Karenge & another v Mbogo & 4 others (Civil Appeal 52 of 2020)
[2026] KECA 714 (KLR) (25 March 2026) (Judgment)

Neutral citation: [2026] KECA 714 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 52 OF 2020

SG KAIRU & AO MUCHELULE, JJA

MARCH 25, 2026

BETWEEN

FRANCIS KAMAU KARENGE ..... 1ST APPELLANT

BENSON MAINA MUGI ..... 2ND APPELLANT

AND

HUMPHREY WAINAINA MBOGO ..... 1ST RESPONDENT

THIKA MUNICIPAL COUNCIL ..... 2ND RESPONDENT

GEORGE MWANGI ..... 3RD RESPONDENT

COUNCILOR ROSEMARY KAHUKI ..... 4TH RESPONDENT

CHIEF LAND REGISTRAR ..... 5TH RESPONDENT

(Appeal from the Judgment of the Environment and Land Court of Kenya at Thika (G.M.A. Ogondo, J.) dated 30th April 2019 in ELC Case No. 205 of 2018)

JUDGMENT

1. This appeal arises from a judgment of the Environment and Land Court (ELC) at Thika (G.M.A. Ongondo, J.) dated 30th April 2019 and delivered on 14th June 2019. In that judgment, the ELC in allowing a claim by the 1st respondent, Humphrey Wainaina Mbogo, restrained by permanent injunction the 1st and 2nd appellants (Francis Kamau Karenge and Benson Maina Mugi) and the 2nd to 4th respondents (Thika Municipal Council, George Mwangi, and Councilor Rosemary Kahuki) from claiming, trespassing, building or erecting any structures on the property known as Title Number Thika Municipality Block II/870 (the property) or interfering with the 1st respondent's quiet and peaceful user and occupation of the same. The appellants and the 2nd to 4th respondents were also ordered to deliver vacant possession of the property to the 1st respondent and in default be evicted.

2. The background is that on 9th December 2003 the 1st respondent, as plaintiff, instituted suit before the High Court at Nairobi in which he named the appellants and the 2nd to 4th respondents as defendants. He pleaded: that he is the registered owner of the property, with a valid Certificate of Lease; that the property had illegally been subdivided without his consent or knowledge and construction works commenced; and that the appellants and the 2nd to 4th respondents had trespassed on the property. He sought the reliefs that were ultimately granted by the ELC in its judgment as indicated above.

3. In its defence, the 2nd respondent (Thika Municipal Council) averred that it was the owner of the property which it asserted was an un-surveyed council land previously used as a dumping site which was rehabilitated into a public park, Moi Gardens, and thereafter portions alienated for public utility purposes and allotted to licensed hawkers. It pleaded that the 1st respondent

> "fraudulently" or through misrepresentation "grabbed" or caused the Commissioner of Lands to issue him with a lease. It counterclaimed against the 1st respondent and sought: a declaration that the grant of lease in favour of the 1st respondent was obtained by fraud or misrepresentation; and an order for cancellation of the 1st respondent's title.

4. Similarly, the appellants asserted that the 1st respondent's title to the property was "procured through blatant and outright fraud". They counterclaimed against the 1st respondent and sought similar reliefs as those sought in the counterclaim by the 2nd respondent. In the alternative the appellants, who claimed to have been lawfully allocated stalls (C-6 and C-12, respectively) on the property and developed them, sought judgment against the 1st and 5th respondents for Kshs.27,689,000.00 and Kshs.20,192,300.00 and interest, being the claimed value of their investments on the property, along with other orders and costs. They also claimed indemnity against the 5th respondent.

5. On the part of the 5th respondent (Chief Land Registrar) it was pleaded in the statement of defence that the 2nd respondent (Thika Municipal Council) did not at any time own the property; that the property was allocated to the 1st respondent on 11th June 1999 long prior to when 2nd respondent claimed to have purported to have allocated it to hawkers on 27th March 2003; that the allocation of the property to the 1st respondent followed due process and was lawful; that the property had never been set aside as a public utility plot; and that the claims by the 2nd respondent and by the appellants lacked merit.

6. At the trial the 1st respondent who testified on his own behalf relied on statements, documents (P Exhibits 1-6), and a letter of allotment dated 11th June 1999 (P Exhibit 7). He described the property as a vacant dumpsite.

7. For the defence, the appellants called Benard Kamau Gachoka (DW1) a registered valuer who produced valuation reports (D Exhibits 2 and 3) in respect of the stalls. Edwin Munoko Wafula, a Land Registrar based in Nairobi at the time testified as DW2. He stated that the property was allocated to the 1st respondent and that the 1st respondent was duly issued with a title.

