Mutige Kiboti Company Ltd v County Government of Kirinyaga (Civil Appeal 165 of 2020) [2026] KECA 784 (KLR) (24 April 2026) (Judgment)

Neutral citation: [2026] KECA 784 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 165 OF 2020

K M'INOTI, S OLE KANTAI & A ALI-ARONI, JJA

APRIL 24, 2026

BETWEEN

MUTIGE KIBOTI COMPANY LTD ..... APPELLANT

AND

COUNTY GOVERNMENT OF KIRINYAGA ..... RESPONDENT

(Appeal from the judgment and decree of the Land and Environment Court at Kerugoya (Cherono, J.) dated 22nd May 2020 in ELCC No. 157 of 2015)

JUDGMENT

1. This appeal arises from the judgment of the Environment and Land Court (ELC) at Kerugoya (Cherono, J.), dated 22nd May 2020, in which the ELC dismissed a suit by the appellant, Mutige Kiboti & Co. Ltd. against the respondent, County Government of Kirinyaga, over the ownership of the properties known as Kibare/Mikarara/136/126 and Kibare/Mikarara/136/128 (the suit properties). By the same judgment, the ELC allowed the respondent's counterclaim, revoked the registration of one of the suit properties (Kibare/Mikarara/136/128) in the appellant's name and ordered rectification of the register to reflect the respondent as the registered owner of the same.

2. The brief background to the appeal is as follows. On 7th December 2006, the appellant filed a suit against the respondent's predecessor, the Municipal Council of Kerugoya/Kutus, claiming ownership of the suit properties. The plaint was amended on 18th December 2014 to replace the respondent's predecessor with the respondent. For convenience, we shall refer to both the respondent and its predecessor as "the respondent".

3. The appellant pleaded that it was registered as the owner and took possession of the suit properties on 6th March 1997. In or about 1988, the respondent requested the appellant for permission to use Kibare/Mikarara/136/128 as a yard for sale of cattle and goats. The appellant acceded to the request

on condition that the respondent would waive the land rates payable for the property for the period it was in use by the respondent, and that the respondent would vacate the property on demand.

4. It was the appellant's further pleading that on 19th October 2000, it gave the respondent notice to vacate the said property, but the respondent requested more time, which the appellant granted. However, on 14th August 2003, the appellant submitted to the respondent development plans for the property, but the respondent declined to approve them. On 16th June 2006, the appellant gave the respondent 14 days' notice to vacate, but the respondent declined to do so and instead demolished a fence that the appellant attempted to erect around the property.

5. By way of reliefs, the appellant prayed for an order of eviction of the respondent from the property, mesne profits from 1st January 1988 and general damages for trespass.

6. On 7th January 2007, the respondent filed a defence and counterclaim. It denied the appellants averments and pleaded that the property was public property reserved for and used as a livestock ring market for Kutus town. It further pleaded that it had never surrendered possession of the property to the appellant and had not authorised or allowed allocation thereof to the appellant or any other person.

7. By way of counterclaim, the respondent pleaded that the allocation and registration of the property in the name of the appellant were irregular. The particulars of the illegal and irregular allocation were pleaded to include that the allocation was not initiated by the respondent which was the owner of the property; that the allocation was done by the Commissioner of Lands without the respondent's consent or consultation; that the respondent had not allowed alienation of the property which was reserved for a livestock ring market; and that the property was found by the Commission of Inquiry into Illegal/Irregular Allocation of Public Land (The Ndung'u Report) to have been illegally alienated.

8. By way of reliefs in the counterclaim, the respondent prayed for revocation of the appellant's registration and rectification of the register to reflect the respondent as the owner of the property.

9. The appellant filed its reply to defence and defence to counterclaim on 23rd January 2007, which it amended on 7th December 2007. In all, the appellant denied the averments in the counterclaim and reiterated its pleadings in the plaint.

10. On 3rd October 2018, the respondent applied to amend its counterclaim and include Kibare/Mikarara/136/126 together with Kibare/Mikarara/136/128 as having been unlawfully and illegally acquired by the appellant, revocation of the registration in the appellant's name and rectification of the register to revert registration of the two properties in the name the respondent. That application was duly granted by the ELC.

