



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ELC LAND APPEAL NO. E011 OF 2025

PHIBIAN KAMENE MUNYAO.....
APPELLANT

-VERSUS-

EDNA NTHENYA KIETI (*Being sued on behalf of the Estate
of the late Kieti Kiva Deceased*).....
RESPONDENT

JUDGMENT

**[Appeal from the judgment of Hon. Daffline Nyaboke Sure,
PM, delivered on 27 January 2025 in Kangundo MCELC
Case No. E067 of 2022 (Edna Nthenya Kieti -being sued on
behalf of the estate
of the late Kieti Kiva Deceased) versus Phibian Kamene
Munyao)]**

Background of the appeal

1. To give context for the appeal, it is important to describe the dispute that was initially before the trial court and is now under consideration here. In the lower court, the appellant filed

a suit against the respondent through a plaint dated 2 November 2021.

2. It was the respondent's case that at all material times, her late father Kiva Kieti ("deceased") was and remained the registered owner of the suit property, namely **PLOT NO. 78 ("suit property")**, measuring 40ft x 100ft, which comprised two permanent shops in Tala town. Further, the respondent contended that the deceased had never disposed of the suit property to the appellant or to any other person and insisted that the suit property formed part of the estate of the deceased and that the actual possession and occupation of the suit property by the appellant had caused his estate loss and total deprivation to its rightful beneficiaries. It was her case that the relationship between the deceased and the appellant was that of landlord and tenant, and that as at 2002, the appellant used to pay rent of Kshs. 10,000 per shop.
3. According to the respondent, after the deceased's demise in the year 2013, the appellant unilaterally stopped paying rent as from May 2014 and thereafter illegally and/or unlawfully occupied the suit property without any claim of or colour of right or the consent and/or authority of the rightful beneficiaries of the deceased and did not pay the outstanding rent of kshs.20,000 per month for two shops. Thus, a trespasser. In consequence, she sought the following orders: -

- a. A declaration that the suit property belongs to the deceased.***
- b. A permanent injunction restraining the appellant by herself, her agents, servants and/or nominees from entering onto and/or remaining on and/or operating any business and/or continuing to operate any business or in any other manner whatsoever interfering with and/or dealing with the suit property.***
- c. An eviction order does issue to remove the appellant and any other unauthorised person or entity from the suit property.***
- d. That the orders of the Honourable court be enforced by the Officer Commanding Station (OCS) Tala Police Station.***
- e. Damages for loss of mesne profit for the suit property at the rate of Kshs. 20,000 per month as from May 2014 until the date of handover with vacant possession of the suit property to the estate of the deceased, or, in the alternative, rent arrears at the rate of Kshs. 20,000 per month from May 2014 until the date of handover of vacant possession of the suit property to the estate, and payable to the estate by the appellant.***

f. An Order that the appellant's posho mill machine erected on the suit property be sold in default of payment of rent or damages, as granted in order (e) above, and that any balance be paid personally, in default of which the appellant be committed to civil jail until payment in full.

g. Costs of this suit and interest.

h. Any other relief that the Honourable court deems fit and just to grant.

4. In opposition, the respondent entered an appearance and filed a defence dated 30 March 2023, in which she denied the allegations against her and contended that she was the beneficial owner of the suit property, which she described as measuring 20ft by 100ft, having legally purchased it by a written agreement for value from its former legal owner, James Makewa Maingi ("James"), who, in turn, had acquired it for value as a purchaser from the deceased in 1961. It was her case that family members witnessed this agreement between James and the deceased. Consequently, she asserted that, as a lawful purchaser of a portion of the suit property for value, the matter of rent payments did not and could not arise under the circumstances.

5. She further affirmed that the deceased and James allowed her to take possession of the entire suit property, to undertake

renovations, partition it according to the required standards and specifications, and subsequently utilise it to recover her investments, which she duly complied with. She urged the trial court to dismiss the respondent's case.

6. Afterwards, the matter was heard. In the appellant's case, she testified, and her evidence was led by James Makewa Maingi ("James"), whilst the respondent testified alone in support of her case. They relied on their oral testimonies, written statements and several documents. Subsequently, in the impugned judgment, the learned trial magistrate framed two issues for determination: whether the appellant was entitled to 20x100 and who should bear the costs. On this, she found that the suit belonged to the deceased and, by extension, to his estate, and granted reliefs in the respondent's favour, some of which were alternate prayers.

Appeal to this court and the hearing

7. Dissatisfied, the appellant appealed to this court and filed a memorandum appeal dated 24 February 2025, filed on 25 February 2025, in which she questioned the impugned judgment on 12 grounds, some of which were repetitive. However, upon her counsel on record, **Ms. Nzuki Nzioka & Co. Advocates**, filing written submissions dated 31 December 2025, it was evident that the appellant abandoned and/or consolidated all her grounds into one: **whether the learned**

trial magistrate erred in law and fact in finding that the respondent proved her case.

8. Accordingly, the appellant implored this court to allow the appeal, set aside the impugned judgment, and substitute it with an order dismissing the respondent's entire suit with costs. She also sought the costs of this appeal.
9. In accordance with the court's directives, the appeal was canvassed through the submissions presented by the appellant, which were previously mentioned. The respondent's law firm on record, **Ms Kiluva A.K. & Co. Advocates**, also submitted written submissions dated 21 January 2026, raising several preliminary issues. These issues shall be addressed promptly prior to engaging with the substantive matters before us.

Preliminary issues

10. Contemporaneously with the filing of the appeal, the appellant lodged an application for a stay of execution of the lower court's judgment dated 24 February 2025, which has since been rendered moot by this judgment.
11. The respondent submitted that the appellant's submissions were filed out of time and that the record of appeal was not properly marked. However, the court considers these to be

purely technical issues that do not affect the appeal's substantive hearing on merits. Additionally, the respondent contended that the appeal amounted to an abuse of court process, as the appellant had filed two appeals against the judgment in question, including the matter at **Machakos ELCEPA/E002/2025**. Nevertheless, the court finds this argument to be raised in bad faith, given that the issue was already addressed during the proceedings and **ELCEPA/E002/2025** was ultimately withdrawn, with costs awarded to the respondent. We shall now proceed.

Issues for determination, Analysis and Determination

12. Respecting the jurisdiction of a first appellate court and as submitted by the respondent and held in **Abdalla v Imu & 3 others [2014] KECA 888 (KLR)**, this court has jurisdiction to reconsider the evidence, re-evaluate the appeal and draw its own conclusion; this jurisdiction must be exercised cautiously. This court is not necessarily bound to accept the findings of fact by the lower court, but it conducts a retrial and its guiding principles are *inter alia* to reconsider the evidence, evaluate it and draw its independent conclusions and bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.

13. Now, regarding the matter at hand, this court has anxiously considered the record, the impugned judgment, and the rival submissions and it is the considered view of this court that the

residual and/or consolidated ground of appeal, namely **whether the learned trial magistrate erred in law and fact in finding that the respondent proved her case**, is the issue that arises for determination.

14. Concerning this issue, the law on unregistered land, unlike registered land, is slightly unclear. Consequently, proof of ownership is established through documentary evidence, which serves as the fundamental basis for the property's ownership. In cases such as the present one, courts typically rely on the evidence provided by the authors of various documents who have bestowed ownership on the parties. These documents must demonstrate an unbroken chain of events that proves the root of title. This position was reaffirmed by the decision in **Caroline Awinja Ochieng & another v. Jane Anne Mbithe Gitau & 2 others [2015] KEHC 4896 (KLR)**, which this court adopts. The said decision articulated as follows: -

“In determining the above issue it would perhaps be appropriate to first state that tracing ownership of unregistered land is dependent on tracing the root of title. Unlike registered land where ownership is domiciled and founded in the register of titles, ownership of unregistered land and the ascertainment or confirmation thereof

involves the intricate journey of wading through documentary history.

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.”

15. The case before the trial court was straightforward, as the respondent pleaded trespass and presented a letter dated 7 January 2016 from the allotter County Government of Machakos, which confirmed that, according to its records, the

suit property belonged to the deceased. The appellant did not contest this evidence; indeed, she testified that the deceased was the registered owner, as reflected in the county records. Therefore, this fact was undisputed. It was also undisputed that all the parties to the suit, including the appellant's witness, were relatives.

16. The appellant subsequently articulated a defence asserting that, although she occupied a section of the contested property measuring 20x100 in size, she was not a trespasser but rather a bona fide purchaser for value. In other words, she had a right of occupancy. Therefore, having made such assertions and pursuant to **Sections 107** and **109** of the **Evidence Act**, the onus of proof rested upon her as the asserting party to prove that she was not a trespasser. To prove so, she produced several agreements before the trial court.
17. Turning to these documents, although the appellant made no counterclaim of constructive trust, she submitted several documents, among which the most notable are those serving as proof of purchase. These include an agreement for sale in the Kamba language, as well as a translated version thereof demonstrating that the deceased sold a portion of the suit property measuring 20 by 100 feet for Ksh 1500 to James in April 1961. The payment was made in instalments, with an initial deposit of ksh 620 paid on the date the agreement was

signed. A second instalment of ksh 350 was paid on 4 February 1962. A third instalment of ksh 400 was paid by Kimumu, an alleged emissary of James, on 26 August 1962. The deceased acknowledged the final payment of Ksh 150 on 30 June 1963 from Kimumu. The total amount paid equates to Ksh 1520.

18. She testified that it was based on this agreement of purchase by James that she acquired a portion of the suit property. To substantiate this, she presented an agreement for sale dated 6 May 2010, showing that she purchased a portion of the suit property registered in the name of the deceased from James, for which the purchase price was kshs. 2,200,000, with a deposit of kshs. 500,000 paid at the time of signing, and the remaining balance to be paid in subsequent instalments following the resolution of the family dispute between the deceased's family and James.
19. On considering these two documents, the learned trial magistrate punched holes in the first agreement between the deceased and James and stated that the dates of April 1961, 4 February 1962, 26 August 1962 and 30 June 1963 as contained in the translated version were not legible in the Kamba version. She also stated that the figures kshs 1,500, 620, and 880 appeared on the right side of the Kamba version, but the translator had incorporated them in the translation and included his own version, with kshs 1,500 being the price, and

that it stated that Makena had given kshs 620, leaving a balance of Kshs 880.

20. She also stated that the Kamba version contained numerical figures of 530, 20, 400, 150, and 150, whereas the translated version explained these figures and included a figure of 350, which did not appear in the agreement. Nonetheless, the translated version indicated that it was not signed. She therefore concluded that she was not convinced the deceased had signed this agreement, and further asserted that the translation suggested the terms were dictated to the translator. She also stated that the Kamba version of the agreement did not include the deceased's signature acknowledging payments.

21. As for the second agreement between James and the appellant, the learned trial magistrate observed that, in the absence of proof of payment, the amount and transaction were solely documented on paper and did not reflect an actual occurrence. The respondent concurred with the learned trial magistrate and further submitted that, as of 2010, the alleged year of the second agreement, the deceased was alive, having passed away in 2013.

22. Concerning the appellant, she submitted that John Kitheka Ndaou testified and confirmed that the appellant acquired the

suit property. However, the proceedings do not reflect that such a person ever testified. Regarding the first agreement, which was drafted in Kamba and subsequently translated, she submitted that the respondent did not submit the document to a forensic examination, despite allegations of fraud or forgery. She submitted that her evidence remained uncontested, and furthermore, she was in possession of the property.

23. This court has examined these two documents and concurs with the learned trial magistrate's findings and conclusions, as well as the respondent's submissions, and finds that the appellant failed to discharge the burden of proof that she occupied the suit property by virtue of a valid purchase.

24. The onus was upon the appellant to establish the existence of the first agreement and to demonstrate that the translated version accurately reflected it. The statements made by the trial court regarding these two documents accurately depict the genuine nature of the discrepancies present. It must be concluded that the translated version was altered in a manner designed to fabricate a particular narrative, thereby aiming to influence the outcome of the case in favour of the appellant.

25. Even if this court may not understand the Kamba dialect, it is self-evident that neither the deceased, James, nor Kimumu ever signed the sale agreement. Pursuant to the repealed

Section 3 (3) of the **Law of Contract Act**, which was in force until 1 June 2003, an agreement for the disposition or sale of land that had been reduced to writing was required to be signed by the party to be charged or by a person authorised by such party to sign on their behalf. Signatures were non-existent in the first agreement. Without these signatures, the first agreement, waved by James, and the appellant were unenforceable, a nullity and of no legal effect. This court finds.

26. The Court of Appeal adopted a comparable stance in its judgment, with which this court aligns itself. In **Okoth v Nyaberi & another [2024] KECA 427 (KLR)**, while referencing **Section 3(3)** of the current **Law of Contract Act**, which pertains to written agreements for sale, the court stated:-

“The Judge was therefore right to make the finding that the agreement was not enforceable without the signature of the 2nd respondent.”

27. Further, in agreement with the appellant, the common law doctrine of *nemo dat quod non habet*, which means that a party cannot give what he does not have, suffices in this case. Applying this principle to the second agreement between James and the appellant, it is evident that James, who had never been a registered owner of the suit property or had no

valid agreement for sale, had nothing to sell to the appellant. In other words, the dealings between James and the appellant had no legal effect. This doctrine has been applied in our court decisions. In the Court of Appeal decision of **King'oo v Mwangi [2019] KECA 734 (KLR)**, it was stated: -

“A purchaser can only acquire a good title as that which inheres or is vested upon the vendor. This is represented by the latin maxim nemo dat quod non habet, literally meaning "no one gives what they don't have.”

28. In the persuasive decision of **Daniel Kiprugut Maiywa v Rebecca Chepkurgat Maina [2019] KEELC 842 (KLR)**, which this court adopts, the court articulated the following on this doctrine and its role in safeguarding the registered owner:

“11. The nemo dat principle means one cannot give what he does not have. This principle is intended to protect the title of the true owner. The rationale behind this principle is that whoever owns the legal title to property holds the title thereto until he or she decides to transfer it to someone else. Accordingly, an unauthorized transfer of the title by any person other than the owner generally has no legal

effect, which means the owner continues to hold the title to the property while the person who received the invalid title owns nothing.”

29. Consequently, given the lack of evidence demonstrating that she possessed a valid sale agreement, the appellant, who was without authorisation from the deceased’s estate to occupy the suit property, was therefore a trespasser. The learned trial magistrate was not in error in granting the reliefs sought. This court so finds.

30. Therefore, for the reasons and findings set out above, this court concludes that the learned trial magistrate did not err in her conclusions and findings, and 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 set out in the judgment rendered on 27 January 2025. Since it is trite law that costs follow the event, and as the appeal being unsuccessful, this court awards costs to the respondent.

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

Mr. Kiluva for the respondent.

No appearance for appellant.