8. The 1st appellant (Francis Kamau Karenge) testified as DW3. He stated that he bought his stall from one Charles Mucheru who was initially allocated the same by the 2nd respondent. He presented evidence via documents (D Exhibits 4-9). He stated that there was no agreement for sale with Mucheru, no title, no survey plan, stamp duty, or transfer for the suit property. He maintained that the 1st respondent's title was fraudulent.

9. The 2nd appellant, Benson Maina Mugo testified as DW4. He stated that he was allocated Stall C.12 located on the property by the 2nd respondent. That he had invested and built on it and paid rates to the 2nd respondent.

10. Upon evaluating the evidence, the learned trial Judge found that the 1st respondent had successfully demonstrated that he was lawfully allocated the property by the Government of Kenya. Invoking the principle of caveat emptor the Judge stated that the appellants should have exercised caution before entering the process of buying non-surveyed property. In that regard the ELC cited the decision in Margaret Wanjiku Kamau vs. John Njoroge Gachuru [2005] eKLR. Noting that the appellants conceded that they did not pay stamp duty, lacked title, a written agreement, or a transfer document for the property, they could not claim to be bona fide purchasers. In that regard, the ELC relied on case of Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura vs. Attorney General and 4 Others [2017] eKLR.

11. Ultimately, the ELC held that the 1st respondent, lawfully acquired the property; that the 1st respondent had a right to the property under Article 40(1) of *the Constitution*; that the appellants and the 2nd to 4th respondent were trespassers on the property; and that the appellants' claim for indemnity was unfounded. Judgment was accordingly entered for the 1st respondent as already indicated, and hence the present appeal.

12. The appellants have challenged the judgment on fifteen grounds set out in their memorandum of appeal which were canvassed before us during the hearing of the appeal on 29th April 2025. Learned counsel Mr. Githinji Mwangi, with Ms. Mwangi, appeared for the appellants while Mr. Owade, learned counsel, appeared for the 1st respondent. There was no appearance for the 2nd, 4th and 5th respondents despite notice of hearing having been served. At the request of the appellants' counsel, the appeal as against the 3rd respondent was withdrawn with no orders as to costs.

13. In the appellants' written and oral submissions, it was urged that this case involved a property allocated by the Government of Kenya to the 1st respondent, while the 2nd respondent also allocated leases to the appellants. Counsel submitted that the property was subject to double allocation, having first been used as a public utility, initially a dumping site, and later rehabilitated into a public garden (Moi Gardens), and subsequently partially allocated by the Thika Municipal Council for use as market stalls. It was submitted that the appellants were lawfully allocated stalls on the property by the 2nd respondent and paid the requisite fees and rates.

14. Faulting the trial court for applying *the Constitution*, the *Land Registration Act*, and the *Land Act*, which were enacted after the 1st respondent's title was issued in 2003, counsel submitted that the correct governing laws should have been the Government *Land Act* and the repealed Physical Planning Act, which outlined specific procedures for allocating unalienated government land and town plots, including the requirement for a Part Development Plan (PDP). It was submitted that Sections 9-18 of the Government *Land Act* had clear provisions for the allocation of "unalienated Government land" and "town plots", and the trial court should have verified if the Land Registrar followed these procedures, which it was submitted, it failed to do. Counsel further submitted that the repealed Physical Planning Act also had procedures for generating PDPs for title issuance, which the trial court did not consider.

15. It was submitted that the 1st respondent's documents, such as the map and PDP, lacked clear origin, authorship, or government adoption, making them unreliable for generating a title. It was pointed out that there were no approvals from relevant government authorities, such as the Town Clerk, Thika Municipal Council, which, preceded the 1st respondent's title.

16. It was urged that despite the allotment letter in favour of the 1st respondent being dated 1999 requiring payment within 30 days, payment was not made until 2002, by which time, according to counsel, the offer had lapsed. Counsel further submitted that at the time of allocation and title issuance to the

1st respondent in 2002, there was a nationwide government ban on allocating public utility land to individuals.

17. It was further submitted that the trial court wrongly dismissed the appellants' indemnity claims despite concession by the 2nd respondent that it allocated parcels of land on the property for hawker facilities. Counsel referred to the appellants' allocation letters and proof of paying rates to the 2nd respondent. It was urged that if the 1st respondent's title is upheld, either the Chief Land Registrar or the Thika Municipal Council should indemnify the appellants for their losses, as supported by valuation reports.

18. In opposition to the appeal, it was submitted that there is no dispute that the property was government land; that the repealed Government Lands Act provided for the manner of alienation of such land; that the 2nd respondent could not allocate it; that the Chief Land Registrar, as the custodian of land records, confirmed that the 1st respondent's documents were regularly and procedurally issued and there was no evidence of fraud.

19. It was urged that the appellants on the other hand did not prove ownership or the validity of their documents, as there was no proof of purchase, allotment, or registration of title from their side; that the trial court correctly invoked the principle of caveat emptor as the appellants purported to have purchased unalienated land. It was submitted that although the appellants alleged fraud, they failed to prove it. With that, the Court was urged to dismiss the appeal.

20. We have considered the appeal and the submissions. The role of this Court, as a first appellate court, is to re-evaluate and reassess the evidence presented before the trial court and to draw its own conclusions based on that evidence. We bear in mind that the trial court had the distinct advantage of observing and hearing the witnesses as they testified. In the case of Peters vs. Sunday Post Limited [1958] EA 424, the predecessor to this Court cautioned that:

> "It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion."

21. With that in mind, the issues arising for determination are: whether the ELC erred in applying post-2010 laws instead of the applicable pre-2010 legal framework; whether it was established that the 1st respondent lawfully acquired the property; whether the appellants proved fraud or irregularity in the issuance of the 1st respondent's title; whether the appellants were lawfully allocated the stalls by the 2nd respondent; and whether the appellants are entitled to indemnity or compensation for developments on the suit property.

22. Regarding whether the ELC erred in applying post-2010 laws instead of the applicable pre-2010 legal framework, the Certificate of Lease in respect of the property based on which the 1st respondent asserted his claim was issued in August 2003. In that regard, the legal regime in force at the time included the Government Lands Act (repealed); the Physical Planning Act (repealed); and the Registered *Land Act* (repealed). However, in his judgment, the learned trial Judge hinged his decision on the provisions of *the Constitution* of Kenya, 2010 and the *Land Registration Act*, both of which came into effect after August 2003. However, the transitional provisions therein stipulated that rights,

interests, titles, or obligations acquired before their commencement were to be governed by the law then in force. Section 106 of the *Land Registration Act* provides:

> "(1) On the effective date, the repealed Acts shall cease to apply to a parcel of land to which this Act applies.
>
> (2) Nothing in this Act shall affect the rights, liabilities and remedies of the parties under any ... lease that, immediately before the registration under this Act of the land affected, was registered under any of the repealed Acts."

23. In the same vein, Section 107 of provides:

> "(1) Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.
>
> (2) Unless the contrary is specifically provided for in this Act ... where any step has been taken to ... execute a disposition, any such transaction shall be continued in accordance with the law applicable to it immediately prior to the commencement of this Act."

24. There was therefore a misdirection on the part of the learned Judge to the extent of failing to anchor his decision on the law as it stood in 2003. However, the matter does not end there. The question of validity of the 1st respondent's title under the legal regime applicable in 2003 remains.

25. In the case of Wreck Motor Enterprises vs. Commissioner of Lands & 3 Others [1997] KECA 391 (KLR), the Court held that:

> "Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter, and actual issuance thereafter of a title document pursuant to provisions held. See Dr. Joseph N.K. Arap Ng'ok v Justice Moijo ole Keiwua & 4 Others, Civil Application No. NAI.60 of 1997 (unreported).

26. In effect the process of acquisition of title involved the issuance of an allotment letter; compliance with its conditions; and the issuance of the title document. In support of his claim to the property, the 1st respondent produced before the trial court several documents, including a letter of allotment dated 11th June 1999; payment receipts showing that the required sums were paid in 2002; and a Certificate of Lease issued in 2003 under the provisions of the Registered *Land Act* (repealed). The appellants however contended that the 1st respondent did not comply with the terms of the letter of allotment on account of the delay in making the payments required which should have been done within 30 days. In that regard in the case of Joseph N.K. Arap Ng'ok vs. Moijo Ole Keiwua & 4 Others [1997] KECA 1 (KLR) the Court stated as follows:

> "It has been held severally that a letter of allotment per se is nothing but an invitation to treat. It does not constitute a contract between the offerer and the offeree and does not confer interest in land at all. It cannot thus be used to defeat a title of a person who is the registered proprietor of the said parcel of land."

27. It was established that the 1st respondent made the required payments, albeit late, and the property was registered in his name. The allocation to the appellants by the 2nd respondent of stalls C-6 and

C-12 on the property was done well after the 1st respondent was registered as the owner. The basis on which the appellants sought to impeach the 1st respondent's title was that it was acquired by fraud or misrepresentation. In Joseph N.K. Arap Ng'ok vs. Moijo Ole Keiwua & 4 others the Court expressed that:

> " Once a title is issued under the Registered *Land Act*, it becomes indefeasible except where fraud or misrepresentation has been proved. Unregistered claims, including equitable interests, cannot override a registered title."

28. In the same spirit, the Court in the case of Kenya National Highway Authority vs. Shalien Masood Mughal & 5 Others [2017] KECA 465 (KLR) stated that:

> " The issuance of a title deed by the Registrar is a solemn act that is presumed to have been undertaken in accordance with the law, unless clear evidence to the contrary is adduced."

