



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
LAND APPEAL NO. E070 OF 2024

BETWEEN

**JAMES METHU MACHARIA
& JENNIFER WAMBUI MACHARIA
(suing as the legal representative of and administrator
of the estate of Macharia James Methu)
.....APPELLANT**

VERSUS

**MOSES NDUNGU MUNGAI
T/A OKOA DEVELOPMENT COMPANY.....1ST
RESPONDENT
ALICE WANJIRU MBUGUA.....2ND
RESPONDENT**

AS CONSOLIDATED WITH

**MOSES NDUNGU MUNGAI
T/A OKOA DEVELOPMENT
COMPANY.....APPELLANT**

VERSUS

JAMES METHU MACHARIA

& JENNIFER WAMBUI MACHARIA

**(suing as the legal representative of and administrator
of the estate of Macharia James Methu).....1ST**

RESPONDENT

ALICE WANJIRU MBUGUA.....2ND

RESPONDENT

JUDGMENT

[Consolidated appeal from the judgment of Hon. E. Kimaiyo Suter PM, delivered on 7/11/2024 in Mavoko CM's Court, MCELC Case No. 40 of 2018 (Macharia James Methu & Jennifer Wambui Macharia & Anr suing as the legal representative and administrator of the estate of Macharia James Methu v Moses Ndungu Mungai T/A Okoa Development Company & Alice Wanjiru Mbugua)]

Background of the appeal

1. For ease of reference in the consolidated appeals, James Methu Macharia and Jennifer Wambui Macharia (suing as the legal representative and administrator of the estate of Macharia

James Methu) shall be referred to as “1st appellant”, and Moses Ndungu Mungai T/A Okoa Development Company shall be referred to as “2nd appellant”, whilst Alice Wanjiru Mbugua, who is a respondent in both appeals, shall be referred to as “respondent”.

2. Having outlined the description of the parties to this appeal, it is essential to summarise the subject matter of the dispute before the trial court and now before this court. In the lower court, the 1st appellant filed a suit against the 2nd appellant and the respondent, by a plaint dated 5 September 2018, in which he sought the following reliefs:

a. A permanent injunction restraining the respondent, her servants, agents and/or employees from carrying out any development or building upon plot no. Mavoko town, Block 2/49/281 and 2/49/282, or from selling, offering for sale, transferring, wasting, alienating or otherwise interfering with the 1st appellant’s lawful possession and ownership of plot no. Mavoko town, Block 2/49/281 and 2/49/282.

b. An order compelling the 2nd appellant to demolish the already partially developed building and remove all building materials and machinery

from the site within 14 days, and the OCS, Mlolongo Police Station, to ensure compliance with the orders.

c. An Order compelling the 2nd appellant to process, within a set timeline, the Title Deeds in respect of plot no. Mavoko town, Block 2/49/281 and 2/49/282, and to have the Title Deeds issued to him.

d. Cost of this suit.

e. Any other relief the Honourable court may deem fit to issue.

3. It was the 1st appellant's case that on 14th and 17th June 1995, he purchased from the 2nd appellant **plot no. Mavoko town, Block 2/49/281 and 2/49/282 ("suit properties")**, which were subdivisions of **L.R No. Block 2/49 ("mother parcel")** registered in the 2nd appellant's name. Thereafter, he was issued with the relevant ownership and beacon certificates, with the understanding that upon payment (on demand) by the 2nd appellant of the transfer and legal fees, which he duly settled, he would be issued with title deeds. Nonetheless, he discovered that the 2nd appellant had

subsequently resold the suit properties to the respondent. He pleaded and particularised fraud and illegality.