11. The suit was heard by Cherono, J. with the appellant and the respondent calling one witness each. The ELC framed five issues for determination, namely,

    i. whether the suit properties were lawfully and regularly allocated to the appellant;

    ii. whether the respondent should be evicted from the suit properties;

    iii. whether the appellant was entitled to mesne profits and general damages;

    iv. whether the appellant's title to the suit properties should be revoked and the register rectified; and

    v. who should bear the costs of the suit

12. By the impugned judgment, the ELC held, as regards the first issue, that the appellant did not lawfully and regularly acquire the properties. On the second and third issues, the ELC found that the appellant had not adduced evidence to justify the eviction of the respondent or award of mesne profits and general damages. On the fourth and fifth issues, the ELC issued an order for revocation of the appellant's title and rectification of the register and awarded costs to the respondent. In the judgment, the ELC appears to have restricted its orders to LR No. Kibare/Mikarara/136/128, even though it had allowed an amendment to include Kibare/Mikarara/136/126 in the respondent's counter- claim. That omission is the subject of the respondent's cross- appeal.

13. The appellant was aggrieved and lodged this appeal founded on eight grounds in which it is contended that the ELC erred by holding that the appellant had failed to call the parties who sold the properties to it, yet the appellant produced the relevant consents, transfers and certificates; by failing to hold that the persons who issued the certificates of title were not parties to the suit; by ignoring evidence of meetings and correspondence between the it and the respondent over the suit properties; by holding that the suit properties were in a riparian section, yet they were being used for sale of livestock; by ignoring the appellant's explanation for failure to occupy the suit properties; by relying on the Ndung'u Report without independently interrogating the facts; by ignoring the appellant's authorities and by rendering a judgment against the weight of evidence.

14. On its part, the respondent filed a notice of cross appeal dated 9th November 2023 in which it urged this Court to vary the judgment of the ELC so as to include cancelation of the appellant's title to LR No. Kibare/Mikarara/136/126 and consequential rectification of the register.

15. Mr. Kagio, learned counsel for the appellant, relied on written submissions dated 13th February 2024 and submitted that the appellant purchased the suit properties from the original allottees in the late 1980 and that the respondent confirmed the said allottees as the owners. It was contended that the appellant was a bona fide purchaser for value without notice. The appellant relied on the Black's Law Dictionary and Lawrence Mukiri v. Attorney General & 4 Others [2013] eKLR, on the attributes of a bona fide purchaser. It was also contended that only officials of the respondent and the Commissioner of Lands could have explained how the original allottees were allotted the properties and therefore the ELC erred by shifting the burden of proof to the appellant. The appellant relied on Philemon L. Wambia v. Gaitano Lusitsa Mukofu & 2 Others [2019] eKLR, and submitted that the court had the duty to uphold the sanctity of the records of the lands office, which showed that the properties were registered in the name of the appellant.

16. The appellant further submitted that its leases were duly signed by the Commissioner of Land and that the court erred by nullifying its registration without indicating who ought to have signed the leases. It was also contended that the appellant corresponded and dealt with the respondent in its capacity as the owner of the properties and that the respondent never questioned the appellant's ownership and title.

17. It was the appellant's further submission that, having requested the appellant to use the suit property as a livestock market and having agreed to waive the rates, the respondent had acknowledged that the properties were owned by the appellant. It was also contended that subsequently, the respondent listed the appellant among the rate defaulters, further confirming the appellant's ownership of the properties. In the appellant's view, all the foregoing constituted acknowledgement by the respondent that the appellant was the owner of the properties, and the ELC ignored that evidence.

18. Next, the appellant submitted that the ELC erred by holding that the properties were in a riparian section, while there was no report from a Water Resources Inspector having determined that the properties are riparian land as required by the Water Resources Management Rules, 2006. It was

contended that the ELC made findings without any evidence and that if the properties were indeed riparian land, it begged the question how the respondent was using them as a livestock market.

19. The appellant also submitted that the ELC erred by failing to find that the appellant had explained why it was unable to occupy the properties, which was attributable to the use of the same by the respondent as a livestock market. It was further contended that after the appellant gave the respondent notice on 16th July 2004 to vacate the properties, the respondent thereafter became a trespasser thereon, and the appellant was entitled to an order of eviction and damages.

20. Turning to the Ndung'u Report, the appellant submitted that no evidence was adduced in court to show that the appellant was summoned and heard by the Ndung'u Commission of Inquiry, or that it was afforded the right to a fair hearing under Article 50 of *the Constitution*. It was also contended that the Report lacked any force of law.