29. The appellants' case was that the 1st respondent's title was acquired through fraud, misrepresentation, and procedural impropriety. They pleaded the 1st respondent's title resulted from collusion with officials of the Commissioner of Lands; that he did not involve the 2nd respondent in the process of acquisition of the title; and that the property was reserved for public utility. The burden lay with the appellants to prove those allegations. No concrete evidence was however tendered in support of those allegations. As pronounced by the Court in the case of Kinyanjui Kamau vs. George Kamau [2015] eKLR:

> " It is well established that any allegation of fraud must be pleaded with particularity, and the burden of proof is higher than that of a balance of probabilities. It must be proved by evidence that is clear and unequivocal."

30. In the case of Kibathi t/a Osoro Chege Kibathi & Company Advocates vs. Musti Investments Limited (Civil Appeal E134 of 2022) [2024] KECA 270 (KLR) the Court stated as follows:

> "Further, in Richard Akwesera Onditi v. Kenya Commercial Finance Company Limited [2010] eKLR, this Court, in rejecting what it found to be bare allegations regarding fraud, stated thus: "...fraud and collusion are serious accusations and require a very high standard of proof, certainly above mere balance of probability and the bare allegations put forward by the appellant do not therefore avail him."

31. The appellants did not tender any credible evidence to suggest that the 1st respondent obtained the title fraudulently, illegally, or un-procedurally, or that he colluded with any government officer in the process. Mere allegations of fraud, without cogent proof, could not suffice to defeat the 1st respondent's title considering also the evidence of the Land Registrar (DW2) that the title in favour of the 1st respondent was issued procedurally.

32. Turning now to the question whether the appellants were lawfully allocated the stalls by the 2nd respondent, the appellants asserted that they were lawfully allocated the stalls on the property by the 2nd respondent, and that they paid the requisite rates and fees for their occupation. They faulted trial court for declaring them trespassers.

33. It was common course that initially, the property was government land. The applicable statute, since repealed, was the Government Lands Act which under Section 3 empowered the President, through the Commissioner of Lands, to alienate such land. From whence the 2nd respondent derived its mandate to purport to allocate the property to the appellants was not demonstrated. The 2nd respondent did not

tender any evidence or participate in the trial. The trial court cannot therefore be faulted for invoking the principle of caveat emptor and concluding as it did that the appellants did not exercise due diligence.

34. On the appellants' claim for indemnity, Section 144 of the repealed Registered *Land Act* provided as follows:

> " 144.
>
> (1) Subject to the provisions of this Act and of any written law relating to the limitation of actions, any person suffering damage by reason of –
>
> a. any rectification of the register under this Act; or
>
> b. any mistake or omission in the register which cannot be rectified under this Act, other than a mistake or omission in a first registration; or
>
> c. any error in a copy of or extract from the register or in a copy of or extract from any document or plan certified under this Act, shall be entitled to be indemnified by the Government out of moneys provided by Parliament."

35. Section 144 (2) further provided that:

> "No indemnity shall be payable under this Act to any person who has himself caused or substantially contributed to the damage by his fraud or negligence, or who derives title (otherwise than under a registered disposition made bona fide for valuable consideration) from a person who so caused or substantially contributed to the damage."

36. In effect, indemnity by the government would only have been available where loss is suffered due to error, omission, or unlawful registration, and only to persons lawfully entitled to the land. The appellants would not have qualified for indemnity under those provisions. Moreover, and as the learned trial Judge found, the testimony of the Land Registrar, DW2, exonerated the 5th respondent, the Chief Land Registrar from blame. To borrow the words of the Court in the case of Super Nova Properties Limited & Another vs. District Land Registrar Mombasa & 2 Others; Kenya Anti-Corruption Commission & 2 Others (Interested Parties) (Civil Appeal 98 of 2016) [2018] KECA 17 (KLR) "we sympathize with the appellants who perhaps fell prey to unscrupulous public officers and in the process lost their money..."

37. In conclusion, and based on our review and evaluation of the evidence presented before the trial court, we hold, as did the trial Judge that the appellants did not prove to the required standard, that the 1st respondent's title to the property was procured through fraud, misrepresentation or un-procedurally. We accordingly uphold the decisions of the trial court ordering the appellants and the 2nd to 4th respondents to deliver vacant possession of the property to the 1st respondent; dismissing the claim against the 5th respondent; and dismissing the appellants' counterclaim. The appeal fails and is hereby dismissed with

38. Lastly, we apologize for the delay in delivery of this judgment, attributable to the death of the Hon. Mr. Justice Fred Ochieng, JA who was a member of the bench. The decision of the remaining members of the bench being unanimous, this judgment is delivered under Rule 34(4) of the Court of Appeal Rules.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF MARCH 2026.

S. GATEMBU KAIRU, FCIArb, C.Arb.

.....

JUDGE OF APPEAL

A.O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR