

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC LAND APPEAL NO. E136 OF 2024

PETER KARIUKI MWANGI

APPELLANT

VERSUS

ANNE CHRISTINE WAKINA NYAGA 1ST

RESPONDENT

CHIEF LAND REGISTRAR 2ND

RESPONDENT

ATTORNEY GENERAL 3RD

RESPONDENT

**(Being an Appeal from the Judgement of Hon. A. Mukenga
(Principal Magistrate) delivered on 30th August 2024 in
Milimani CM ELC No. E193 OF 2023).**

JUDGEMENT

**1. This Appeal arises from the judgement of Hon. A. Mukenga
(Principal Magistrate) delivered on 30th August 2024 in**

ELC LAND APPEAL NO. E136 OF 2024

Judgment

Milimani CMELC No. E193 OF 2023. In the matter, the Learned Magistrate dismissed the Plaintiff's suit (now Appellant) in which he claimed ownership of **Nairobi/Block 105/5065**, herein referred to as the "suit property". He also allowed the Defendant's counterclaim (now 1st Respondent) and declared her the registered owner of the suit property.

2. Dissatisfied with the said judgement, the Appellant filed the Memorandum of Appeal dated 18th September 2024 in which he raised the following grounds of Appeal;

a) **That the learned trial Magistrate erred in law and in fact in failing to uphold and apply the equity maxim that, "when two equities are equal, the first in time prevails".**

b) **That the learned trial Magistrate erred in law and in fact and misdirected himself by completely ignoring the Plaintiff's oral and documentary evidence to support his claim on and not limited to the root of his Certificate of title to the suit property Nairobi/Block 105/5065.**

- c) That the learned trial Magistrate erred in law and in fact and misapplied the law in finding that the 1st Respondent's Certificate of Title was the genuine title to the suit property Nairobi/Block 105/5065.**
- d) That the learned trial Magistrate erred in law and in fact and misdirected himself in finding that the 1st Defendant had proved fraud on the part of the Appellant.**
- e) That the learned trial Magistrate acknowledged that the Appellant held a legitimate Embakasi Ranching Co. Ltd Share Certificate No. 4954 for two (2) Shares and a Provisional Letter of Allocation dated 28th November 1982 to the suit property Nairobi/Block 105/5065 but erred in law and in fact in failing to give any weight to the same.**
- f) That the learned trial Magistrate erred in law and in fact by ordering the 2nd Respondent to cancel the Appellant's Certificate of Title to the suit property Nairobi/Block 105/5065.**
- g) That the learned trial Magistrate erred in law and in fact and misdirected himself in failing to**

direct that the 2nd Respondent, the custodian of the Lands Register and Records, be summoned to authenticate and verify that the 1st Defendant's title was indeed genuine and was acquired legitimately.

h) That the learned trial Magistrate erred in law and in fact in ignoring the pleadings, evidence and submissions by the Appellant and giving more weight to the pleadings, evidence and submissions by the 1st Respondent thereby making a lopsided and an unjust determination.

i) That the learned trial Magistrate erred in law and in fact and misdirected himself by taking into account extraneous matters not pleaded all together and thus making uncalled and unnecessary observations to the prejudice of the Appellant's case.

3. He sought for orders that:

a) The Judgement of the Hon. A. Mukenga delivered on the 30th August 2024 be set aside.

- b) The 1st Respondent's Defence and Counter-Claim dated 3rd July 2023 be dismissed and**
- c) In its place, this Honorable Court allow the prayers in the Plaint dated 2nd June 2023 as prayed.**
- d) The Appellant be granted the costs of this Appeal and the costs in the trial court.**

4. The Appeal was canvassed by way of written submissions.

Submissions

- 5.** The Appellant relied on the decisions of **Mwangi & another v Manyeki (Environment and Land Appeal E003 of 2023) [2024] KEELC 220 (KLR) (25 January 2024) (Judgment)**, **Ethics and Anti-Corruption Commission v Simon Thuo Muchiri [2022] eKLR** and **Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR** to submit that despite the 1st Respondent listing particulars of fraud, she did not prove them to the required standard thus the trial court ought to

have concluded that his title was issued regularly and is legitimate. Further, that since the 1st Respondent's witness DW3, the only Embakasi Ranching representative did not dispute the validity of his documents, the issue of fraud does not arise, adding that the 2nd Respondent did not testify to prove that his title deed was either a forgery or irregularly acquired.

