the registered proprietor’s root of title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is in challenge and therefore, the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from***

any encumbrance including interests which would not be noted in the register.”

- 58.** The Supreme Court emphasized in the above case that an illegal title does not convey a valid interest in land. In ***Arthi Highway Developers Limited v West End Butchery Limited & Others***, the Court of Appeal emphasized that a fraudulent registration does not extinguish the interest of the legitimate owner of land.
- 59.** In the suit giving rise to this appeal, the 1st respondent made the appellant’s burden of proof much lighter by admitting key aspects of the appellant’s case. The appellant subsequently led evidence demonstrating that neither the deceased nor the deceased’s estate excised and transferred the 13 acres to the 1st respondent. She led evidence to the effect that neither the deceased nor the estate sold nor conveyed the 13 acres to the 1st respondent. She also led evidence demonstrating that the family of the deceased had all along been in possession of the 14 acres. Regrettably, it appears from the record that the 1st respondent did not realize that the burden of proof had been discharged by the appellant and it was his obligation to demonstrate how in 2017 he acquired the title he was waving.
- 60.** Having analysed the pleadings and the evidence that was before the trial court, this court agrees with the appellant that the appellant properly proved the estate’s case and that the trial court erred in dismissing the appellant’s claim.
- 61.** On costs, the general principle in **Section 27** of the **Civil Procedure Act** is that costs follow the event. No proper

grounds have been demonstrated to warrant a departure from the general principle. Secondly, it was the duty of the 1st respondent to demonstrate how he acquired the title that he was waving. He acquired it while his suit through which he sought to be registered as proprietor of the suit land was pending. In the circumstances, he will bear the appellant's costs of this appeal.

- 62.** The 2nd - 4th respondents failed to attend trial when they were required. They contributed to this appeal by failing to attend trial or to avail to the court the instruments which they relied on to change the acreage of parcel number Ruiru Rwarera/130 and to create parcel number Meru Central/Ruiru Rwarera/2107 in 2017. Consequently, they will bear their own costs of this appeal and costs of the suit in the lower court.
- 63.** In the end, for the reasons outlined above, this appeal succeeds and is allowed in the following terms:-

(a) The judgment dated 30/1/2024 in Meru CMC E & L Case No 22 of 2019 is set aside wholly and is substituted with an order allowing the plaintiff's suit in terms of prayers (a) and (b) of the plaint.

(b) The 1st defendant in Meru CMC E & L Case No. 22 of 2019 shall bear the plaintiff's costs of the suit.

(c) The 1st respondent shall bear costs of this appeal.

DATED, SIGNED AND DELIVERED AT MERU THIS 13TH DAY

OF APRIL, 2026

B M EBOSO [MR]

ELC JUDGE

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