4. In response, the 2nd appellant filed a defence dated 6th May 2021, in which it admitted the plaintiff's ownership claims and maintained that the respondent was a stranger to it, as it had never sold the suit properties to her. It put her to strict proof of her assertions. It stated that the respondent was in occupation without its knowledge or authority. It denied the allegations of fraud.
5. As for the respondent, she contested the assertions made in the plaint and counterclaimed through her amended defence and counterclaim dated 14 June 2021, where she admitted that the suit properties were subdivisions of the mother parcel. She denied the assertions contained in the plaint and put the 1st appellant to strict proof.
6. She pleaded that she commenced the purchase of the suit properties from the 2nd appellant in 1998 and completed payment in 1999, with respective share certificates issued to her. Upon completion of payment, she took possession and developed them. She stated that the 2nd appellant beseeched her to hand over all the original certificates she held over the suit properties for purposes of processing the title deeds. Still, unbeknownst to her, the appellants had colluded in making such a request and had generated the 1st appellant's share

certificates. She pleaded fraud and illegality and sought the following prayers in her counterclaim:

a. A declaration that the respondent has been in actual occupation of the suit properties from the year 2000 to date.

b. A permanent injunction restraining the appellants from ever carrying out themselves as owners of the suit properties, and further restraining them permanently from selling, offering for sale, transferring, wasting, alienating or otherwise interfering with the respondent's lawful possession, occupation and ownership of the suit properties.

c. An Order compelling the 2nd appellant to process, within a set timeline, the Title Deeds in respect of the suit properties and to have the Title Deed issued in her name.

d. That, in the alternative, the court does issue an order compelling the 2nd appellant to compensate her for the sum of the actual and current market value of the suit properties.

e. Cost of this suit.

f. Any other relief the Honourable Court may deem fit to issue.

7. Consequently, the 1st appellant filed a defence to this counterclaim dated 8 July 2021, in which he denied most of the assertions and put the respondent to strict proof. He informed the trial court that he had implored the respondent to vacate the suit properties to no avail. He urged the trial court to dismiss the counterclaim and allow the reliefs sought in his plaint.
8. Subsequently, the matter was heard, with the parties calling their respective witnesses and relying on witness statements, oral testimonies, and produced documents. In the 1st appellant's case, James Methu Macharia, son of the deceased 1st appellant, testified (**PW1**). Gabriel Ngugi Ndungu, an employee of the 2nd appellant, testified for the 2nd appellant (**DW1**), and the respondent testified on her own (**DW2**), and a valuer led her evidence.
9. The matter was subsequently reserved for judgment, and the learned trial magistrate framed three issues for determination:
(a) whether the 1st appellant or the respondent had proved to

be the rightful and legal owner of the suit properties; (b) what reliefs should issue; and (c) who should bear costs.

10. In her analysis and determination, the learned trial magistrate found and concluded that the documents produced by the 2nd appellant as proof of ownership/payments by the 1st appellant had been altered and/or pertained to different properties, not the suit properties. She found that, having considered the history of alleged ownership, the 1st appellant's chain was broken in the absence of evidence of payment of the purchase price, whereas the respondent had proved her case by demonstrating payment and possession. She therefore granted the following orders:

a. A permanent injunction is hereby issued restraining the appellants from carrying out themselves as owners of the suit properties and/or from selling, offering for sale, transferring, wasting and/or alienating them.

b. The 2nd appellant is hereby ordered to process the Title Deeds of the suit properties belonging to the respondent within 120 days of the Judgment date.

c. The respondent shall have the costs of the suit, which shall be borne by the 2nd appellant.

Appeal to this court and the hearing

11. Aggrieved by the outcome, the appellants lodged separate memoranda of appeal, the 1st appellant's is dated 22 November 2024, and the 2nd appellant's dated 2nd December 2024, and both raised 10 grounds of appeal challenging the findings of the learned trial magistrate. These grounds of appeal were repetitive, and the appellants acknowledged their shortcomings and condensed them in their submissions.
12. In his submissions, the 1st appellant addressed the issues of whether he proved his case before the lower court, whether the learned trial magistrate erred in disregarding the material evidence and testimony produced by the 1st appellant and whether the learned trial magistrate erred in law and in fact by misapplying the legal principles of standard of proof in civil matters whereas the 2nd appellant, in its submissions, consolidated its grounds of appeal into two: that the learned trial magistrate erred in disregarding material evidence of the 2nd appellant and that the learned trial magistrate erred in law and in fact by misapplying the legal principles of the standard of proof in civil matters. Accordingly, the appellants urged this court to grant the appeals, overturn the contested judgment and consequential decree, and substitute them with a

judgment in the 1st appellant's favour as sought in the plaint, award them the costs of the appeal and the lower court suit, and grant any other relief this honourable court deems fit to grant.

