

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA

ELC APPEAL CASE NO. E017 OF 2023

PETER KANIA MACHARIAAPPELLANT.

V E R S U S

MARGARET WANJIRU KARIUKIFIRST RESPONDENT.

PETER NJOROGE.....SECOND RESPONDENT.

(Being an Appeal from the judgment of the Hon Senior Resident Magistrate's Court at Nyahururu (Hon S N Mwangi) dated the 16th Day of September 2022 in Nyahururu MC ELC No. 306 of 2018).

J U D G M E N T:

The Appellant herein Peter Kania Macharia was the Plaintiff in the Chief Magistrate's Court in Nyahururu CMCC No. ELC Case No. 306 of 2018 vide a plaint dated 28/3/2011 which started as Nakuru High Court Civil Suit No. 65 of 2011.

Margaret Wanjiru Kariuki and Peter Njoroge were the respective Defendants. The Appellant sued both Respondents for the following orders.

- a) ***A permanent injunction restraining the defendants, their servants and/or agents in any manner however form trespassing, alienating, selling, wasting, leasing, disposing of, subdividing, damaging, constructing and/or***

erecting any structures on Nyandarua/Karati/2457 measuring eight (8) acres adjacent thereto being part of Karati Settlement Scheme No. 489 before submission.

- b) **A declaration that the plaintiff is the sole rightful and beneficial owner of the suit premises being No. Nyandarua/Karati/2457 measuring 8 acres and then 3 acres adjacent thereto being plot of Karati Settlement Scheme No. 485 before Subdivision.**
- c) **Costs of this suit.**
- d) **Interest on (d) (sic) above.**
- e) **Any other relief that this court may deem fit to grant.**

As the basis of the case, the Appellant averred that he was the registered owner of that parcel of Land Known as Nyandarua/ Karati/2457 being part of Karati Settlement Scheme No. 489 before sub-division having purchased the same from one Mundia Njoroge and Muruga Njoroge both of whom had passed away before the filing of the suit. He also said that he had been in open, exclusive, peaceful and uninterrupted possession and occupation of the said land parcels of land since 1978 (which is over 30 years). He further averred that in March 2011 the Respondents, without any colour of right threatened to unlawfully and illegally enter and forcibly cultivate the Appellant's Parcel of land and that the Respondents had proceeded to the Area Chief who "**ordered**" that the land be

re-surveyed and that 3 acres be excised from the Appellant's land and be given to the Respondents which said "**order**" was illegal and unlawful and has no basis or foundation in law and was purely meant to harass the Appellant which action denied the Appellant his right over the suit property and peaceful possession and enjoyment thereof in which he has heavily invested with a borehole and with more than five thousand trees. He said he had been in open, exclusive, peaceful and uninterrupted possession and occupation of the parcels of land since 1978 (over 30 years).

Both Respondents filed a Defence dated 10/5/2011 which was later amended vide amended Defence and counter-claim. Amended on 10/5/2011. The amended statement of Defence and Counter-claim was filed in court on 22/3/2013 after being allowed by the court through a Ruling dated 8/2/2013. In the amended Defence, the Respondents pleaded that it was not true that the Appellant was the registered owner of NYANDARUA/ KARATI/ 2457 and if so, such registration was affected through fraud committed by the Appellant in collusion with one Mundia Njoroge Mbote alias Kenneth Mundia Njoroge (now Deceased) making the said registration illegal, null and void *ab initio*. And one of the particulars of fraud by the Appellant was that the latter knew that the land Nyandarua/Karati/ 489 was registered in the name of Mundia Njoroge Mbote in trust for himself and his brothers, Peter Kariuki Njoroge and Muruga Njoroge in equal shares which purported sale agreement he knew very well and/or would be reasonably expected to know that Mundia Njoroge Mbote had

incapacity to sub-divide and sell NYANDARUA/KARATI/2457 which was a sub-division of the original L.R. No. NYANDARUA/KARATI/489 and that L.R. No. NYANDARUA / KARATI/2457 constituted part of the bequest 1/3 share of Peter Kariuki Njoroge out of Nyandarua/Karati/489 without the authority and/or consent of the said Peter Kariuki Njoroge who was now deceased. Finally, the other particular of fraud was that the Appellant failed to obtain consent from the Land Control Board before the transfer.

The Respondents also denied that the Appellant had been in the land in open, continuous possession at any given time or at all. On the contrary, it is the Respondents who had been on L.R. No. NYANDARUA/KARATI/2457 together with other parcels of land formerly NYANDARUA/KARATI/489 all along and the two (2) had buried the late Peter Kariuki Njoroge, 1st Respondent's husband and 2nd Respondent's father thereon and that therefore, they cannot be said to trespass upon land that lawfully belongs to them.

They admitted the jurisdiction of the High Court, Nakuru to try the matter.

In the counter-claim, the Respondents averred that the suit parcel of Land was originally plot NO. 163 Karati Settlement Scheme which was duly registered in the name of Njoroge Mbote who was the 1st Respondent's husband after whose death the parcel of land was to be divided equally between the Deceased's 2 households-plot Nos. 163 A and 163B.

