



**Macharia v Ndung’u (Environment and Land Appeal E001 of 2024)
[2025] KEELC 5695 (KLR) (24 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5695 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT AND LAND APPEAL E001 OF 2024**

JM KAMAU, J

JULY 24, 2025

BETWEEN

JOEL MACHARIA APPELLANT

AND

MARGARET WAHU NDUNG’U RESPONDENT

*(An Appeal from the Judgment and Decree in Nyahururu Chief Magistrate’s Court
CMELC No.E042 of 2022, Hon. S.O. Mogute (SPM) dated 5 th December, 2023)*

JUDGMENT

1. This is an Appeal from the Judgment of Honourable S.O. Mogute, Senior Principal Magistrate, Nyahururu delivered on 5.12.2023 between Margaret Wahu Ndung’u (Plaintiff) and Joel Macharia (Defendant). In the said suit, the Respondent herein sued the Appellant vide Plaint dated 7.6.2022 with the following prayers:-
 - a. Cancellation of the Title No.Nyandaruanemi currently in the Defendant’s names and re issuance of the said Title Deed by the Land Registrar Nyahururu to the Plaintiff’s names.
 - b. A declaration that the Plaintiff is the registered owner of the absolute proprietor of the 2 acres of land known as Nyandaruanemi and that the Defendant actions thereon are illegal and constitute fraud.
 - c. A permanent injunction restraining the Defendant whether acting in person, through his servants, agents and/or assign form entering, remaining or in any way interfering with the Plaintiff’s quiet possession of the 2 acres of land known as Nyandaruanemi
 - d. Costs of this case be borne by the Defendant.
 - e. Any other relief the Honourable Court may deem fit to grant.



2. The Respondent claimed that she was the legal owner of the 2 Acres of land known as Nyandaruandemi which she claimed to have bought from Mwihoti Women Group. The same was originally owned by one Mugure Njuguna before she sold it to Mwihoti Women Group in 1994 at a consideration of Kshs.14,000= . She herself bought it at a consideration of Kshs.110,000=. But that the Appellant had had the Parcel of land secretly transferred it to himself and had been issued with the original Title Deed at the Land Registry, Nyahururu. This in the words of the Respondent was carried out fraudulently, wrongfully and criminally after forging and uttering fake documents and printing himself as the legitimate owner of the suit land.
3. On his part, the Appellant denied the Respondent's claim and claimed to be the bona fide beneficial and registered owner of the suit land. He claimed to have procured the land from the same Mugure Njuguna who was the Respondent claimed had sold the same to Mwihoti Women Group and that the same had been a subject of litigation between him and Mwihoti Women Group and the Appellant has told the Respondent as much and that should the Respondent have conducted due diligence, she would have known that Mwihoti Women Group was a "fraudulent owner" because he had already bought it from Mugure Njuguna before the transaction between herself and Mwihoti Women Group. He therefore claimed that his title was legitimate, lawful and indefeasible and should therefore not be a subject of cancellation.
4. The Appellant then contemporaneously filed a caution claim to the effect that there was a big parcel of land which Mugure Njuguna sub-divided into several sub-divisions and 1993 – 1994 and the sub-titles were issued and registered in 1995 to their respective owners and that Mwihoti Women Group never owned the land. After which the Respondent took possession of the land and had illegal occupation and alleged to have leased it from Mwihoti Women Group.
5. The Appellant claimed that the matter was arbitrated over by an unspecified land Tribunal where he lost but the same was challenged in Nyahururu ELC Court Judicial Review No.10 of 2017 and the award overturned. But nevertheless, the Respondent has refused to vacate the suit land in spite of several Demands form the Appellant.
6. The hearing of the case commenced on 18.7.2023 when the Respondent adopted her statement recorded on 7.6.2022 as her evidence in chief which was essentially in line with the averments in the Plaint. She also in addition testified that there are developments on the suit land as well as camps. She claimed that the issuance of the Title Deed to the Appellant was fraudulent, malicious, done in bad faith, unjustifiable and illegal and that as a result she has suffered irreparable loss and damage and that if the land is held to be the Appellant's then she would be rendered homeless and destitute. She also produced documents to support her case viz –
 - a. A copy of Sale Agreement dated 15.8.1996.
 - b. A copy of Letter of Consent dated 23.11.1994
 - c. A copy of Transfer Form dated 29.8.1996
 - d. A copy of Search
 - e. A copy of Proceedings in Land Dispute Tribunal Case No.302009
 - f. A copy of Chief's Letter dated 19.4.2021
 - g. A copy of Letter to the Provisional Commissioner dated 3.7.1999



