REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELCA NO. E070 OF 2024

JOHN CHEWA NYAGA ..... 1ST APPELLANT

DANIEL MWEA MURUKA ..... 2ND APPELLANT

VERSUS

ANN NYAWIRA KARURI ..... 1ST RESPONDENT

JOHN MUTHIKE CHEWA ..... 2ND RESPONDENT

IRENE WANJIRU RUKENYA ..... 3RD RESPONDENT

JUDGMENT

(Being an appeal from the judgment of Hon. M.N. Gicheru, CM, delivered on 24th April 2019 in Embu CMCC No. 160 of 1991)

1. This appeal arises from the judgment of **Hon. M.N. Gicheru, CM,** delivered on **29th April 2019** in **Embu Chief Magistrate's Civil Suit No. 160 of 1991**, in which the learned trial magistrate held that the appellants had failed to prove their case on a balance of probabilities, and consequently dismissed their suit.

The trial court further upheld the respondent's counterclaim, entered judgment in their favour as prayed therein, and awarded them the costs of the suit.

2. The appellants, who were the plaintiffs in the lower court, were dissatisfied with the judgment of the learned trial magistrate and preferred the present appeal, through the memorandum of appeal dated 22nd May 2019, setting out the following five (5) grounds:

    1) That the learned magistrate erred in law and in fact by failing to consider that the parties who presented the case were irregularly before the court and therefore lacked the capacity to move it, resulting in a miscarriage of justice.

    2) That the learned magistrate erred in law and in fact by directing the parties to proceed by way of written submissions, thereby denying them the right to cross-examine each other on serious matters, occasioning a miscarriage of justice.

    3) That the learned magistrate erred in law and in fact by failing to fully analyze the submissions filed by the appellants, thus occasioning a miscarriage of justice.

4) That the learned magistrate erred in law and in fact by failing to consider that accounts had been taken by one Mr. Munyagia, yet proceeded to dismiss the plaintiffs' case, thereby occasioning a miscarriage of justice.

5) That the learned magistrate erred in law and in fact by failing to consider that the plaintiff was the registered owner of the subject matter, hence a miscarriage of justice was occasioned.

The appellants prays for thes appeal to be allowed, and the judgment of the lower court delivered on 29th April 2019 be set aside with costs.

3. The dispute before the lower court was commenced vide a plaint dated 5th June 1991, through which the appellants, as plaintiffs, sought reliefs against the defendants, now respondents. In particular, they prayed that the defendants be compelled to account for all monies obtained from the premises erected on **Plot No. 6 Mutitu Market**, that John Chewa Nyaga be registered as a co-proprietor of the said premises, and that the defendants bear the costs of the suit together with any other or further relief the court might deem just and expedient.

The appellants' case was that sometime in the 1940s, the **Embu Local Native Council allocated Plot No. 4 Mutitu Market** to M/S Kamondo Chewa and Jeffret

Muvuka as tenants in common in equal shares. They averred that around 1971, Charles Rukenya and Gilbert Karuri were invited to join as partners and that their names were duly entered in the Council's register as co-owners of the plot.

4. It was further their contention that on or about 8th December 1968, Charles Muriuki Rukenya and Gilbert Gicabaru Karuri constructed business premises on the plot consisting of one main shop and two rear rooms. In 1973, John Chewa Nyaga was authorized by the co-owners to construct additional buildings, upon which he erected one front shop and six rear rooms.

   The appellants further averred that in 1988, Japhlet Muringi transferred his share in the property to his son Daniel Mwea. They claimed that the respondent thereafter took control and management of the suit property to their exclusion. It was their position that the premises had housed various tenants over the years, yet no accounts of rent received or profits earned had ever been rendered, nor had the proceeds been shared among the co-owners. The appellants thus sought an order compelling the respondents to account for all monies received from the rental or business activities conducted on the suit plot.

5. The respondents opposed the appellants' claim through an amended statement of defence and counterclaim dated 15th October 2018. They denied all the allegations made in

the plaint and averred that the 1st appellant was not a co-owner of **Plot No. 6 Mutitu Market.** They refuted the assertion that he had constructed additional buildings on the suit property, and contended that if indeed he had done so, then such construction had been undertaken on behalf of his father, the 2nd respondent.