This was the edict in the District Magistrate's Court at Tulaga Succession Cause No. 15 of 1968. 163 'A' was to be in the name of Kenneth Mundia Njoroge/Mundia Njoroge Mbote which was given parcel Number 489 measuring 17.5 Acres and the Respondents believed it was to be so registered in the said names to be held in trust of for his (Kenneth Mundia Njoroge's) brothers Muruga Njoroge and Peter Kariuki Njoroge and any sale thereafter by Mundia Njoroge would be unlawful. Peter Kariuki Njoroge is therefore a beneficiary of the parcel of land NYANDARUA/ KARATI /489 together with Murunga Njoroge the said land being a sub-division of NYANDARUA/KARATI/163 which Green Card was opened on 16/6/1981 pursuant to Succession Cause No. 15 of 1968 at Tulaga District Magistrate's Court. The two said that it is the late Peter Kariuki Njoroge who lived on the suit land L.R. No. Nyandarua/Karati/489 till he passed on on 20/5/1996 and not the Appellant.

Also, in occupation thereon was Evanson Muriuki Kariuki, a brother to the 2nd Respondent. The Appellant and Kenneth Mundia Njoroge sub-divided the suit land 489 into 1001 and 1002 and later sub-divided the two parcels further into NYANDARUA / KARATI/2241, 2242 and 2457 the latter then was sold to the Appellant fraudulently without consent of the Land Control Board and unlawfully sub-dividing it without capacity to do so. They said that NYANDARUA/KARATI/2241 was reserved for the late Peter Kariuki Njoroge. They therefore prayed for orders of:

- a) A **declaration that NYANDARUA/KARATI/489 was registered in the name of MUNDIA NJOROGE alias**

KENNETH MUNDIA NJOROGE in trust for MURUGA NJOROGE and PETER KARIUKI NJOROGE in equal share and the estate of PETER KARIUKI NJOROGE (Deceased) is entitled to 1/3 share thereof.

- b) A declaration that the subdivision of NYANDARUA / KARATI/489 without the express authority and consent of all three beneficiaries is illegal, fraudulent, null and void ab initio.**
- c) A declaration that the sub-division and subsequent sale and transfer of NYANDARUA/KARATI/489 into NYANDARUA/KARATI/2457 to the Appellant by the late MUNDIA NJOROGE was fraudulent, illegal, null and void.**
- d) The District Land Registrar Nyahururu be ordered to cancel the subdivision of L. R No. NYANDARUA/ KARATI/ 489 into NYANDARUA/ KARATI/ 1001,100, 2241,2242, 2456 and 2457 and rectify the register of title reverting the same to Nyandarua/Karati/489 in the names of Mundia Njoroge Mbote a.k.a KENETH MUNDIA NJOROGE to hold in trust for the beneficiaries of the Estate of the late Njoroge Mbote.**
- e) Any other or further orders this Court may deem fit to grant to finally determine these matters.**

The Appellant in his Reply to Defence and Defence to Counter - Claim repeated the averments in the Plaint and denied the contents of the Counter-claim. He also reiterated that he has been in actual physical possession and occupation of the suit

land since 1978 for over 30 years without any interference from third parties and more specifically the Respondents until March 2011 when the Respondents forcefully trespassed onto the land and started cultivating the same and that the sub-division of parcel No. NYANDARUA/KARATI/489 and transfer to him of NYANDARUA/ KARATI/ 2457 was not based on fraud and this allegation was baseless, unfounded and unsubstantiated. There was no connivance nor collusion between him and the Deceased Vendors to procure the registration of the said Titles and that if there were any fraudulent acts by the vendors, he had no knowledge of the same nor was he a party to the same and such allegations ought to be addressed to the legal representatives of the Deceased Vendors.

Finally, he concluded that the Counter-Claim by the Respondents was fatally defective and an abuse of the Court process and that the same should be struck out with costs and Judgment entered for the Appellant as prayed for in the Plaint.

Before the case was heard, the same was transferred to Nyahururu Environment and Land Court for disposal vide the Order of Mr. Justice Munyao Sila (as he then was) on 25/1/2017 and was given serial No. 13 of 2017. And on 12/6/2018 the matter was transferred to Nyahururu Chief Magistrate's Court for Hearing and given serial No. 306 of 2018.

PW 1 Peter Kania Macharia, the Appellant testified and said that he is a farmer in Nyandarua where he grows cabbages, carrots, and peas and also rears cattle and goats. He adopted his statement dated 28/3/2011 which was filed in Court on

29/3/2011. In the said statement Mr. Macharia said that in 1978 he purchased eight (8) Acres from Mr. Mundia Njoroge and Muruga Njoroge the parcel of land known as NYANDARUA/KARATI/ 2457 and 3 Acres and eight (8) Acres were transferred to himself and he obtained a Title Deed to the same in 1997. He did enter into a further agreement with Mundia Njoroge which meant that after paying the purchase price he still had a balance of 3 Acres which would be transferred to him. Since the date of the purchase, he has been occupying the land, cultivating it and has planted approximately 5,000 trees and he also has several animals on the said land. But in March 2011, armed with a sword, the 1st Respondent's son, who is also the 2nd Respondent unlawfully entered into the land and forcefully wanted to plough the land but was repulsed by neighbours. The Chief directed the land to be resurveyed. Of course, this was without authority or power. The Respondents have for all this time been the Appellants' neighbours. But the 2 only revived this issue after the demise in 1996 and 2010 respectively of the two aforesaid Vendors. He then produced the following documents to buff up his case:

- 1. Copy of Title Deed in respect of NYANDARUA/KARATI/ 2457 showing the land to be 3.24 Hectares issued to the Plaintiff, Holder of Identity card no. 1238211 on 6/3/1997.***
- 2. Copy of sale agreement in Kikuyu language.***
- 3. Copy of Search Certificate as at 11/2/2022 showing the Plaintiff to be the owner of the suit land.***

He further said that the 1st Respondent entered into the land, destroyed his fence and started cultivating the lower side of the land and also started grazing her animals thereon. He said he bought 11 acres for which he did due diligence and was sure that the land belonged to the two Vendors. Peter Njoroge was not a party to the said Agreement. He also added that they attended a Land Control Board for consent which they did obtain. But he did not get the Title Deed for the 3 Acres because Mundia was involved in a road traffic accident and died before the transfer.