7. On cross-examination by Mr. Maina for the Appellant, Ms. Ndung'u said that her Sale Agreement was in Kikuyu language and that she personally signed her witness statement for purposes of this case.
8. PW2 – Ruth Wanjiru Mwaura adopted her statement recorded on 28.9.2022 as her evidence in chief. She claimed to be daughter of an unnamed official of Mwihoti Women Group and claimed that she knew that the suit land belonged to the Respondent who has been in continuous occupation of the land for more than 26 years having bought the land from the Women Group the latter having bought it from Mugure Njuguna.
9. In cross-examination, this witness said she was a neighbor to the Respondent and that she was daughter to Jane Nyambura Muigai and that she was married since 1984. She resides in Kipipiri 5 kilometers away from the suit land and that she saw the Respondent in 1996 when the latter came to buy the land. She said she was also aware that the Appellant also bought land but she couldn't tell which one.
10. On re-examination the witness said her mother in law was one of the sellers of the land to the Respondent.
11. PW3 - Daniel Chege Maina from Ndemi Village adopted his statement of 28.9.2022 to the effect that he is the Respondent's neighbor and that the Respondent has developed the land and has been in occupation of the suit land for over 25 years.
12. On cross-examination, the witness claimed that he is about ½ kilometer from the Respondent since 1982 February. In 1996 he was a witness when the Chief Mr. Kinuthia was trying to settle this dispute. He also said that he was not a witness in the land transaction and that he did not know the Appellant.
13. On re-examination, this witness said that the suit land is 2 Acres and the same is developed. Joel Macharia has his land elsewhere which he bought from the same Mugure Njuguna and that there is a parcel of land in between the parties herein owned by one Mother Wangari. He further said that although he did not append his signature as a witness, he was present when the sale transaction took place at the Chief's office and that the consideration paid by the Respondent to Mugure Njuguna was kshs.110,000=.
14. The last witness from the Respondent's side was Ann Wairimu Kamau who adopted her statement dated 28.9.2022 and who said he was a daughter in law of Mugure Njuguna married to her son Moses Mbugua Njuguna in 1988. She resides in Ndemi and has been on the husband's land. She testified that the Appellant had bought 2 Acres from her mother in law Mugure who sold the suit land to the Women Group to the Respondent on which she has been since 1996 having come from Timboroa. She claimed that the Appellant took the land fraudulently just as he had done to his. She also said that by 2010 all the members of the Women Group had died including her mother in law. She said that the Respondent had lived on the suit land for more than 27 years.
15. On his part, the Appellant adopted his statement of 20.4.2023 and produced documents in accordance with his list of documents dated 20th April, 2023 –
 - a. Letter dated 26th July, 2018
 - b. Copy of Judgment in Nyahururu ELC No.44 of 2018
16. The statement is in conformity to the averments in the defence and counter claim. He said that the Respondent who is unknown to him occupied his land. He claimed to have bought 12 Acres and the 2 Acres were part of the 12 he had bought from the late Esther Mugure Njuguna and got a Title Deed.



17. On cross-examination he said that he bought the land in 1988 and that Mugure's family knew of the transaction. He said that each Acre went 5,000= . He said that he didn't have any documents in court since he had given them all to his Advocate in Nakuru. He had 3 Title Deeds and that he didn't know which land was the subject of this suit since he had 6, 4 and 2 Acres respectively. He also testified that although he had built 2 homes at the land he didn't have photographs of the same in court.
18. He further testified that he lived on the suit land for 8 years but can't tell when he left. He further said he cannot tell how much he paid for consent to transfer nor did he have the relevant receipts for the same nor even at the Land's Office. The Appellant mentioned that the court signed the relevant documents (without substantiating).
19. This was the conclusion of the trial after which the Trial Magistrate retired to deliver his judgment and a Decree was drawn as follows –

“The Court enters judgment in favour of the Plaintiff against the Defendant as prayed in the Plaintiff dated 07062022 in terms of Prayer (a), (b), (c) and (d). The Plaintiff gets the costs of the counterclaim. Orders accordingly.