13. In accordance with the court's directive, the appeal was canvassed by written submissions, with the respective parties filing their documents on different dates. The submissions for the 1st appellant, dated 22 October 2025, were filed by **Ms. J.M. Njengo & Co. Advocates**. The submissions for the 2nd appellant, dated 27 February 2026, were filed by **Ms. H.O. Oyugi & Co. Advocates**. Lastly, the respondent's submissions, dated 2 February 2026, were filed by herself as she acts in person.

Issues for determination, Analysis and Determination

14. As this is a first appeal, the authority of this court is set out in **Order 42 Rule 32** of the **Civil Procedure Rules**. Additionally, the court shall be guided by the principles articulated in the well-cited case of **Selle v Associated Motor Boat Company Ltd [1968] EA 123**, which encapsulates the guiding principles as follows: an appellate court shall not interfere with the challenged judgment unless it is convinced that the learned trial magistrate misdirected herself and consequently arrived at an erroneous decision, exercised her discretion improperly, and thereby caused injustice through such an erroneous exercise.

15. Regarding the matter at hand, this court has carefully reviewed the records, the impugned judgment, and the competing submissions it is the considered opinion of this court that the grounds of appeal can be effectively evaluated by examining the singular issue of **whether the learned trial magistrate erred in law and fact in concluding that the respondent proved her counterclaim and that the 1st appellant did not prove his claim.** We will proceed.
16. Regarding this matter involving unregistered land, the learned trial magistrate recognised that the law concerning such parcels of land is ambiguous and thus, proof of ownership relies heavily on tracing the origin of the title.
17. Consequently, she appropriately referred to **Danson Kimani Gacina & another v Embakasi Ranching Company Ltd [2014] eKLR**, which held that, in cases of unregistered land, proof of ownership is primarily established by documents that trace the root of title. All the parties hereby agree to this extent. The appellants and respondent, in their submissions, have relied upon the case of **Caroline Awinja Ochieng & another v. Jane Anne Mbithe Gitau & 2 others [2015] KEHC 4896 (KLR)**, a case also cited by the learned trial magistrate, which affirmed the legal position regarding unregistered land. This decision stated:

“The simple reason is that unregistered titles exist only in the form of chains of documentary records. The court has to perform the delicate task of ascertaining that the documents availed by the parties are not only genuine but also lead to a good root of title minus any break in the chain. It is the delivery of deeds or documents which assist in proving not only dominion of unregistered land but also ownership. The deeds must establish an unbroken chain that leads to a good root of title or title paramount. A good compilation of the documents or deeds relating to the property and concerning the claimant as well as any previous owners leading to the title paramount certainly proves ownership. It is such documents which are basically ‘the essential indicia of title to unregistered land’”: per Nourse LJ in Sen v Headley [1991] Ch 425 at 437.”

18. As submitted by the respondent, having made allegations of fraud and illegality, pursuant to **Sections 107** and **109** of the **Evidence Act**, the onus of proof rested upon the asserting party to prove that his/or case.