He said he has constructed a house on the land and planted eucalyptus, cedar and pine trees on 4 Acres thereon. The whole land is fenced. He too said the Respondents' land is separated from his by a river. Peter Njoroge was not buried on the suit land. And they are not immediate neighbours. He said he was not aware of the alleged trust.

On cross examination by Mr. Gichuki for the Respondents, Mr. Macharia said that he went to the Respondents, Mr. Macharia said that he went to the Land Control Board for the 8 Acres first and later for the remaining 3 Acres the latter being in the name of Mundia Njoroge but he died and his family has not taken out letters of administration in respect to his Estate which he is eagerly waiting for so that he can have the 3 Acre land transferred to him. He also said that he knew Peter Kariuki was a brother to the two Vendors and that each of the brothers had his own parcel of land. The sale agreement is dated 22/9/1999 by which time he had paid the entire purchase price. Part of which was paid when Mundia was sick in hospital after the

accident which money was used to pay his medical bill. He said that a brother to the 2nd Respondent by the name Evanson was charged with destroying the trees. He also said that he was cultivating on part of the 3 Acres which has no Title Deed, and the other portion he set aside for grazing. And that the Respondents entered the land after he harvested his crop. He further testified that there was Nairobi High Court Civil Case No. 1304 of 1996 to determine where Peter Kariuki Njoroge was to be buried and it was decided he be buried on his own (Kariuki's) land. He said he was buying 14 Acres but by the time the Vendor, Mundia died, he had only paid for 11 Acres and that is all he is asking for. He further said that the 2nd Respondent is a nephew to the late Mundia.

On Cross examination Mr. Macharia said he had already paid Mr. Mundia 220,000/= which was 50,000/= per Acre and that Peter Kariuki Njoroge is not buried on the 11 Acres he is demanding. He said when he conducted the search of the land, it was nowhere indicated that the late Mundia was holding it in trust and that Mundia's two other brothers were present when the sale was taking place.

PW 2, Geoffrey Wanjohi adopted his statement made on 16/3/2011 as his evidence in Chief. He said he knew the Plaintiff since 1978 when he moved into his neighborhood. He said he also knew the Respondents. He said that he knew the Appellant has all along lived on the suit land peacefully and that this issue arose only the other day. He said that he knew Mr. Macharia had dug a well, built a house and planted trees on the suit land. He also knew Pete Kariuki Njoroge who was

buried on a different parcel of land which he had been given by his brother. There is a Mr. Kania whose land is between that of the Appellants and that of the Respondents.

On cross examination by Mr. Gichuki for the Respondents, this witness said the Appellant had bought another land to which he did not have a Title Deed but that the tussle in this case was over the land on the side of the land near the river. He said he also knew that Kania also herds cattle on the suit land. And that he had not heard that the Respondents had cases with other neighbours who had also bought land from Mundia.

On re-examination Mr. Wanjohi said that the Appellant had fenced the whole of his land using barbed wire.

Peter Njoroge Kariuki, the 2nd Respondent was the first to testify on behalf of the Respondents. He said he knew the Appellant and that he came to know him when he was 10 years old. He said the suit land belonged to his late father and that he was present when the land was being sold to the Appellant by his uncle Kenneth Mundia Njoroge. His grandfather Njoroge Mbote had 90 Acres. He had 2 wives, Joyce Wamaitha and Wangari Wambui. Each house got 45 Acres out of plot No. 163. Kenneth Mundia was given the land belonging to the first house - 163 A. Wambui got 163 B. Mundia's land was then allotted No. NYANDARUA/KARATI/489-45 Acres to be registered in the name of Kenneth Mundia Njoroge, the eldest son in trust for James Mwangi Njoroge and Peter Kariuki Njoroge and each was to get 15 Acres. He said he was born in 1974 and therefore was not yet born in 1968. He said that his siblings grew up on plot No.

489 registered in the name of Kenneth Mundia Njoroge. Murunga and Mundia died on 2/12/2009 and in February 1999 respectively. His father died first on 20/5/ 1996. Before he died, Mundia had sold a total of 28 Acres. 17 Acres to Josiah Kimemia and 11 to the Appellant.

The court ordered that his father be buried on NYANDARUA / KARATI/2241, 17 Acres. He said they had not gone to Land No. 2457. And that the Appellant blocked them from going to the river. He said that the Appellant only grazes on the land he had a Title for and not on the 3 Acres. He as well admitted that he and his siblings and mother have never taken out the Letters of Administration in respect to the late Mundia because they were waiting for their cousin to do so where they want to claim 15 Acres- the entitlement of their father out of plot No. 489. He said he knew that the Appellant had bought 6 Acres and another 6 Acres but the agreement did not show he had completed payment of the land at pages 37 of the proceedings. He produced his father's death certificate showing that the latter died on 20/3/51996 while the land was sold on 13/9/1999. He said they could not sue the other buyer, Kiuna because although he was on the land, he did not have a Title Deed for the portion of land he occupies. He said in the Counter-claim they are interested in NYANDARUA/KARATI/2241 and not 2457. He then produced the following documents:

1. Copy of application for Certificate of Succession dated 9th June, 1978.
2. Copy of Notice of Motion application dated 5th January, 1977 together with the supporting affidavit

in Succession case No. 15 of 1968 in the District Magistrate's Court at Tulaga.