Right of Appeal 30 days explained.”

20. Being dissatisfied with this Judgment, the Appellant filed a Notice of Appeal and a Memorandum of Appeal for orders that –

The Memorandum of Appeal was Grounded on the following –

1. That the Learned Trial Magistrate erred in fact and in law in finding that there was sufficient evidence and proceeding to hold that the Respondent had proved her case on a balance of probability.
2. That the Learned Trial Magistrate erred in fact and in law in dismissing the Appellant's Counter-Claim and proceeding to declare that transfer of the suit property to the Defendant's name was done illegally.
3. That the Learned Trial Magistrate erred in fact and in law by holding that the Respondent was the owner of the suit property and disregarding and/or failing to consider the Appellant's evidence that he is the legitimate/ rightful owner.
4. That the Learned Trial Magistrate erred in fact and in law by failing to consider the entirety of the proceedings and by discrediting the evidence of the Appellant that the transfer of the suit property was done procedurally and legally.
5. That the Learned Trial Magistrate erred in fact and in law by not putting sufficient weight and consideration to the Appellant's evidence and submissions tendered hence arising at a fundamentally flawed determination.
6. That the Learned Trial Magistrate erred in law and in principle in finding the gaps in the Respondent's case hence drawing his own inferences that were not supported by the evidence tendered during trial.
7. That the Learned Trial Magistrate erred in fact and in law in failing to determine the matter on merit having heard all the parties.



8. That the Learned Trial Magistrate erred in law in totally misdirecting himself on the evidence presented before him during trial hence arriving at a flawed decision occasioning a miscarriage of justice.

21. The Appellant prays for the following orders:

1. That the appeal be allowed.
2. That the judgment of the Honourable Magistrate together with any other consequential orders therefrom be set aside, varied and/or reviewed.
3. Costs of the appeal.

22. The Counsels on record relied on their submissions on record, which I have duly considered.

23. This is an appellate court of first instance, whose duty was succinctly stated in the case of *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123, that was cited and relied upon by counsel for the Appellant, where the court stated thus:

...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court is by way of retrial 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..."

24. I am of the opinion that the issues raised in the memorandum of appeal can be condensed into whether the trial magistrate erred in law and in fact in discrediting the evidence on record and finding in favour of the respondent while dismissing the appellant's counter-claim.

25. The Plaintiff before the trial court, who is the Respondent in this appeal had claimed that she bought the suit property Nyandaruanemi from Mwihoti Women Group which was originally owned by one Mugure Njuguna before she later sold it to Mwihoti Women Group. However, she later found out that the title to the land was registered in the Appellant's name, who also had a counterclaim, claiming that he also bought the suit land from the original owner, Mugure Njuguna around the years 1988-1989.

26. Seeing as the Appellant is the registered owner of L.R Nyandaruanemi, it is his title that was to be put under scrutiny by the trial court. Section 26(1) of the *Land Registration Act* CAP 300 provides that a Certificate of title is to be held as prima facie evidence of absolute and indefeasible proprietorship except under the following circumstances:

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—
on the ground of fraud or misrepresentation to which the person is proved to be a party; or
where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."

27. Counsel for the Respondent relied on the holding of the Court of Appeal in the case of *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR where the court expressed thus:



28. We state that when a registered proprietor's 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 need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant's testimony."
29. Let us then proceed to scrutinize how the Plaintiff acquired title. During the hearing, the Appellant relied on his statement that he bought the suit land and 2 other parcels from the original owner known as Mugure Njuguna. He also produced a letter from the Deputy Registrar, Environment and Land Court at Nyahururu dated 26th July 2018, confirming the transfer of the ELC Judicial Review suit no.10 of 2017 from Nakuru law courts, as well as the Judgment thereof.
30. In the aforesaid judicial review suit, the Appellant was the Ex-parte Applicant therein, against the Principal Magistrate's Court at Nyahururu, the Kipipiri Land Disputes Tribunal and Mwihoti Women's group. I duly note that the Respondent was not a party to that suit.
31. The subject matter of the judicial review case was the finding of the Kipipiri Land Dispute Tribunal in favour of cancelling the suit land's title in the Appellant's name. That the suit land was owned by the Mwihoti Womens Group and has occupied the land for a period of 12 years, therefore the seller, Mugure Njuguna had not sold land to the Appellant, which the Appellant herein disputed.
32. The only reason that the Nyahururu Court in the aforesaid judicial review gave in quashing the land dispute tribunal's decision, was that the tribunal did not have the power to determine matters under the repealed Registered *Land Act*, thus they acted in excess of jurisdiction. It was not a question of the merit of the dispute and the decision, which was yet to be determined at the time, noting that the Respondent was not party to the said judicial review . The issue that the Appellant raised in the submissions that the land never belonged to the Mwihoti women's group was therefore not determined on merit by the judicial review .
33. The Appellant also produced a copy of the title deed to the suit land registered in his name. The above were all the documents that the Appellant produced to prove his case.
34. The Respondent then filed her own case before the trial court, claiming that it was she who bought the suit land from the Mwihoti Women's group, who had bought it from the original owner, Mugure Njuguna. She produced a number of documents in support of her case, including a copy of the sale agreement between herself and the officials of Mwihoti women's group, the Land Control Board consent dated 23rd November 1994, Transfer form relating to the suit property dated 29th August 1996 transferring the suit land from Mugure Njuguna to Jane Nyambura Muigai, Hannah Wanjiku Njogu and Ruth Wanjiku Wanjohi, who are listed as the charlady, treasurer and secretary of Mwihoti women's group in the agreement for the sale of land. This proves that indeed, the land did belong to the said women's group. There is also exhibited a letter from the Chief, Ndemi location, stating that the Respondent purchased the suit land from Mwihoti women's group and has lived and settled on the suit land for a period of over 24 years.
35. This explains why during the hearing before the trial court, the Appellant upon cross-examination, did not have any documents in court to prove how he acquired the suit land and his statement that he lived on the suit land for 8 years but couldn't tell when he left. He also could not recall how much he paid for consent to transfer nor did he have the relevant receipts for the same.



36. From the evaluation of the above evidence, the path that the Appellant followed to obtain title is not clear nor certain. He did not produce an agreement for sale which he used to purchase the land, nor copies of any transfer documents. The Respondent on the other hand, had documents indicating a clear path of exchange of hands from the original owner, Mugure Njuguna, to the officials of Mwihoti Women’s group and to herself upon purchase.
37. It is therefore evident from the facts that the Defendant failed to prove his counterclaim and to defend his title. In the Kenyan context, the burden of proof is on whoever wishes the court to believe the existence of the facts he alleges. Section 107 of the *Evidence Act* Cap 80 provides that;

Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

Mativo J(as he then was) in the case of *Bwire v Wayo & Sailoki (Civil Appeal 032 of 2021)* [2022] KEHC 7 (KLR) (24 January 2022) (Judgment) examined the concept of burden of proof as follows:

“As we all know, in both criminal and civil cases, the phrase ‘burden of proof’ is commonly said to be used in two quite distinct senses. In one sense it means ‘The peculiar duty of him who has the risk of any given proposition on which the parties are at issue — who will lose the case if he does not make this proposition out, when all has been said and done.’ A basic test for determining which party has the burden of proof is contained in the judgment of Walsh JA in *Currie v Dempsey*. His Honour stated “in my opinion the legal burden of proof lies on a plaintiff, if the fact alleged (whether affirmative or negative in form) is an essential element in his cause of action, eg if its existence is a condition precedent to his right to maintain the action. The onus is on the defendant, if the allegation is not a denial of an essential ingredient in the cause of action, but is one which, if established, will constitute a good defence, that is, an “avoidance” of the claim which, prima facie, the plaintiff has.”

38. Burden of proof constantly shifts to both sides and the Appellant had the burden of proving how he acquired title to the suit land since it was under question and failed to discharge the burden.
39. This Court therefore does not find any reason to overturn the judgment of the trial court as the reasoning was sound. The Court upholds the judgment of the trial court and dismisses this appeal with costs to the Respondent.

JUDGEMENT READ, DATED, SIGNED AND DELIVERED VIRTUALLY AT NYANDARUA THIS 24TH DAY OF JULY 2025.

HON. MUGO KAMAU

JUDGE

In the presence of:-

Kendi - Court Assistant

Mr Kairu Maina - for the Appellant

Mr Miruka - for the Respondent