21. As regards the authorities it relied upon in the ELC, the appellant submitted that the ELC ignored relevant decisions. It cited the decision of this Court in Denis Noel Mukhulo Ochwada & Another v. Elizebeth Murungari Njoroge & Another [2018] eKLR and contended that despite irregularities in the acquisition of title, an innocent purchaser for value without notice is protected. Also relied on was the decision of the ELC in Mike Maina Kamau v. Attorney General [2017] eKLR for the proposition that in the absence of proof of fraud on its part, the appellant was entitled to protection as absolute owner of the properties.

22. Lastly, the appellant submitted that it adduced sufficient evidence to show that it was the validly registered owner of the suit properties and that the ELC erred by ignoring that evidence. For the foregoing reasons, the appellant urged the Court to allow the appeal and set aside the judgment of the ELC.

23. The appellant did not address the respondent's cross-appeal.

24. The respondent, represented by Mr. Muchira, learned counsel, opposed the appeal vide submissions dated 16th September 2025. Counsel submitted that the onus was on the appellant to call the alleged allottees of the suit properties from whom the appellant claimed to have bought the properties, to testify on how they were allotted land which was found to have been intended for public purpose. It was contended that the appellant failed to do so and produced no letters of allotment and therefore there was no basis for blaming the ELC.

25. It was further submitted that the burden was on the appellant to defend the root of its title, which it failed to do. The respondent cited the decision of the Supreme Court in Dina Management Ltd v. County Government of Mombasa & 5 Others [2023] KESC 30 (KLR), and submitted that when a proprietor's title is under challenge, he or she must prove the legality of the title. The respondent added that from the evidence adduced by its witness, the suit properties were historically used for buying and selling of livestock and were unalienated public land, which the Ndung'u Report confirmed to have been illegally and irregularly acquired by the appellant.

26. The appellant further submitted that the meetings held and the correspondence exchanged between the appellant and the respondent, as well as the demand and payment of rates, could not cure an illegally and irregularly obtained title. It was further contended that the ELC did not err as regards the riparian section because the evidence adduced in the form of approved Development Plan for Kutus town indicated that the suit properties were open spaces next to Thiba River, which were in use as a livestock market.

27. Turning to occupation of the suit properties, the respondent submitted that the appellant had never taken possession of the same. As regards the Ndung'u Report, it was submitted that the ELC only took judicial notice of the inclusion of the suit properties in the report and noted that the appellant had not challenged that inclusion.

28. Lastly, the appellant submitted that the ELC properly considered all the evidence and the relevant authorities and rendered a judgment which in all respects satisfied the requirements of the law. For the above reasons, the appellant urged the Court to dismiss the appeal with costs.

29. We have carefully considered the record of appeal, the judgment of the ELC, the grounds of appeal, the submissions by both parties and the authorities they relied upon. We remind ourselves that this is a first appeal in which the duty of the Court is to reconsider the evidence, assess it and make appropriate independent conclusions, but always bearing in mind that we neither saw nor heard the witnesses as they testified. We shall, therefore, not readily interfere with the findings of fact by the ELC unless we find that they were based on no evidence or on a misapprehension of the evidence or that the ELC acted on wrong principle in reaching its findings. (See Jaban v. Olenja [1986] KLR 661).

30. Although the appeal is founded on an unnecessary surfeit of grounds, we think that this appeal turns on only one central question, namely, whether the ELC erred in holding that the appellant did not prove that it was regularly, validly and lawfully registered as the owner of the suit properties.

31. We start by noting that while Article 40 of *the Constitution* of Kenya, 2010, like section 75 of the former Constitution protects the right to property, a major distinction between the two Constitutions is the fact that the current Constitution, in express terms, denies protection in respect of irregularly or illegally obtained property. Article 40(6) of the present Constitution provides as follows:

> " The rights under this Article do not extend to any property that has been found to have been unlawfully acquired."

32. The background to Article 40(6) of *the Constitution* was explained by this Court in Tom Dola & 2 Others v. Chairman, National Land Commission & 5 Others [2020] eKLR, as follows:

> " Under the former Constitution and land laws, registration of a person as owner of property largely conferred on them absolute and indefeasible title that could not be impeached, save in very few and restricted situations. Those who were registered as owners of land in first registration were completely immunised from scrutiny, even if they had acquired their titles through fraud or express violation of the law. After close to 50 years of application of that law, it became plainly obvious that the land law as it existed had metamorphosed into a sort of Frankenstein monster for fraud and large scale theft of public land, to the detriment of the majority of the people of this Country...the mischief that *the Constitution* wished to address when it expressly provided in Article 40(6) that the right to property does not extend to property that is unlawfully acquired, was the widespread abuse of the existing land laws and the rampant theft of public land christened "land-grabbing".