3. Copy of the Order in Succession Case No. 15 of 1968 dated 12th April 1978.
4. Copy of Certificate of death Peter Kariuki Njoroge.
5. Copy of order in High Court Civil Suit No. 1304 of 1996 issued on 14th June, 1996.
6. Copy of Green Card to parcel number Nyandarua/Karati/163 opened on 28th November, 1973.
7. Copy of Green Card to Parcel number Nyandarua/Karati/489 opened on 16th June 1981.
8. Copy of Green Card to Parcel number Nyandarua/Karati/1001 opened on 15th October, 1987.
9. Copy of Green Card to Parcel number Nyandarua/Karati/1002 opened on 15th October, 1987
10. Copy of Green Card to Parcel number Nyandarua/Karati/2241 opened on 15th October, 1987
11. Copy of Green Card to Parcel number Nyandarua/Karati/2242 opened on 25th August , 1995.
12. Copy of Green Card to Parcel number Nyandarua/Karati/2457 opened on 17th December, 1996.
13. Copy of Green Card to Parcel number Nyandarua/Karati/2456 opened on 15th October, 1996

14. Copy of Green Card to Parcel number Nyandarua / Karati/2455 opened on 17th December, 1996.

15. Copy of letter from Njora Waweru & Associates dated 31st March, 2011.

16. Copy of letter from Wachira Mburu Mwangi & Company Advocates dated 3rd February, 2012.

17. Copy of Limited Grant ad litem issued on 30th May, 2011 in P&A Cause No. 880 of 2011.

The 2nd Respondent testified that Mundia did not have powers to sell the land without the family authority as a co-heir and that the Appellant should have filed a Succession Cause in respect to Mundia's Estate before coming to Court so that he can get his land.

In cross examination by Mr. Njagi for the Appellant, Kariuki said he was born in 1974 and that his grandfather's probate filed in 1968 before he was born but that he had gone through all the pleadings wherefrom he had got the information. He said that they resided on land parcel No. 489 and referred to the Title Deed. He said that the Court order never indicated that the late Mundia was holding the land in trust for himself and his 2 brothers. He said that his father was alive when all these parcels of land were sold yet his father never raised any objection. He also did not go to Court when the other two, Josiah Munyua Kimemia and Peter Muhura Njoroge bought their land. He said that he and his mother, the 1st Respondent reside on NYANDARUA/KARATI/2241.

On cross examination Mr. Kariuki said that land No. 2241 was sub-divided into 2455 and 2456 whose owners he does not know. He only knew that of the Appellant - 2457. He also said he does not know when 2241 was sub-divided but that NYANDARUA/ KARATI/2457's Title was issued on 17/12/1996. After his father's death. The Court said 2241 was the only remaining land and therefore his father should be buried there (page 40 of the proceedings). He finally said they had nothing against the Appellant but that it is not shown when he paid the Kshs.100,000/= he was to pay in December 1991 and to who.

DW 2, Evanson Muriuki Kariuki, a son to the 1st Respondent and brother to the 2nd Respondent took to the witness box and adopted his undated statement but which was filed in court on 4/4/2012 as his evidence in Chief. In the statement, Muriuki said that his grandfather died on 28/8/1967 and following his death, Kenneth Mundia Njoroge and John Njuguna Njoroge were appointed as the administrators of his Estate on 12/4/1978 in Secession Cause No. 15 of 1968. The suit land was initially Plot No. 163 Karati Settlement Scheme. There was a Green Card indicating the Administrators as having succeeded the Deceased. NYANDARUA/KARATI/489 measured approximately 17.5 Hectares. The Green Card shows this parcel was registered on 16/6/1981. The land was to be held by the Administrator in trust for himself and his 2 brothers viz.

- (a) Muruga Njoroge, and
- (b) Peter Kariuki Njoroge.

Mundia sub-divided the same into NYANDARUA/KARATI/1001 AND 1002 without the consent of other beneficiaries and sold the two to Peter Muhura Njoroge and Josiah Munyua Kimemia respectively. The farm was further subdivided into 2241 and 2242 and the Appellant bought the latter - 2242 and parcel No. 2241 was also further sub-divided into NYANDARUA/KARATI/2455, 2456 and 2457. He said their land which is registered in the name of Kennedy Mundia Njoroge does not border the Appellant's land. On the issue of how their grandfather's land was shared he repeated the evidence of his brother, DW 1. He said his father was to be given land by Mundia Njoroge Mbote but this never happened. He said they have never got their father's inheritance which they are claiming from Kenneth Muriuki Njoroge who he said was now Deceased.

On cross-examination by Mr. Kania for the Appellant, the witness said at the time of testifying he was only 39 years old and that when his grandfather died on 28/8/1967, he had not been born. It was Mundia who sub-divided the land. They have never sued Josiah Kimemia. Peter Muhura Njoroge died the same week the witness was testifying in court and was buried on 2242-10 Acres and that the Respondents' family never challenged this. He said that the Court had decreed that out of the suit land, the Respondents get 16 Acres. He said that they occupied Plot Nos. 2455 and 2456 where they have built, cultivated and also reared cows. There is no one between their land and where Kania occupies. He later changed and said there was one Peter Kariuki. He said the land sold to the

Appellant was so sold fraudulently because Mundia did not have authority to sell the land alone.

On re-examination Mr. Muriuki said that Mundia sold 17 Acres alleging that he was selling his own share. He said the Appellant should sue the family of Mundia Njoroge for him to be issued with a Title Deed. He said that for them to get their land they need to sue Mundia's children and wife. He said that plot No. 2455 is 5 ½ Acres. It was from 2241. No. 2456 in the name of Mundia is 2 ¼ Acres and the same was from 2241. Plot No. 2457 measuring 8 Acres was also excised from 2241. The remaining land is therefore 8 ¾ Acres.

This hearing was followed with a Judgment dated 16/9/2022 by the Honourable S. Mwangi Senior Resident Magistrate to the effect that the Appellant's case was entirely dismissed with costs to the Respondents and who further found and held that the Respondents did prove their case on a balance of probabilities and upheld the Counter claim in the following terms:

- a. A declaration be and is hereby made that NYANDARUA/KARATI/489 was registered in the names of Mundia Njoroge alias Kenneth Mundia Njoroge to hold the same in trust for Mundia Njoroge and Peter Kariuki Njoroge (deceased) is entitled to one third share thereof.
- b. A declaration be and is hereby made that the subdivision of NYANDARUA/KARATI/489 without the

express authority and consent of all three beneficiaries was illegal, fraudulent, null and void ab initio.

- c. A declaration be and is hereby made that the subdivision and subsequent sale and transfer of NYANDARUA/ KARATI/2457 to the Plaintiff by the late Mundia Njoroge was fraudulent, illegal, null and void.
- d. The Land Registrar Nyandarua/Samburu be and is hereby ordered to immediately cancel the subdivision of L.R No. NYANDARUA/KARATI/489 into NYANDARUA/KARATI/ 1001,1002,2241,2242,2455,2456 and 2457 and rectify the register of Title reverting the same to NYANDARUA/KARATI/489 in the names of Mundia Njoroge Mbote alias Kenneth Mundi Njoroge to hold in trust for the beneficiaries of the Estate of the late Njoroge Mbote, being Mundia Njoroge Mbote alias Kenneth Mundia Njoroge, Muriuga Njoroge and Peter Kariuki Njoroge.
- e. The Plaintiff is condemned to pay costs for the main suit which I have dismissed and also costs in the counterclaim as costs do follow the event.
- f. The Defendants are also entitled to interests herein.

The reasoning of the Court was that the suit Land was rooted in the original Title Deed No. 163 in Karati Settlement Scheme owned by the Defendant's family, Patriarch Njoroge Mbote. In Succession Cause No. 15 of 1968 the land was to be shared between the 2 houses, 163 A and 163B for Wamaitha and Wambui. The learned Magistrate observed that plot No.163 was to be sub-divided between NYANDARUA/KARATI/489 and

490. She said this is what was tendered by the Respondents. Nowhere is this shown in evidence. She further held that there was nothing to negate the possibility that the Deceased Mundia Njoroge was holding the mother land No. NYANDARUA/KARATI/489 under customary trust.

The Court said that the Appellant did not produce the Application for consent. Any evidence of consent for sub-division and transfer or transfer forms they executed. The court held that the Appellant colluded with the Deceased Mundia Njoroge to have the land transferred in his name. All sub-divisions from NYANDARUA/ KARATI/489 were done fraudulently by Mundia Njoroge in collusion with the other purchasers he sold to and as a result the Court cancelled all the entries therein and also the resultant sub-divisions from the mother Title No. 489 "forthright". The Respondent proved their case on a balance of probabilities and so the Counter-claim was upheld.

The Appellant appealed against the said Judgment on the following grounds:

1. The learned trial magistrate erred in law and in fact in failing to give due consideration to the fact that the Respondents have no locus standi to institute and/or defend the suit on behalf of the Estate of Peter Kariuki Njoroge (Deceased) because the said Respondents are not administrators of the said estate and they have not obtained a limited grant ad litem.

2. The learned trial magistrate erred in law and in fact in failing to hold that the Respondents do not have sufficient locus to institute, sustain and/or defend the suit against a third party, the Appellant, on behalf of the Estate of Peter Kariuki Njoroge (Deceased) without the requisite locus standi given that the Respondents are not administrators of the estate of the Deceased and therefore have no authority and/or instructions to represent the said estate.
3. The learned trial magistrate erred in law and in fact by relying on the hearsay evidence of the 2nd Respondent and Evanson Muriuki Kariuki who testified on behalf of their mother, the 1st Respondent, about matters which transpired long before they were born.
4. The learned trial magistrate erred in law and in fact by shifting the burden to disprove existence of a trust to the Appellant whereas the Respondents had not discharged their burden of proof of a trust by Mundia Njoroge Mbote in favour of Muruga Njoroge and Peter Kariuki Njoroge in respect of NYANDARUA/KARATI/489.
5. The learned trial magistrate erred in law and in fact by revoking the sale and/or disposition of NYANDARUA/KARATI/2457 and the 3 Acres adjacent thereto being part of Karati Settlement Scheme No. 489 (the properties), to the Appellant on the basis that the same amounted to a breach of trust whereas Mundia Njoroge Mbote, the Vendor, was the absolute proprietor of the said properties and had sufficient capacity to subdivide, transfer or

otherwise deal with the property in any manner whatsoever.