6. He reiterated that he demonstrated a cogent trail of the root of his title and that he complied with the conditions to receive the suit plots thus this is a case of double allocation. Further, that since his title was issued on the 19th September 2016, while the 1st Respondent's was issued on the 13th August 2020, his title must take precedence over that of the 1st Respondent. To buttress this position, he relied on the decision of **Kamau James Njendu v Serah Wanjiru & another [2018] eKLR**, and **Maalim v Alio & another (Environment and Land Appeal E003 of 2022) [2024] KEELC 3944 (KLR) (25 April 2024) (Judgment)**.

7. He also urged the court to consider the judgment of Hon. Lady Justice

Mogeni in a similar matter, **Wainaina v Mwago & 3 others (Environment & Land Case E297 of 2021) [2023] KEELC 21728 (KLR) (16 November 2023) (Judgment)**, where the learned judge opined that Embakasi Ranching Company Limited was engaged in double allocation of plots.

8. On his part, the 1st Respondent submitted that while the Appellant was enjoined to adduce evidence tracing the root of his title, he did not do so while on her part, she proved that her Certificate of Lease was procured regularly and in compliance with Embakasi Ranching Company Limited procedures and the law as there was no objection lodged by the Appellant with the said Company or the Ministry of Lands and Physical Planning prior to the issuance of the Certificate of Lease and the Lease to her. To buttress this position, she relied on the following decisions: **Munyu Maina v Hiram**

Gathiha Maina Civil Appeal No.239 of 2009[2013]
ELC LAND APPEAL NO. E136 OF 2024 **Judgment**

eKLR, Embakasi Properties Limited & Another v Commissioner for Lands and Another [2019] eKLR and Mwangi Njehia v Janetta Wanjiku Mwangi & another [2021] eKLR.

9. She also submitted that there was fraud in the manner in which the Appellant's Certificate of Lease was processed since there is no documentation from Embakasi Ranching Co. Ltd demonstrating how he was allocated the suit property, but he only demonstrated that he was allocated shares, of which his share certificate was not endorsed by the said Company.
10. She also argued that the Appellant was not an innocent purchaser for value since by the time he alleges to have been issued with a Certificate of Lease, she had already been in actual occupation of the suit property from 2010 and had erected a residential permanent house. To this end, she relied on the decisions of **Torino Enterprises Limited v**

Attorney General (Petition 5 (E006) OF 2022) [2023]
ELC LAND APPEAL NO. E136 OF 2024 **Judgment**

KESC 79(KLR) and Sehmi & another v Tabarana company limited & 5 others (petition e003 of 2023) [2025] KESC 21 (KLR) (11 April 2025)

11. The 1st Respondent also submitted that since the Appellant did not summon witnesses to demonstrate how he was issued with a Certificate of Lease on 19th September 2016, pursuant to Section 80 and 112 of the Evidence Act, where a party fails/refuses to tender evidence, the Court is entitled to make an adverse inference that if such evidence was produced, it would be adverse to such a party. To this end, the case of **Sanjay Varma & 2 others v Jackson Eshiwani Likoye & 7 others [2020] eKLR** was relied on.

12. The 2nd and 3rd Respondents did not participate in the Appeal.

Analysis and Determination

13. Upon consideration of the Memorandum of Appeal, Record of Appeal and rivalling submissions, the issue for determination

is who is the owner of the suit property and if the Appellant indeed demonstrated the root of his title.

14. The Appellant faults the trial Magistrate for allegedly ignoring his oral and documentary evidence on the root of his title to the suit property, thereby making a finding that he had engaged in fraud and thus upheld the 1st Respondent's title as genuine. Further, that the trial Court failed to involve the 2nd Respondent to verify the authenticity of the competing titles. Additionally, he contends that the trial Court failed to apply a key principle that where two equitable interests are equal, the earlier one prevails.

15. On her part, the 1st Respondent contends that she complied with due process stipulated by Embakasi Ranching Company Limited and the law to procure the Certificate of Lease to the suit property thus she is the legal owner, while the Appellant's purported Certificate of Lease is as a result of fraudulent

activity as he failed to demonstrate that due process and procedure was adhered to, in procuring it.

16.The duty of an Appellate Court, with regard to a first Appeal is as stated in **Selle and Another v. Associated Motor Boat Company Ltd & Others, [1968] 1 EA 123;**

“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that 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. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul

Hameed Saif v. Ali Mohamed Sholan, (1955), 22 E.A.C.A. 270).

17. On who is the owner of the suit property, the Appellant and the 1st Respondent presented to the trial Court, competing titles to the suit property. Section 26(1) of the Land Registration Act provides that a title may be impeached if it was acquired illegally, unprocedurally, or through a corrupt scheme. It states thus:

“26 Certificate of title to be held as conclusive evidence of proprietorship

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of

that proprietor shall not be subject to challenge, except

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

18. In order to legally impeach a title, a party would be required to demonstrate the root of the said title. The Court of Appeal held as follows in the case of **Munyu Maina v Hiram Gathiha Maina [2013] eKLR;**

“We state that when a registered proprietor root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any

encumbrances including any and all interests which would not be noted in the register.”

19. Further, the Supreme Court held as follows in **Dina Management Limited v County Government of Mombasa & 5 others [2023] KESC 30 (KLR)**:

“Indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible...”

20. Before I make a determination of who is the owner of the suit property, I will proceed to interrogate the evidence that was presented in the trial Court by both the Appellant and 1st Respondent. On perusal of the proceedings in the trial Court, I note the Appellant as PW1 provided various documents as exhibits to canvass his case. The documents included: Certificate of Lease dated 19/9/2016, two receipts dated 29/11/1982 for survey fees payments made to Embakasi Ranching Company Limited, Provisional letter of allocation of plot dated 28/11/1982, share certificate number 4954 for two

shares, pink certificate dated 12/3/2019 for issuance of bonus plots, receipts for Kshs. 12,000/= dated 23/4/1995 for payment of survey fees for bonus plots, receipt for Kshs 7,000/- dated 2/11/2020 for civil engineering fees, receipt for Kshs. 20,000/= dated 6/2/2019 for site visit fees for plot number S390B and S391B.

21. During cross examination, the Appellant confirmed that he was given a Certificate of Lease on 19th September, 2016 for a term of 99 years from May, 2010. He did not have documents that preceded issuance of title like the Transfer Form nor the Clearance Certificate issued before 2016. He did not have any documents from the Surveyor nor the Beacon Certificate but had a receipt dated the 6th February, 2019 for survey fees. He could not recall the date of survey. In reexamination, he stated that the survey in 2019 was to survey the initial plot Nos. 5065 and 5066 so as to be issued with the bonus plots.

22. As for the 1st Respondent, she testified as DW1 and confirmed she purchased the disputed plot in 2006 and commenced construction in 2007. Further, that she finished construction and moved in, in 2010. she produced documents which included: Certificate of Lease issued on 13/8/2020, Lease for the suit property, Transfer from Embakasi Ranching Company Limited to the 1st Defendant, Receipt for Beacon Certificate dated 6/7/2021, Site visit receipt dated 24/6/2021, Non Member Certificate of Plot ownership dated 6/11/2006, Clearance form/pink certificate dated 8/9/2021, receipt dated 3/1/2011 from El Shaddai Junior Academy, Letter dated 23/9/2021 addressed to Ministry of Lands and Physical Planning by Embakasi Ranching Company Limited, Site visit report dated 24/6/2021, extracts of maps, receipts for payment of legal fees dated 18/9/2020, print out information verification, assorted receipts for purchase of construction materials, payment of electricity connection and electricity bills, letter dated 20/4/2009 from KPLC, water connection bills and receipts, assorted occurrence book

number extracts form Utawala police station, photographs of the suit property, newspaper advertisements by the Ministry of Lands and Physical Planning, sample Certificates of Lease for titles in Nairobi Block 105.

23. DW3 Jack Kamau Wachira who was a Surveyor from Embakasi Ranching Company Limited in his testimony explained that in 2016 there was a Court Order in ELC 395 of 2011 barring Embakasi Ranching Company Limited from processing titles on Nairobi Block 105 and 106 respectively. He confirmed that by the 29th November, 1982 as per the receipt produced by the Appellant, the survey had not been undertaken and members did not know locations of their plots. In his testimony, he affirmed the 1st Respondent's documents and stated that Embakasi Ranching Company Limited had written to the Permanent Secretary confirming that the 1st Respondent was owner of Nairobi Block 105/5065. Further, that the Verification Book from the Ministry of Lands used for purposes of printing titles shows

that Nairobi Block 105/5065 is owned by the 1st Respondent. He reiterated that the 1st Respondent complied with the procedures for acquiring a property with Embakasi Ranching Company Limited. He was emphatic that for one to process title, they required a Certificate of Ownership, Payment of Survey fees and Engineering fees. Further, that the None Member Certificate of Ownership of Plot issued to the 1st Respondent where she paid Kshs. 2000, was authentic. In reexamination, he insisted that none of the Appellant's documents had any correlation with Nairobi Block 105/5065 but the documents produced by the 1st Respondent relates to the said block.

24. From my analysis of this evidence presented in the lower court, I find that the Appellant's documents had glaring discrepancies while the 1st Respondent's documents were synchronized. A cursory look at both the Appellant and Respondent's documents, I find that the 1st Respondent's documents demonstrate the root of the title as opposed to

the Appellant's document. Further, I note in the Plaintiff the Appellant only sought for eviction and injunctive orders against the 1st Respondent as opposed to the 1st Respondent that particularized fraud and sought for cancellation of the Appellant's Certificate of Lease/Title.

25. I further note that the trial court held that the authenticity of the documents held by the Appellant was in question. The Court of Appeal held as follows in **Vijay Marjariov Nansingh, Madhusingh Darbar & another [2000] eKLR:**

“It is well established that fraud must be specifically pleaded and the particulars of fraud alleged must be stated on the face of the pleadings. The act alleged to be fraudulent must of course be set out and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from the facts.”

- 26.** The Appellant has argued that since his title was issued on the 19th September 2016 while the 1st Respondent's was issued on the 13th August 2020, his title ought to take precedence over that of the 1st Respondent. Further, that the first title in time should suffice. He however has not explained how he acquired a title in 2016 when there was a Court Order barring the issuance of titles in the said year, and did not have all the documents needed to process the said title.
- 27.** Based on the facts before me while relying on the legal provisions cited and associating myself with the decisions quoted and applying them to the circumstances at hand, I opine that even if the Appellant's title was issued first, he failed to demonstrate its root due to the glaring inconsistencies in the dates on the documents including missing documents, which culminated in his obtaining his title. I find that a title obtained fraudulently, even if it was first in time is not a legitimate title for a party to wave claiming its indefeasibility and should hence be impeached.

28. In the circumstances, I find that the learned trial Magistrate did not err in law and in fact in failing to uphold and apply the equity maxim that, “when two equities are equal, the first in time prevails”. Further, I find that the learned trial Magistrate did not misdirect himself and did not completely ignore the Appellant’s oral and documentary evidence to support his claim on and not limited to the root of his Certificate of title to the suit property. I opine that the learned trial Magistrate properly applied the law in finding that the 1st Respondent’s Certificate of Title was the genuine title to the suit property and she had proved fraud on the part of the Appellant.

29. To my mind the learned Magistrate was correct in ordering the 2nd Respondent to cancel the Appellant’s Certificate of Title to Nairobi/Block 105/5065. It is trite that the acquisition of title is a process and it was incumbent upon the Appellant to prove his case and not expect the learned Magistrate to summon the 2nd Respondent, the custodian of the Lands

Register and Records, to authenticate and verify if the 1st Respondent indeed acquired her title genuinely and legitimately. I further find that the learned Magistrate considered the evidence on record including pleadings to arrive at his decision and did not take into account extraneous matters including make unnecessary observations as claimed by the Appellant.

30. In the foregoing, I find that the Appellant did not duly demonstrate the root of his title as there were contradictions in the dates and sequencing of documents. I wish to reiterate that there were glaring inconsistencies in the dates on documents that Appellant allegedly used to process his title. Further, there is no way he would have acquired the title during a period of moratorium in the issuance of the titles to Embakasi Ranching Company Limited, fail to produce a Beacon Certificate and only pay for a site visit after obtaining his title. I however find that the 1st Respondent who had been in possession of the suit property over a period of time and

put up permanent structures thereon had proved her allegations of fraud as against the Appellant to the required standard, I further find that the 1st Respondent properly processed her title.

31.In the foregoing, I find the instant Appeal unmerited and will proceed to dismiss it with costs.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS
30TH DAY OF APRIL, 2026**

**CHRISTINE OCHIENG
JUDGE**

In the presence of:

Ms Awuor for Kariuki for Appellant

Nderitu for 1st Respondent

Court Assistant: Joan