The respondents further averred that the 2nd defendant had long passed away, and they failed to understand why he had been sued instead of his lawful beneficiaries. They also maintained that the 2nd appellant had not constructed any buildings on the suit property, nor had his father, Japheth Muruka, contributed any money towards the development of the premises. On that basis, they prayed that the appellants' suit be dismissed with costs.

6. In their counterclaim, the respondents contended that Plot No. 6 Mutitu Market was jointly owned by four persons, namely: Kamondo Chewa, Charles Rukenya, Gilbert Gichabaru Karuri, and Daniel Mwea Muruka. They averred that after the demise of the original owners in 2007, the 2nd appellant unlawfully began renting out the premises and collecting rent solely for his own benefit.

   The respondents stated that the court had previously directed the collection and deposit of rent from the premises with an accountant, but that the appellant went ahead and fraudulently removed the names of the other co-owners from the allotment register and substituted his

own, without the knowledge or consent of the other beneficiaries. The respondents therefore sought for judgment on their counterclaim for the following reliefs: that the plaintiffs' suit be dismissed with costs; that the plaintiff do render a full account of all monies collected from the premises since 2007 to date and refund the same; that the names of the original owners be reinstated in the allotment register; and that they be awarded the costs of the suit and the counterclaim.

7. The record of the lower court shows that on 29th October 2018, the learned trial magistrate delivered a ruling directing as follows inter alia:

> *"This suit has been pending in court since 1991. It is 27 years old. The parties have fully disclosed by filing witness statements and documents that they will rely on at the trial. We have strict instructions under the Sustaining Judiciary Transformation to conclude all cases five years and more before the end of this year. What the parties would have told the court orally is already on record. Under* ***Section 1A and 1B of the Civil Procedure Act and Order 11 Rule 2 of the Civil Procedure Rules****, I direct that the parties adopt the witness statements and documents as their evidence."*

The trial court proceeded to determine the suit based on the materials already on record without calling oral testimony. The trial court identified two issues for determination, namely:

1) *Who were the legal owners of* ***Plot No. 6 Mutitu Market****?*
2) *Which party had been collecting rent from the suit premises, and who ought therefore to account?*

8. These were the central issues as framed by the respondents in their counterclaim.

On the first issue, the learned magistrate found that ownership of the suit plot was held under a tenancy in common, as opposed to a joint tenancy. He observed that the available evidence clearly demonstrated that the tenancy was in common, which explained why the original allottees, Jeffret Muvuka, Charles Rukenya, and Gilbert Karuri, were able to transfer their respective shares to members of their families.

The court further held that the 2nd appellant had failed to explain how he came to be the sole proprietor of the suit plot. He had not demonstrated that he had purchased the shares of his co-owners, nor had he produced any sale agreement or evidence of payment to them or to their dependants. The learned magistrate therefore concluded

that the co-owners remained the rightful owners of the suit property.

9. On the second issue, the court found that it was the 2nd appellant who was in occupation of the suit premises and who had been collecting rent from the tenants.

   The court also noted that although the 1st appellant had been involved in developing the property, he too had collected rent between 1973 and 1977 to the exclusion of the other co-owners.

   In the end, the learned trial magistrate held that the appellants had failed to prove their case on a balance of probabilities. Consequently, he dismissed their suit and upheld the respondents' counterclaim in its entirety, entering judgment in their favour accordingly.

10. The appeal was canvassed through written submissions in accordance with the court's directions. The learned counsel for 2nd appellant filed written submissions dated 20th May 2025. Counsel abandoned ground number 1, and conceded that the respondents had duly filed their respective applications for substitution and were therefore properly before the court.

    On Ground No. 2, counsel submitted that the learned trial magistrate erred in directing that the matter be disposed

of by way of adopting the parties' witness statements and documentary evidence. It was contended that although the directive under the *Sustaining Judiciary Transformation Framework* required that all cases older than five years be concluded expeditiously, such a procedure was unsuitable in cases involving allegations of fraud. Counsel argued that fraud must be proved beyond a balance of probabilities and that such proof can only be achieved through oral testimony subjected to cross-examination.

It was therefore submitted that by directing the parties to adopt their witness statements and documents without oral hearing, the learned magistrate exposed the appellants to an unfair trial. In respect of Grounds Nos. 3 and 5, counsel argued that the learned trial magistrate failed to fully analyze the submissions filed by the appellants, thereby occasioning a miscarriage of justice.

It was submitted that the appellants' submissions were not considered, and no reasons were given for such omission. Counsel further faulted the trial court for failing to consider key documents such as the transfer of shares and the minutes dated 28th May 2009, which, according to the appellants, would not have been overlooked had the matter proceeded to oral hearing and cross-examination. Counsel emphasized that those documents had not been challenged by the respondents, and the court did not explain why it disregarded them. He added that this

omission underscored the appellants' position that the County Government of Kirinyaga ought to have been joined to clarify the authenticity and effect of the document dated 6th December 1988.

On Ground No. 4, counsel submitted that the learned magistrate failed to consider the accounts allegedly taken by an accountant, which could have been verified had the matter proceeded to full hearing. It was contended that the court ought to have summoned the accountant as an expert witness to clarify the financial position of the parties.

Regarding Ground No. 5, counsel argued that it was the County Government that effected the changes in the ownership register and not the appellants.

He submitted that the documents of transfer had been lodged on 12th May 1998, and the same were implemented on 28th May 2019, contending that the delay could not be attributed to the surviving owner. Counsel maintained that the transfer process was already in motion from 1998 and that the subsequent deaths of the co-owners did not vitiate that intention.

On Ground No. 6, counsel faulted the trial court for concluding that the appellants had fraudulently removed the names of the co-owners from the plot records.

He submitted that the alleged fraud was not proved to the required standard and that the trial court's finding in that regard was unsupported by evidence.

Counsel concluded by urging that the alleged fraud had not been substantiated and that the trial court erred in upholding the counterclaim. He therefore prayed that the appeal be allowed, and the judgment of the lower court set aside.

11. The 2nd Respondent filed written submissions dated 17th July 2025. Counsel framed three issues for determination.

On the first issue, relating to grounds 2 and 4 of the memorandum of appeal, he observed that the 2nd Appellant's complaint was twofold: first, that the trial court directed that the matter be disposed of through adoption of written statements and documents, thereby denying the parties the opportunity to cross-examine witnesses; and second, that the court failed to fully analyze the Appellant's submissions and the accounts taken by Mr. Munyagia, thus occasioning a miscarriage of justice.

Counsel submitted that the record shows the respondents had filed an application dated 20th March 1995 seeking to set aside the accountant's report, and that the same was duly set aside by **Hon. L.W. Gitari.** He pointed out that

on 29th October 2018, when the parties appeared before **Hon. M.N. Gicheru** for directions on the hearing of the suit, the learned magistrate rendered a ruling directing that the parties adopt their written statements and documents, and that written submissions be filed and exchanged. Counsel contended that this Court lacks jurisdiction to review or reconsider that ruling, the Appellant having failed to lodge any appeal against it.

Consequently, the ruling stands final, and the Appellant cannot now be heard to complain.

Counsel further argued that the Appellant failed to exercise his right of appeal as guaranteed under **Article 50 of the Constitution**. On the second issue, touching on grounds 3 and 5, Counsel submitted that the 2nd Appellant's list of documents dated 22nd October 2018, which included transfer of ownership documents and extracts of County Council minutes purporting to transfer **Plot No. 6 Mutitu** from the original co-owners to one Daniel Mwea, was inconsistent with his own pleadings and evidence. He argued that the Appellants failed to produce any evidence to corroborate the alleged transfer or to authenticate the purported minutes approving it.

Counsel further noted that the documents produced by the Appellants contained glaring irregularities: one of the original co-owners, Jaffret Muvuka, was shown to have

transferred his share twice on 27th January 1988 and again on 6th December 1988 and that the County Council purportedly approved the transfer of **Plot No. 6 Mutitu in 2007** after the demise of some co-owners, namely Kamondo Chewa and Gilbert Karuri. These inconsistencies, in Counsel's view, pointed to fraudulent conduct on the part of the Appellants. He urged that the respondents had proved their claim of fraud to the required standard.

Finally, on the issue of costs, Counsel submitted that under the general principle that costs follow the event, the respondents were entitled to costs of both the suit and the appeal, and prayed that the 2nd Appellant be ordered to bear them.

12. From the grounds on the memorandum of appeal, record of appeal and submissions, the following three issues arise for the court's determinations:
    a. *Whether the learned trial magistrate erred in directing that the suit be determined based on the witness statements and filed documents without viva voce evidence, thereby denying the Appellants a fair hearing.*
    b. *Whether the learned trial magistrate failed to properly evaluate the Appellants' documentary evidence and submissions, thereby reaching an erroneous conclusion.*

c. *Whether the learned trial magistrate erred in law and in fact in his findings on ownership of* ***Plot No. 6 Mutitu Market*** *and in upholding the Respondents' counterclaim.*
d. *Who pays the costs?*

13. I have carefully considered the grounds on the memorandum of appeal, record of appeal, the submissions by the learned counsel, superior court decisions cited, and come to the following determinations:

a. This being 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 first issue of whether the learned trial magistrate erred in directing that the suit be determined on the basis of the witness statements and filed documents without viva voce evidence, the gravamen of the Appellants' complaint is that the learned trial magistrate, by his ruling of 29th October 2018, directing the matter be disposed of by adopting the parties' filed witness statements and documentary evidence without calling oral testimony or allowing cross-examination, contravened the rules of natural justice and occasioned a miscarriage of justice, particularly in view of the allegations of fraud raised in the proceedings.

The court record shows that on 29th October 2018, the learned trial magistrate noted that the matter had been pending since 1991, a period of twenty-seven years, and that all parties had already filed their respective witness statements and documentary evidence. He invoked the need to comply with the Judiciary's policy on concluding aged cases and, in exercise of his discretion, directed that the parties' witness statements and documents be adopted as evidence, the matter to proceed thereafter by way of written submissions. The Appellants did not object to that direction, nor did

they seek review or file an appeal against it. They participated fully by filing their written submissions.

The question, therefore, is whether such a course was contrary to the **Civil Procedure Act or Rules**, and if so, whether it occasioned prejudice to the Appellants.

c. The **Civil Procedure Act, at Sections 1A**, establishes the overriding objective of the **Act and Rules,** namely, to facilitate the just, expeditious, proportionate, and affordable resolution of civil disputes and **Section 1B** imposes a corresponding duty on courts to handle all matters before them with the aims of ensuring just determination, efficient use of resources, and timely disposal of proceedings.

The **Civil Procedure Rules, 2010 (Legal Notice 151 of 2010)** operationalize these objectives through case-management provisions. While **Order 11 Rule 2 of the Civil Procedure Rules** requires parties to within fourteen days after close of pleadings, to file and serve the case management checklist, the discretion to control the mode of taking evidence is expressly conferred by **Order 18 Rule 2,** which provides that:

> ***"Unless the court otherwise orders, on the day fixed for the hearing of the suit, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove."***

d. The phrase *"unless the court otherwise orders"* gives the trial court latitude to vary the usual order of oral testimony, and therefore to adopt alternative modes of receiving evidence where the circumstances so warrant. This discretion is further complemented by **Order 19 Rule 1**, which empowers the court to order that *"any particular fact or facts may be proved by affidavit ... on such conditions as the court thinks reasonable."*

   These provisions, read together with **Sections 1A and 1B of the Act,** empower the trial court to manage cases innovatively and to adopt procedures that achieve substantive justice, provided no party is prejudiced. The Rules do not contain an express exception restricting that discretion in cases involving allegations of fraud.

e. The key question is therefore not whether viva voce evidence was omitted, but whether the adopted procedure denied a fair trial or impeded proof of

material facts. In the present case, the Appellants acquiesced to the direction of 29th October 2018 and did not raise any contemporaneous objection. They proceeded to file submissions under the very procedure they now impugn. Having voluntarily participated, they cannot at this appellate stage challenge a procedure to which they consented and from which they did not demonstrate any actual prejudice.