6. The learned trial magistrate erred in law and in fact by holding contrary to the law that the sale and transfer of the properties to the Appellant was null and void because of a trust whereas the Appellant was a bonafide purchaser for value without notice of any defects in Title.
7. The learned trial magistrate erred in law and in fact by holding contrary to the law that the sale and transfer by the trustee, if any, of NYANDARUA/KARATI/2457 to a third party, the Appellant, was liable to be defeated by claims arising under the impugned trust whereas the trustee had the power and authority to bind the trust and act for and on behalf of the trust.
8. The learned trial magistrate erred in law and in fact by holding that a customary trust by Mundia Njoroge Mbote in favour of Muruga Njoroge and Peter Kariuki Njoroge exists with respect to NYANDARUA/KARATI/489 whereas the claim was not directed to the registered proprietor, Mundia Njoroge Mbote and he was not a party to the proceedings leading to such declaration, contrary to the established precedence that a customary trust can only be successfully raised against the registered proprietor of the land.
9. The learned trial magistrate erred in law and in fact by shifting the burden of proof of a trust to the Appellant contrary to the elementary rules of evidence that he who alleges must prove.

10. The learned trial magistrate erred in law and in fact in holding that the transfer of NYANDARUA/KARATI/2457 to the Appellant was fraudulent whereas no evidence was presented to prove such fraud.
11. The learned trial magistrate erred in law and in fact by inferring fraud from the pleadings of the Respondent contrary to the established rules of evidence that fraud must be strictly pleaded, particularized and proved.
12. The learned trial magistrate erred in law and in fact in holding that fraud had been proved to the required standard whereas no evidence had been tendered in support of the allegations of fraud and regardless of the fact that the standard of proof for fraud is higher than the standard of proof in ordinary civil matters.
13. The learned trial magistrate erred in law and in fact in holding that the Appellant colluded with Mundia Njoroge Mbote to fraudulently purchase the properties whereas the Appellant did not have knowledge and/or notice of the Respondents' claim over the properties, if any.
14. The learned trial magistrate erred in law and in fact in holding that the title of the Appellant with respect to NYANDARUA/KARATI/2457 was impeachable or defeasible despite the apparent absence of fraud and the express and clear intention of Mundia Njoroge Mbote to transfer the properties to the Appellant.
15. The learned trial magistrate erred in law and in fact in failing to give due consideration to the pertinent circumstances of the matter and specifically that the late

Muruga Njoroge and the Late Peter Kariuki Njoroge did not object at any moment in the course of their lives to the occupation, use and possession of the properties by the Appellant.

16. The learned trial magistrate erred in law and in fact in failing to give due consideration to the fact that the Respondents waited until the demise of the three brothers, the late Mundia Njoroge, the late Muruga Njoroge and the late Peter Kariuki Njoroge for them to claim an interest over the properties.
17. The learned trial magistrate erred in law and in fact in failing to give due consideration to the fact that the Respondents' counterclaim was an afterthought and was only filed in response to the Plaintiff's suit against them for trespass.
18. The learned trial magistrate erred in law and in fact in failing to give due consideration to the fact that the counterclaim by the Respondents was barred by the Limitation of Actions Act as it related to transaction that had happened more than 20 years earlier.
19. The learned trial magistrate erred in law and in fact in failing to give due consideration to the fact that the Appellant's use, occupation and possession of the properties from 1978 was quiet, peaceable, open notorious and uninterrupted and without any adverse claims from the Respondents until 2011 when they trespassed on the properties.

20. The learned trial magistrate erred in law and in fact by failing to conduct a site visit which would no doubt have been beneficial to the Court in arriving at its decision.

21. The learned magistrate erred in law and in fact in ordering that the Appellant bears costs of the Suit.

He accordingly sought for the following orders in the Memorandum of Appeal dated 17/5/2023:

1. The appeal be allowed as prayed.

2. The Judgment delivered by Honourable S N Mwangi on 16/9/2022 be set aside.

3. The order for Costs in the Judgment of the Honourable S N Mwangi be set aside.

4. A declaration that the Respondents have no power to substitute, sustain and/or defend suit on behalf of the Estate of Peter Kariuki Njoroge (Deceased)

5. A permanent injunction restraining the Respondents, their servants and/or agents in any manner howsoever from trespassing, alienating, selling, wasting, leasing, disposing of, subdividing, damaging, constructing and/or erecting any structures on Nyandarua/Karati/2457 measuring 8 acres and the 3 acres adjacent thereto being part of Karati Settlement Scheme No. 489 before subdivision.

6. A declaration that the Appellant is the sole rightful and beneficial owner of

Nyandarua/Karati/2457 measuring 8 acres and the 3 acres adjacent thereto being part of Karati Settlement scheme No. 489 before subdivision respectively.

To being with, I will deal with the issue of locus. I agree with the Appellant's counsel that the Respondents did not have locus standi to file a counter-claim on behalf of the Estate of the late Peter Kariuki Njoroge. In paragraph 8 of the counter-claim, the two claim that together with one Evans Muriuki Kariuki they are the administrators *ad litem* of the Estate of Peter Kariuki Njoroge vide cause No. 880 of 2011. It is not indicated which Court the Succession cause No. 880 of 2011 was filed in and obtained from. No such a copy of the Grant was produced in Court save a Certificate of death in respect to Peter Kariuki Njoroge which shows that the late Kariuki died on 20/5/1996. Whereas the two had a right to defend themselves in the suit brought up by the Appellants, they did not have any locus to bring a counter-claim on behalf of the Estate of the late Peter Kariuki Njoroge without probate and therefore their prayers under the counter-claim must fail. Without proof of their being personal representatives of the Estate of the late Peter Kariuki Njoroge, which was very easy to prove, the Respondents had no business bringing the claim on behalf of the Deceased's Estate. Having said as I have, this Appeal succeeds with costs to the Appellant. Although in the submissions the Respondents claim to have produced the *Ad litem* Grant I took time to go through the lower Court file cover to cover but did not succeed to find any.

I am also of the view that should the Respondents have felt that the Appellant never bought the suit land from the late Mundia Njoroge Mbote lawfully and that the transfer was marred with fraud, then Mbote was the one that was guilty of first-degree fraud. They therefore ought to have sued the Estate of Mbote in the Counter-claim. He is the one who received money from the Appellant, he did sell the land and therefore if there was any fraud, he is the one who defrauded them. Additionally, it is the Estate of Mundia which would have claimed that Mundia did not receive the full purchase price and not the Respondents who have claimed in the suit that the Appellant did not pay full purchase price for the land. They have no cause of action on this but are trying to cling to it as a straw to soil the Appellant.

Coming to the main claim in the Plaint, it is the Appellant who instituted the suit. He sued the Respondents in their own personal capacities for an injunction against trespass on NYANDARUA/ KARATI/2457 and a Declaration that the said suit land belonged to the Appellant. He did not sue them as personal representatives and/or administrators of the Estate of the late Peter Kariuki Njoroge. But for purposes of the Counter claim, the Respondents claimed to have taken out Letters of Administration *Ad litem* in respect of the Estate of Peter Kariuki Njoroge. But which has been found not to be true. In the Order of the District Magistrate's Court at Tulaga, Succession Cause No. 16 of 1968, the Court held that plot No. 163 Karati scheme was to be shared equally by the "Ithaku" (houses) of Wamaitha and Wambui. Kenneth Mundia and John Njuguna

were appointed for each of the houses. This was on the 12/4/1978. NYANDARUA/KARATI/489 was opened on 16/6/81 in the name of Kenneth Mundia of Karati on 16/6/1981. A land certificate was issued on the same date and on 15/10/1987, 6 years later the land was registered in the name of Mundia Njoroge Mbote of ID. No. 1421226/64 and of P. O. Box 132, Naivasha. On the same date the Title Deed was closed on sub-division into NYANDARUA/KARATI/001 and 1002.

This is manifest from both the Green Card dated 5/4/2011 produced as an exhibit by the Respondents as well as their certificate of official search dated 11/2/2011. The land is shown to be approximately 17.5 Hectares.

In the Order of the High Court Nairobi the body of the late Peter Kariuki was ordered in Civil Suit No. 1304 of 1996 to be buried on NYANDARUA/KARATI/2241 on the 14/6/1996. And the Judge was very clear that the order did not confer any right or status to any one of the people who were given the body, (Margaret Wanjiku Kariuki, the 1st Respondent herein, Esther Wambui Kariuki and Maria Njeri Kariuki) which she did not have at the time of the death of the Deceased. NYANDARUA/KARATI/2241 measures 6.57 Hectares and the parcel file was opened on 25/8/1995 in the name of Mundia Njoroge Mbote which was later closed on 17/12/1996 on sub-division into 2455 - 24577 (inclusive), 2457 measuring 3.24 Hectares which was opened on 17/12/1996 in the name of Mundia Njoroge Mbote of ID No. 1421226/64. About 4 months later on 6/3/1997 the same was transferred to the Appellant herein of ID. No. 1238211 at the purchase price of Kshs. 240,000/- and Title Deed issued the

same day before a restriction was placed on the land on 26/5/2005 vide Nairobi C.M Criminal case No 748/2005 until the case was determined from the time NYANDARUA/KARATI/489 was closed i.e. on 15/10/1987 on sub-division to 1001 and 1002. 2241 came out of 1001 on 25/8/1991. This is when NYANDARUA/KARATI/1001 was closed to pave way to 2241 and 2242. The file for NYANDARUA/KARATI/2241 was opened on 25/8/1995 before it was then closed on 17/12/1996, one year 4 months later. Then 4 months later, the same was transferred to the Appellant herein.

I have given this background for purposes of Section 24 of the Land Registration Act, 2012. The journey of transfer of the land from 163 to 489 to 2241 started on 28/11/1973 when the file in respect to NYANDARUA/KARATI/163 was opened. It was then closed on 16/6/1981 to open the 2 titles i.e. 489 and 490. Title No. NYANDARUA/KARATI/489 was opened on 16/6/1981 and Title Deed closed on 15/10/1987 when the land was sub-divided into NYANDARUA/KARATI/1001 and 1002. Then 1001 was closed on 25/8/1991 to pave way for NYANDARUA/KARATI/2241 and 2242. It would not have been expected that the Appellant would have to go back from 25/8/1991 when 2241 was opened to 28/11/1973 when NYANDARUA/KARATI/163 was opened and then 16/6/1987 when NYANDARUA/KARATI/489 was made one of the sub-titles to trace how the suit land reached the Vendor, Mundia Njoroge Mbote.

Section 24 of the **Land Registration Act 2012**, gives the registered proprietor absolute rights over land. It provides that:

Subject to this Act—

(a) The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) The registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease

Further, this Title is protected under Section 26 of the same Act which provides:

(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.

As was held in the case of **Esther Ndegi Njiru & Another =vs= Leonard Gatei [2014] ekr:**

“the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which a person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme”.

Section 80 (1) of the **Land Registration Act No. 3 of 2012** provides as follows:

“Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”

But such allegations must go beyond imaginations. They must be proved. In **RG PATEL VS LALJI MAKANJI (1957) EA 314** the court expressed itself as follows:

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require prove beyond reasonable doubt, something more than a mere balance of probabilities is required”

Given the seriousness of the allegations, the onus was on the Respondents to provide evidence to the Court of the alleged fraud which evidence must meet the standard of proof as was underscored by the Court of Appeal in **Central Bank of Kenya Limited v Trust Bank Limited & 4 Others [1996] eKLR** as being beyond that of a balance of probabilities but not beyond reasonable doubt. In that case, the Court rendered itself as follows:

“The appellant has made vague and very general allegations of fraud against the respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in an ordinary civil case.”

In the case of Urmila w/o Mahendra Shah v Barclays Bank International Ltd & another [1979] eKLR, the Court of Appeal took the view that the onus to prove fraud in a matter is on the party who alleges it. Similarly, in cases where fraud is alleged, it is not enough to simply infer fraud from the facts. The position that emerges is that evidence of especially high quality and strength is required to prove fraud in land cases. It is a daunting and burdensome task to prove fraud in any civil case. In the instant case, the needed to not only plead and particularize the fraud, but also lay a basis by way of credible evidence upon which the Court would make a finding that indeed there was fraud in the transaction leading to the transfer and registration of the suit land in the name of the Appellant.

Fraud is a quasi-criminal charge which must, as already stated, not only be specifically pleaded but also proved on a standard though below beyond reasonable doubt, but above balance of probabilities. However, from the evidence tendered in Court, the Respondents did not prove fraud at all. No evidence was tendered to this end by the Respondents at least to verify their allegations.

In the absence of evidence, I am therefore unable to impeach the Appellant's Title Deed in respect to L.R. NO.

Nyandarua/Karati/2457 or even find that it was acquired fraudulently and the Respondents then accordingly fail in their claim over the parcel of land No. ***Nyandarua/Karati/2457***.

Kenya's Court of Appeal and our third-tier superior courts have in a number of decisions cited the holding by Uganda's Court of Appeal in *Katende v Haridar & Company Limited* [2008]

2 EA 173 in relation to what a party claiming to be a bonafide innocent purchaser for value must demonstrate. The Court of Appeal of Uganda held thus:

“A *bona fide* purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a

purchaser to successfully rely on the bona fide doctrine, (he) must prove that:

- i)he holds a certificate of Title;**
- ii)he purchased the property in good faith;**
- iii)he had no knowledge of the fraud;**
- iv)he purchased for valuable consideration;**
- v)the vendors had apparent valid Title;**
- vi)he purchased without notice of any fraud;**
- vii)he was not party to any fraud.**

It has not been shown what misrepresentation or fraud was involved and if so, whether the Appellant was a party to the same. By the time NYANDARUA/KARATI/1001 was sub-divided into 2241 the records only showed that it was a sub-division of 489. And 2241 showed that it was a sub-division of 1001.

Getting to the root of the Title does not mean that one has to go back to all the mother Titles and grandmother or great

grandmother Titles to the current Title in order to show that the Title is clean.

Secondly, nothing looks suspicious in all these Titles. Nothing shows that the land was ancestral and a product of a succession cause. For Title No. NYANDARUA/KARATI/163 initial Title records show that the land belonged to the Settlement Fund Trustees first registered as such on 28/11/1973. Then on 22/12/1973 to John Njuguna Njoroge of Karati, then a caution was placed against it by Mundia Njoroge on 3/7/1978 which he withdrew on 15/9/1978.

Another caution was placed by John Njuguna Njoroge on 19/10/1978 after the land was registered in the names of himself and Kenneth Mundia on 15/9/1978. He then withdrew it on 10/6/1981. There is nowhere in any of the Green cards is it shown that this land had its genesis in a succession cause and the Appellant was not duty bound to go beyond what was in the parcel files, revealed by the various Green Cards and official searches. As to the Magistrate's conclusion that the Appellant never produced a copy of the Consent from the Land Control Board, it is general knowledge that the consent is normally given to the land registry when registering the transfer and it

would not have been expected that the Appellant retained the consent. Maybe a copy which again was not necessary. The purpose of the consent of the land control board was achieved the moment the transfer documents were presented for registration.

On this issue, when the Appellant said he was given Consent and presented it together with transfer forms, he was not cross-examined by counsel for the Respondents at all and therefore his evidence in this respect was not shaken.

The upshot of the above is that the Appellant succeeds in his Appeal and this Court orders that:

- 1. This appeal be and is hereby allowed as prayed.***
- 2. The Judgment delivered by Honourable S N Mwangi on 16/9/2022 be and is hereby set aside.***
- 3. A declaration is hereby issued that the Respondents have no power to sustain and/or defend a suit on behalf of the Estate of Peter Kariuki Njoroge (Deceased)***
- 4. A permanent injunction restraining the Respondents, their servants and/or agents in any manner howsoever from trespassing, alienating, selling, wasting, leasing, disposing of, subdividing, damaging, constructing and/or***

erecting any structures on Nyandarua/Karati/2457 measuring 8 acres and the 3 acres adjacent thereto being part of Karati Settlement Scheme No. 489 before subdivision.

5. A declaration that the Appellant is the sole rightful and beneficial owner of Nyandarua/Karati/2457 measuring 8 acres and the 3 acres adjacent thereto being part of Karati Settlement scheme No. 489 before subdivision respectively.

Judgment read and delivered at Nyandarua this 7th Day of May 2026.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Samson.

Plaintiff's Counsel: Ms. Mwikuyu H/B for Mr. Gitonga.

Defendant's Counsel: Ms. Wanjiku H/B for Mr. Gichuki.