33. The appellant's claim to the ownership of the suit properties is founded on the fact of its registration as proprietor under the repealed Registered *Land Act*, cap 300; sanctity of title; allotment by the Commissioner of Lands to the persons from whom the appellant purchased the suit properties; consent of the respondent to the transfer of the property to the appellant; the appellant being a bona fide purchaser for value without notice; payment of rates by the appellant; and the respondent's acknowledgement of the appellant as the owner of the suit properties.

34. The evidence on record indicates that at all material times, the suit properties were registered under the repealed Registered *Land Act*, cap 300, in the name of the respondent. The appellant contends that the suit properties were then allotted by the then Commissioner of Lands, Mr. Wilson Gachanja, to three people, namely, Danson Munene, Jane Wanjiru, and Pauline Wanjiru Kabetu, from whom the appellant purchased the suit properties. The evidence also shows that the appellant was registered proprietor of the suit properties on 6th March 1997.

35. It is common ground that neither of the alleged allottees testified in court, nor were the alleged letters of allotment produced in court. The appellant did not produce any agreements for sale between itself and the purported allottees. More intriguing, the appellant could not explain how the Commissioner of Lands could allot land which was already alienated and registered in the name of the respondent, without the respondent's involvement. The appellant neither called the Commissioner of Lands nor any officer from that office to testify on the circumstances under which the Commissioner purported to allot the suit properties belonging to the respondent, particularly in light of the respondent's pleading that the purported allotment was fraudulent and without the respondent's involvement or consent.

36. There is a lot of evidence on record which leaves more questions than answers regarding the legality and validity of the registration of the appellant as proprietor of the suit properties. Although the appellant's evidence indicates that it was registered as owner of the suit properties on 6th March 1997, the appellant pleaded and testified that the respondent approached it for permission to use the suit properties for purposes of a livestock market in 1988, several years before the appellant was registered as the owner. We initially thought the year 1988 was a typographical error, but that doubt dissipated when we took into account that the appellant was seeking mesne profits from the respondent from 1st January 1988. Which begs the question how the appellant owned the suit properties before they were registered in its name.

37. The evidence of Mr. Josphat Mwai Ngonyi, at the time the respondent's Director of Lands, Survey and Geospatial Information Systems, was that the suit properties were reserved and historically used as a public livestock market. He contended that the suit properties constituted open public space which was never alienated, a fact that was supported by the development plan for Kutus market, which he produced in evidence. Even the appellant does not dispute that the suit properties, or at least part of them, was in use as a public livestock market.

38. The other aspect of the case that raises great concern is that the two suit properties, namely Kibare/Mikarara/136/126 and Kibare/Mikarara/136/128 were alleged by the appellant to be subdivisions of Kibare/Mikarara/136. Yet, a search conducted 21st September 2015, some 18 years after the appellant's registration as proprietor of the suit properties, and produced in evidence in court, showed that Kibare/Mikarara/136 was still intact and registered in the name of the respondent. If that original title was lawfully subdivided into the two suit properties and title to the two registered in the name of the appellant, the original title would not have continued to exist and to be reflected in the records. The appellant was obliged to explain this anomaly, but did not do so.

39. It is in light of these fundamental questions that it is not surprising that the Ndung'u Commission of Inquiry found that the suit properties were irregularly alienated and recommended revocation of their titles in favour of the appellant.

40. In Torino Enterprises Ltd v. Attorney General [2023] KESC 79 (KLR), the Supreme Court addressed the ability of an allottee of land to sell and pass a good title, in the following terms:

> "It is settled law that an allotment letter is incapable of conferring interest in land, being nothing more than an offer, awaiting the fulfilment of conditions stipulated therein...Suffice

it to say that an Allottee, in whose name the allotment letter is issued, must perfect the same by fulfilling the conditions therein. These conditions include but are not limited to, the payment of a stand premium and ground rent within prescribed timelines. But even after the perfection of an allotment letter through the fulfilment of the conditions stipulated therein, an allottee cannot pass valid title to a third party unless and until he acquires title to the land through registration under the applicable law. It is the act of registration that confers a transferable title to the registered proprietor, and not the possession of an allotment letter." Emphasis added.