19. In the matter before the trial court, the suit properties were unregistered, with each party submitting their respective documentation as evidence of ownership. Both parties essentially requested the trial court to consider these documents as proof of ownership. The contested judgment considered the ownership documents, and there is no indication in the impugned judgment that the learned magistrate failed to appreciate the standard of proof applicable in civil cases. Consequently, this court finds that the grounds of appeal challenging the impugned judgment on these grounds are unfounded.
20. The appellants have submitted that they proved their case before the trial court in accordance with the requisite standards. Consequently, as this is a court of first appeal, the court shall examine the evidence presented by the parties during the trial court proceedings. We will first examine the documents adduced by the appellants.
21. The 1st appellant stated that he purchased plot no. 282 on 14 June 1995, and plot no. 281 on 17 June 1995 for valuable consideration from the 2nd appellant. He did not produce documentary evidence to substantiate these payments.
22. He also tendered ownership certificates showing that plot no. 282 was issued to him on 14 June 1995, and 281 was issued on

17 June 1995, with the beacon certificates issued on the respective dates. He also produced a letter dated 13 October 2004 from the 2nd appellant, asking purchasers to provide “1. instalment book, 2. original receipts, 3. ownership certificate, 4. Beacon certificate and 5. pin. no. photocopy.” The purchasers were also to pay a transfer and legal fee of ksh. 17,500 for the collection of the title deed. He also produced a receipt issued by the 2nd appellant showing that he paid kshs 35,000 for these amounts in respect of the suit properties on 1 September 2012. **PW1** testified that he did not have the instalment book and original receipts listed above.

23. The 2nd appellant, who supported the 1st appellant’s case, produced several documents. The first document was an alleged extract from a card, apparently transferred onto paper. It recorded payments for the suit properties and another property. The text is partially illegible, but it ends with the number 31. The document references various receipt numbers corresponding to payments made from 21 February 1995 to 1 September 2012. Additionally, the 2nd appellant produced a corresponding instalment card indicating that the 1st appellant purchased a commercial plot, Phase 2/88/31. The suit properties are referenced at the bottom of this card. Furthermore, this card shows that plot numbers 474 and 475 are cancelled, and the suit properties are embossed in their place.

24. This corresponding instalment card shows that payments of legal and transfer fees were made on 16 November 2008, which is at variance with the receipt produced by the 1st appellant, which showed payment on 1 September 2012. They also produced another piece of paper showing that Phase 2/88/31 was transferred to Isaac Ikonge on 26 November 2008, and on the same date, some payments were made for the transfer and legal fees for the suit properties, as evidenced by receipt no. 009843. This receipt number tallies with the receipt produced by the 1st appellant for ksh. 35,000.
25. Furthermore, the various receipts produced by **DW1** demonstrated that the 1st appellant made multiple payments for plot numbers 474 and 475, which are described as being in JKA 1. These payments were made between 21 February 1995 and 12 May 1995, with the survey fees for these plots paid on 31 May 1995 and 14 June 1995. Additionally, a survey fee was paid for the 1st appellant in relation to the suit properties on 17 June 1995 and 29 June 1995. Moreover, receipts indicating that the 1st appellant settled consideration for the commercial plot, Phase 2/88/31, were also produced.
26. **DW1** testified that their records solely indicate the 1st appellant as the proprietor of the suit properties, and that the respondent's documents did not originate from their office.

Furthermore, he affirmed that during the time the documents were issued to the other parties in 1995, he was a student. He also explained that discrepancies in the plot numbers were due to changes in allotment, title, and clearance numbers. He clarified that plot number 2/88/31 is not the same as the suit properties.

27. Respecting the respondent, she produced several receipts showing that she paid consideration for the suit properties between 5 March 1995 and 16 September 1999, though some amounts were not legible. The instalment card did not show the parcel nos but showed that all payments were made.
28. She also produced a letter dated 29 March 2017 from the 2nd appellant requesting documents. She tendered maps showing the locality of the suit properties, a valuation report of her developments, and an entry showing that her name and that of the 1st appellant were entered as owners of the suit properties. She stated that this particular record was obtained from a black book that the 2nd appellant held in its office, with the 1st appellant's name appearing to have been imposed after her name had been entered. She also produced ownership certificates. Her evidence was uncontradicted during cross-examination.

29. Moreover, it was undisputed that the respondent occupied the suit properties. It was also unchallenged that her occupation persisted for several years, during which she established her residence, comprising semi-permanent and temporary structures; in other words, she was in *de facto possession*. This *de facto possession*, is defined by **Sheehan, Duncan in The Principles of Personal Property Law, Bloomsbury Publishing Plc, 2017, pages 65 and 66**, as actual control of, or detention of property.

30. Such possession was pivotal to the case before the trial court, as the rights of a person in possession prevail over those of a person who holds no better title, as in the present case, where the respondent is in possession, and neither she nor the 1st appellant has title documents. In reaching this conclusion, the court relies on the Court of Appeal decision in **Benja Properties Limited v Syedna Mohammed Burhannudin Sahed & 4 others [2015] KECA 457 (KLR)**, which stated as follows: -

“In its pleadings, the 1st, 2nd and 3rd respondents aver that they have always been in possession of the suit land. It is trite law that all titles to land are ultimately based upon possession in the sense that the title of the man seised prevails against all who can show no better right to

seisin. Seisin is a root of title. The 1st, 2nd and 3rd respondents being in possession of the suit land have a better right to the same as against the appellant. The maxim is that possession is nine-tenths ownership. As was stated by the Privy Council in Ghana of Wuta-Ofei -v- Danquah [1961] All ER 596 at 600, the slightest amount of possession would be sufficient.

31. Regarding the documentary evidence pertaining to the root of title, the learned trial magistrate, in her analysis and determination, made numerous findings. She concluded that the 1st appellant failed to prove that he paid consideration for the suit properties or to disclose the amount of such consideration. The court concurs with this finding, as the 1st appellant did not substantiate his evidence of such payments.
32. Additionally, she found that there were alterations in the instalment booklet of the 1st appellant, a finding with which this court also agrees, as demonstrated earlier in its analysis of the documentary evidence. Furthermore, she concluded that the appellants did not allege any transfer or change in block or plot numbers. This court concurs with this analysis, noting that there appears to have been a unilateral deletion by the 2nd appellant in their record of plot numbers 474 and 475, or the

commercial plot, Phase 2/88/31, and a replacement with the suit properties.

33. As for the respondent's case, she concluded that she paid consideration of Ksh. 80,000 for the suit property and produced the instalment book confirming the summaries. Although some of these receipts are illegible, the payment settlement is confirmed. She also found that the 2nd appellant did not prove that the respondent's documents did not emanate from its office, and this court agrees because once the respondent produced her documents and discharged the evidentiary burden, the burden of proof shifted to the 2nd appellant to adduce evidence in rebuttal, such as by calling a document examiner, which it failed to do. ***See the Court of Appeal decision of Mbuthia Macharia v Annah Mutua Ndwiga & another [2017] eKLR.***

34. Regarding the issue of a missing last page in the respondent's instalment book, the trial court was satisfied with the respondent's evidence demonstrating that the 2nd appellant requested documents from her. This was corroborated by the letter dated 29 March 2017, in which the 2nd appellant demanded documents from its members. This court agrees with the learned trial magistrate that the records in the black book were uncontradicted. Ultimately, this court finds that the learned trial magistrate did not err in concluding

that the 1st appellant failed to establish his case on the balance of probabilities and that the respondent had successfully proved her counterclaim.

35. Therefore, for the above reasons, this court will not disturb the lower court judgment. This court finds and holds that this appeal is devoid of merit. It is hereby dismissed, and this court upholds the orders issued in the judgment rendered on 7 November 2024. Since it is trite law that costs follow the event, and the appeal being unsuccessful, this court awards costs to the respondent, which shall be borne by the 2nd appellant.

Orders accordingly.

Delivered and Dated at Machakos this 21st day of April, 2026.

**HON. A. Y. KOROSS
JUDGE
21.04.2026**

**Judgment delivered virtually through Microsoft Teams
Video Conferencing Platform**

In the presence of;

Ms. Kanja Court Assistant

No appearance for parties.

ORIGINAL