Furthermore, the Appellants did not themselves object to the direction of 29th October 2018; the record shows that it was the Respondents who, in their counterclaim, raised the issue of fraud, alleging that the 2nd Appellant had fraudulently removed the names of the original co-owners from the allotment records and substituted their own. The burden of proving that fraud therefore rested on the Respondents.

f. This Court is mindful that fraud must be specifically pleaded and strictly proved, the standard being higher than on a balance of probabilities, though not as high as beyond a reasonable. However, the strictness of the standard does not dictate the mode of proof. Fraud may be established by credible documentary evidence, circumstantial proof, or even admissions contained in filed witness statements.

The essential requirement is cogency and credibility of the evidence, not whether it is viva voce or documentary.

g. In this case, the Respondents' claim of fraud was based on documents, particularly the transfer of their share to the 2nd Appellant. The learned trial magistrate had those materials before him, and evaluated them alongside the Appellants' documentary evidence. The absence of oral testimony and cross-examination did not, in itself, vitiate the process, or prejudice either party, since the documents and statements were on record and mutually accessible for scrutiny.

   Accordingly, the Court finds that the mode of trial adopted by the learned trial magistrate did not violate the principles of a fair hearing, or render the judgment unsafe. The decisive issue is the sufficiency, and evaluation of the evidence, not the absence of viva voce testimony.

h. The Appellants further contended that the learned trial magistrate erred in law and fact by failing to analyze their written submissions, thereby occasioning a miscarriage of justice. However, the record clearly disproves this assertion, because when the court delivered its ruling on 29th October 2018,

directing that the matter proceed by the adoption of witness statements and documents, it also ordered the Respondents to file their written submissions.

On 26th November 2018, when the matter came up, learned counsel Miss Muthoni, appearing for the 2nd Appellant, confirmed that she had received the Respondents' written submissions and sought seven (7) days to file that for 2nd appellant. The court granted that request, and when the matter next came up on 3rd December 2018, counsel sought and was granted a further extension up to 17th December 2018 to file the Appellants' submissions. The judgment was scheduled for 28th January 2019, later rescheduled to 1st April 2019 and subsequently delivered on 29th April 2019.

i. It is not in dispute that the 2nd Appellant's written submissions were eventually filed on 23rd January 2019, more than one month after the deadline directed by the court. Having failed to comply with the timelines, the Appellants cannot now turn around and accuse the court of failing to consider their submissions. The failure to file within time was entirely of their own making. The court cannot be faulted for adhering to the directions on timelines and proceeding to judgment on the basis of the material properly before it.

j. Further, even if the court had considered the belated submissions, it bears repeating that submissions are not evidence. They are merely a party's articulation of how the evidence and law should be applied. It is trite that submissions serve to guide the court, and cannot constitute proof of any fact. The duty of the trial court is to evaluate the evidence on record, and render a reasoned judgment thereon. The judgement that is on record clearly demonstrates that the learned trial magistrate did exactly that. He expressly noted inter alia that:

> *"In support of his case, the plaintiff filed seventeen documents which include a transfer of the plot dated December 1988 and receipts for payment of rates for the years 2011 to 2018."*

This acknowledgement shows that the court was fully aware of the Appellants' case and the material they had placed before it.

k. It is settled law that an appellate court does not re-evaluate evidence merely to substitute its own opinion for that of the trial court. Its duty is limited to determining whether the trial court considered all relevant material, misapprehended the evidence, or

made findings unsupported by the record, see the decisions in the case of ***Selle versus Associated Motor Boat Co. Ltd*** **[1968] EA 123** and ***Peters versus Sunday Post Ltd*** **[1958] EA 424**. In this case, the record reveals that the learned trial magistrate gave careful consideration to the documentary evidence, assigned reasons for discounting it, and supported his conclusion with logical analysis.

l. The court is satisfied that the Appellants have not demonstrated that any document was overlooked, or that the learned trial magistrate relied on extraneous matters. The adverse finding merely reflects a different assessment of credibility and weight, which lies within the trial court's province. Accordingly, this ground of complaint also fails.

m. The final issue concerns the learned magistrate's determination that ownership of **Plot No. 6 Mutitu Market** was held in common, among four individuals and that the Appellants had failed to prove that they had lawfully acquired the interests of the other co-owners. The Appellants contended that they were the rightful proprietors of the entire plot, having effected a transfer through the County Council of Kirinyaga, and that the learned magistrate erred in failing to recognize that position.

In the judgement, the learned trial magistrate found that based on the evidence before him, the original allocation of the suit plot by the then **Embu Local Native Council** was made jointly to Kamondo Chewa, Jeffret Muvuka, Charles Rukenya, and Gilbert Karuri, as tenants in common in equal shares.

He further held that a tenancy in common, by its nature, allows each co-owner to hold a distinct, transferable share, but that the title remains jointly vested until the transfer is lawfully executed.

n. The learned trial magistrate further observed that the 2nd Appellant had not produced any sale agreement, receipts, or acknowledgment to demonstrate that he had purchased the shares of the other co-owners, or their beneficiaries. The trial court therefore concluded that the Appellants had not proved lawful acquisition of the other shares, and that the alleged transfer process was irregular and untrustworthy.

This Court has independently reviewed the record, and finds no basis to fault the learned trial magistrate's reasoning and conclusion. The evidence on record, including the Appellants' own documents, supports the finding that the suit property was

originally co-owned, and that there was no credible proof of an exclusive transfer to the Appellants.

o. Under **Section 107(1) of the Evidence Act Chapter 80 of Laws of Kenya**, he who asserts a fact bears the burden of proving it. The Appellants, having claimed exclusive ownership, were required to prove that claim through cogent documentary or other admissible evidence. The burden was not discharged by mere production of irregular transfer forms, or by receipts showing payment of land rates. Such payments, while relevant, do not confer title in the absence of a valid transfer.

   The learned trial magistrate was also correct in treating the arrangement among the original allottees as a tenancy in common rather than a joint tenancy. The distinction is material, in that in a tenancy in common, each co-owner holds a defined but undivided share, which can devolve upon death to his estate. The evidence before the trial court showed that after the demise of the original allottees, their respective shares devolved to their successors, among them the Respondents, who were therefore entitled to an interest in the property.

p. The learned trial magistrate's finding that the Appellants had not shown how they became sole

proprietors, and that the other co-owners or their beneficiaries remained entitled to their respective shares, was therefore consistent with both law and evidence. The counterclaim seeking reinstatement of the original names in the allotment register, and for an account of rent was properly founded.

This Court finds no error in the trial court's decision to uphold the counterclaim. The decision was supported by the evidence, and the reasoning was consistent with established principles governing co-ownership and proof of title.

Accordingly, I find that the learned trial magistrate properly directed himself on the law, and the facts in holding as he did that ownership of Plot No. 6 Mutitu Market remained shared among the original co-owners and their estates. The Appellants' claim to exclusive ownership was correctly rejected,

q. **Section 27 of the Civil Procedure Act, Chapter 21 of Laws of Kenya** provides that costs shall ordinarily follow the event unless the court, for good reason, orders otherwise. The court in the case of ***re Estate of Monica Wanjiru Macharia (Deceased) (Family Appeal 15 of 2023) [2024] KEHC 14780 (KLR)*** held that:

> ***"Section 27 of the Act is clear that it lies in the discretion of the court to award costs***

in a suit. This discretion must be exercised judiciously."

The court finds no reasonable cause to deviate from that edict and as the appellants have failed in the appeal, they will meet the respondents' costs in this appeal.

14. From the determinations s set out above, the court finds and orders as follows:

    a. **That the appeal is devoid of merit and is hereby dismissed in its entirety.**

    b. **That the judgment of the learned trial magistrate, Hon. M.N.Gicheru, CM, as he then was, delivered on 29th April 2019 in Embu Civil Suit No. 160 of 1991, and the decree emanating thereof is hereby upheld.**

    c. **The appellants to meet the respondents' costs in the appeal.**

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 22ND DAY OF APRIL 2026.

S. M.

Kibunja

ELC

JUDGE

In the presence of:

Appellants – No appearance

Respondents – M/s Ndwiga for Magee

Kinyua - Court Assistant.

S. M.

Kibunja

ELC

JUDGE