41. We agree with the respondent that it was not enough for the appellant, in this day and age, to cite registration alone and sanctity of title, particularly when there were prima facie fundamental questions casting doubt on the legality of its title to the suit property. In Dina Management Ltd v. County Government of Mombasa & 5 Others (supra), the Supreme Court upheld the decision of this Court in Munyu Maina v. Hiram Gathiha Maina [2013] eKLR and reiterated that:

> "...where the registered proprietor's root title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register."

42. And in Mbarak v. Freedom Ltd [2024] KECA 760 (KLR), this Court held as follows:

> "It must be borne in mind, though, that the right to immovable property is not entirely dependent on formal registration and issuance of a certificate of title thereto, particularly where the process is shown to have been tainted with irregularity."

43. Yet again in Kemboi v. Macharia & 2 Others [2025] KECA 1665 (KLR), the Court reiterated as follows:

> "The principle is now firmly settled: a certificate of title cannot cure an unlawful allocation process. A title is merely the end-product of a process, and where that process is tainted, whether through procedural irregularity, fraud, or illegality, then the resultant title is void. No right can flow from nothing. A nullity at inception remains a nullity, no matter how many hands it passes through. In our humble view, the suit property was not available for allocation and alienation to Chomba, therefore the subsequent transfer was equivalent to putting nothing over nothing."

44. In the present case, appellant utterly failed to discharge the onus on it to demonstrate the validity of its title to the suit properties, once those titles were called into question. It could not rely on the fact of registration or sanctity of title alone to prove legality of the title.

45. On the appellant's assertion that it was a bona fide purchaser for value without notice, the position is well established that where property is demonstrated to have been illegally acquired as provided in Article 40(6) of *the Constitution*, the purchaser of such property is not availed by the doctrine of a bona fide purchaser. To quote the Supreme Court again in Dina Management Ltd v. County Government of Mombasa & 5 Others (supra):

> "Article 40 of *the Constitution* entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired. Having found that the

1st registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under Article 40 of *the Constitution*. The root of the title having been (successfully) challenged, as we already noted above the appellant could not benefit from the doctrine of bona fide purchaser ."

46. More recently, in Igainya Ltd & 2 Others v. Godfrey Karuri Githae & 5 Others [2026] KECA 252 (KLR) this Court reiterated the position as follows:

> " We, just like the learned Judge, have to arrive at one inevitable finding: the title to which the appellants lay claim cannot withstand scrutiny as regards its roots. It cannot be said to have been a good title. In our view, the doctrine of bona fide purchaser cannot cure an illegality at inception, particularly in cases involving public land.
>
> Indefeasibility of title is not absolute, and Article 40 of *the Constitution* does not extend protection to unlawfully acquired property. A purchaser who relies solely on the register, without interrogating the legality of the process leading to registration, does so at his/her own peril." (Emphasis added).

47. Turning to the cross-appeal, we agree with the respondent that the ELC amended the counterclaim to include Kibare/Mikarara/136/126 in respect of which the respondent also prayed for revocation of the appellant's title and rectification of the register to revert that property back to the respondent. The evidence adduced by the parties addressed the process of acquisition of the two suit properties by the appellant, which the Court found to have been unlawful and irregular. It is plainly obvious to us that the ELC omitted to address both suit properties and instead focused on Kibare/Mikarara/136/128, which was originally and before the amendment of the counterclaim, the only subject of the suit and the counterclaim. The court ought to have made orders in respect of both the suit properties rather than only one.

48. Taking into account all the foregoing, we find no merit in the appellant's appeal, which is hereby dismissed with costs to the respondent. As regards the cross appeal, the same is hereby allowed to the extent that the decree of the ELC is hereby varied to include both suit properties, namely, Kibare/Mikarara/136/126 and Kibare/Mikarara/136/128 . The respondent will have the costs of the cross-appeal as well. It is so ordered.

DATED AND DELIVERED AT NYERI THIS 24 TH DAY OF APRIL, 2026.

K. M'INOTI

.... JUDGE OF APPEAL

S. ole KANTAI

..... JUDGE OF APPEAL

A. ALI-ARONI

....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR