



**Kibinge (Suing as the Administrators Ad Litem of the Estate of Nelson Kibinge Githura - Deceased) v Wainaina (Environment and Land Appeal E018 of 2024) [2025] KEELC 5399 (KLR) (21 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5399 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT AND LAND APPEAL E018 OF 2024**

**MAO ODENY, J  
JULY 21, 2025**

**BETWEEN**

**MICHAEL MWANGI KIBINGE (SUING AS THE ADMINISTRATORS  
AD LITEM OF THE ESTATE OF NELSON KIBINGE GITHURA -  
DECEASED) ..... APPELLANT**

**AND**

**ELIZABETH NJERI WAINAINA ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon. E.G Nderitu (C.M)  
delivered on 12th March, 2024 in Molo CMCC No 123 of 2019)*

**JUDGMENT**

1. This appeal arises from the Judgment of Hon. E.G Nderitu (C.M) delivered on 12<sup>th</sup> March, 2024 in Molo CMCC No 123 of 2019. The Appellant being aggrieved by the entire judgment lodged a Memorandum of Appeal dated 4<sup>th</sup> April, 2024 and listed the following grounds of Appeal:
  1. That the Learned Magistrate erred in law and in fact in disregarding the Appellant's evidence adduced, the submissions filed and the authorities in support hence arriving at an erroneous finding.
  2. That the Learned Magistrate erred in law and in fact in disregarding the corroborative evidence tendered by the Appellant's witnesses touching on the subject matter hence arriving at an unfair determination.
  3. That the Trial Magistrate erred in law and in fact in dismissing the Plaintiff's suit despite finding no fault on the part of the Appellant in the process of acquiring the suit property.



4. That the Learned Magistrate erred in law and in fact in blaming the Appellant for the mistakes and/or negligence of Kenya Commercial Bank notwithstanding that the Appellant was not a party thereto hence arriving at an erroneous determination.
  5. That the Learned Magistrate erred in law and in fact in failing to appreciate the authenticity of the Appellants title deeds under Section 26 of the Land Registration Act, 2012 hence arriving at an unfair finding.
  6. That the Learned Magistrate erred in law and in fact in issuing orders for cancellation of the Appellant's title deed when there was no evidence adduced to challenge the Appellant's title deed under the exception provided under Section 26 (a) and (b) of the Land Registration Act, 2012 hence failed to address its mind on the legal implication of the said holding on Appellant's title deeds.
  7. That the Learned Magistrate erred in law and in fact in failing to appreciate the evidence tendered by the Appellant's to the effect that Appellant was an innocent purchaser for value without notice of any fraud hence arriving at an erroneous finding. (sic)
  8. That the Learned Magistrate erred in law and in fact in disregarding the appellant's overwhelming un-rebutted oral and documentary evidence adduced.
  9. That the Learned Magistrate erred in law and in fact in finding that the Appellant did not prove his case on a balance of probabilities against the Respondent hence arriving at erroneous determination.
  10. That the Learned Magistrate erred in law and in fact in holding that there was a family relationship between the Appellant and the Respondent without any evidence being tendered by the Respondent herein hence arriving at an unfair determination.
  11. That the Learned Magistrate erred in law and in fact in failing to appreciate and/or disregarding the Appellants evidence tendered on the due process followed by the Appellant in acquiring the suit property by way of public auction hence arriving at an erroneous finding.
  12. That the Learned Magistrate erred in law and in fact in totally disregarding the overriding objectives espoused in the Environment and Land Courts Practice Directions hence arriving at an unfair determination.
  13. That the Trial Magistrate failed in law by failing to render substantive justice to the Appellant as enshrined in Article 159 (2) (a) of the Constitution.
  14. That the Learned Magistrate erred in law and in fact in considering extraneous issues not borne of the pleadings which thus arriving at an erroneous finding. (sic)
2. The Appellant prayed that the Appeal be allowed with costs to the Appellant and the said judgment of the Trial Magistrate be set aside and substituted with a judgment of this court.
  3. The Appellant had sued the Respondent in the lower court vide Plaint dated 30<sup>th</sup> May, 2019 seeking the following orders:
    - a. An eviction order to remove the defendant her family, servant and/or agents from that parcel of land known as Shawa/Rongai Block 3/47 (Sachangwani).
    - b. A permanent injunction to issue to restrain the Defendant by herself, her agents, servants or any person claiming under her from trespassing, entering,



disposing, selling and/or dealing in whatever manner with the Plaintiff's parcel of land Shawa/Rongai Block 3/47 (Sachangwani).

- c. General damages for trespass.
  - d. Costs and interests of the suit.
  - e. Any other relief this honourable court may deem fit and just to grant.
4. The Respondent filed a Counterclaim dated 7<sup>th</sup> May 2021 and sought the following orders:
- a. A declaration that the sale and subsequent registration of Shawa/Rongai Block 3/37 (Sachangwani) to the deceased Nelson Kibinge Githura was fraudulently done hence illegal, null and void ab initio.
  - b. An Order of cancellation of the title deed for L.R Shawa/Rongai Block 3/47 (sachangwani) from the deceased Nelson Kibinge Githura back to Harun Wainaina Karanja (deceased).
  - c. An order of eviction of the plaintiff, his representatives, agents, servants and/or anybody claiming under them from the suit land and demolition of any structures.
  - d. An Order of Permanent injunction restraining the Plaintiff now Defendant, his relatives, agents, servants and/or employees from interfering with the Defendant now Plaintiff's quiet and peaceful occupation of L.R Shawa/Rongai Block 3/47 (Sachangwani).
  - e. The costs of the suit and interests.
5. The suit was heard and the Trial Magistrate in her judgment dated 12<sup>th</sup> March, 2024 found in favor of the Respondents to have proved their counterclaim.

### **Appellant's Submissions**

6. Counsel for the Appellant filed submissions dated 30<sup>th</sup> December, 2024, and gave an elaborate background to this suit enumerating the evidence by the parties in the Trial Court. Counsel submitted that the Appellant's father was a lawful purchaser of the suit land that passed to him at the fall of the hammer hence the Respondent cannot lay claim to the property as her interests were extinguished at the auction.
7. It was counsel's submission that the Trial Magistrate erred in converting a suit filed by the Appellant against the Respondent seeking eviction of the latter into a suit by the Respondent against the Bank (chargee) who was not a party to the suit and never participated in the proceedings.
8. Counsel relied on Section 99 of the *Land Act* and the cases of Daniel Kanyi Mwarano v National Bank of Kenya Ltd (2006) eKLR, *John Mwenja Ngumba v Kenya Commercial Bank Ltd & Another*, Kitur & Another v Standard Chartered Bank & Another (No 2 [2002] 1 KLR 640 and Priscillah Krobought Grant v Kenya Commercial Finance Co. Ltd & 2 others: CA No 227 of 1995 (UR).
9. According to counsel, the particulars of fraud were never substantiated by the Respondent and relied on Sections 107, 108 and 109 of the *Evidence Act* and the case of Kuria Kiarie & 2 others v Sammy Magera [2018] eKLR. Counsel urged the court to allow the Appeal as prayed.



## Respondent's Submissions

10. Counsel filed submissions dated 20<sup>th</sup> January, 2025 and submitted that it was incumbent upon the Appellant to prove on a balance of probability that he legally acquired the suit property, a burden the Appellant failed to discharge. Counsel further submitted that grounds 1, 2, 3, 4, 8, 9 and 11 of the Memorandum of Appeal lack merit and relied on Section 107 of the *Evidence Act* and the cases of *Peterson Ndung'u, Stephen Gichanga Gituro*, N. Ojwang, Peter Kariuki, Joseph M. Kyavi & James Kimani v Kenya Power & Lighting Company Ltd [2018] eKLR, *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, *Dina Management Limited v County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021 [2023] KESC 30 (KLR), *Martevu Guest House Limited v Njenga & 3 others* (Civil Appeal 400 of 2018) [2022] KECA 539 (KLR).
11. It was counsel's further submission that the Respondent demonstrated to the required legal threshold that the Appellant's title deed was fraudulently obtained by the late Nelson Kibinge Githura (deceased) and thus could not be protected under Section 26 of the *Land Registration Act*.
12. Counsel relied on Section 26 (1) of the *Land Registration Act* and the case of *Esther Ndegi Niir & Another v Leonard Gatei* (2014) eKLR and submitted that the Appellant cannot claim to be an innocent purchaser as he did not conduct due diligence. It was counsel's submission that the Appellant did not claim to be an innocent purchaser for value at the trial court and is thus introducing this issue before the appellate court, which is un-procedural.
13. According to counsel, the Bank did not sell the Respondent's suit property by public auction and cited the case of *Said v Shume & 2 others* (Civil Appeal E050 of 2023) [2024] KECA 866 (KLR) and that the relationship between the Respondent and the Appellant is inconsequential.
14. Counsel submitted that it is the Respondent who resides and is in physical possession of the suit land, further that the Appellant has not demonstrated how the Trial Court considered extraneous issues and urged the court to dismiss the Appeal with costs.

## Analysis and Determination

15. I have considered the grounds of Appeal and the court is cognizant of the fact that this is a first Appeal and the principles that pertain to the consideration of such Appeal. In the case of *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] e KLR, the court held as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”
16. The trial court had the benefit of taking the evidence and appreciating the demeanor of the witnesses before it, which this court did not have the opportunity. The Appellant listed 14 grounds of Appeal which were repetitive and in my opinion can be reduced to one ground, which is whether the Learned Trial Magistrate erred in law and fact in concluding that the Appellant acquired the suit land illegally hence the transaction that led to the transfer was null and void.
17. The Trial Magistrate listed the issues for determination that arose from the pleadings and the evidence on record. The Appellant faulted the Trial Magistrate for dealing with extraneous matters and



converting a suit seeking eviction of the Respondent into a suit by the Respondent against the Bank (chargee) who was not a party to the suit and never participated in the proceedings.

18. In a suit where the root of a title is in question, the party alleging ownership must prove that the same was acquired legally and procedurally. This is a suit where the acquisition of the title by the Appellant was in question and it was incumbent upon him to prove and leave no doubt that the transaction leading to the issuance of the said title was proper and legitimate.
19. The evidence on record shows that it is the Appellant who called the Bank's lawyer E. Okero Advocate, to give evidence on the issue of the loan that had been advanced to the Respondent's deceased husband and how the Bank exercised its statutory power of sale.
20. The Appellant's claim to ownership of the suit land arose out of a sale by public auction by Jogi Auctioneers who were instructed by the bank to realize the outstanding loan. The Appellant cannot run away from the evidence that he had presented to the court as it formed part of the record. The court had an obligation to analyze the evidence and come up with a decision. What was the point of the Appellant tendering such evidence including production of documentary evidence, if he did not want it to be analyzed as part of the record?
21. The Trial Magistrate in her Judgment stated that:

“The basic facts in this case are un-contested and clear. L.R No Shawa/Rongai Block 3/47 (Sachanwani) the suit land herein belonged to the defendant's late husband and was registered up until the 3<sup>rd</sup> of August 2000 when the same was transferred into the name of Nelson Kibinge Githura, the father to the Plaintiff herein. The defendant's deceased husband had purchased the suit land on 14<sup>th</sup> May 1986.

He i.e Harun Wainaina Karanja had obtained a loan of Kshs 200,000 from Kenya Commercial Bank sometime in 1992 and secured same with the suit land. On the 11<sup>th</sup> of January 1995 he passed on before fully repaying the loan. According to the defendant, as at the time of his death, her husband had an unserviced loan balance of Kshs 58,000. The defendant testified that after his demise, she informed the bank, took a copy of his death certificate and continued paying off the loan for the interest of the estate even though she had not obtained letters of administration at the time. This evidence is indeed confirmed by the payment receipts totaling to Ksh 35,000/= all issued in acknowledgement of repayment on account of the Harun Wainaina Karanja's loan account long after the date of his demise. It was her evidence that indeed she made some of the payment through Nelson Kibinge Githura, the Plaintiff's deceased father who was very well aware of the deceased's death and the outstanding loan, being his first cousin and noting that he lived in Kisumu where the loan account was domiciled.

Though it is not clear, how much of the loan was still outstanding as at October 1999, what is clear is that the suit land was sold on the 27<sup>th</sup> day of October 1999 at a public auction allegedly in exercise of the banks statutory power of sale to Nelson Kibinge Githura for Kshs 382,500. From a credit note produced by the defendant, her late husband loan account was credited with an amount of Two Hundred and thirteen thousand five hundred and eighty-nine shillings being loan repayment and a surplus amount of Kshs 127,200.70 was deposited in a fixed deposit account in deceased's name.....

It is clear by dint of the letter dated 19<sup>th</sup> April 1999 written to the defendant herein asking her to give concrete proposals and timetable on how she intends to clear the loan balance and giving her 14 days' notice and not three (3) months contemplated under Section 74



of the Registered Land Act, that the bank was well aware that the charger Haron Wainaina Karanja was no more..... There is absolutely no evidence that the requisite notice was served upon the defendant or indeed any of the late Haron Wainaina Karanja's dependants....”

22. The Trial Magistrate analyzed the evidence in its totality and found that the Appellant did not follow the laid down procedures as per Sections 74 and 77 of the Registered Land Act (Repealed).
23. It is further noted that the Magistrate found that there was no compliance with the prerequisites with regard to service of the notice on the Chargee which was mandatory and that noncompliance with the same renders the entire process undertaken by the Chargor to realize the security is invalid as was held in the case of Kenya Commercial Bank Ltd v Pamela Akinyi Ochieng. [1996]eKLR.
24. The other finding that this court is in agreement with, is that by the time the sale and transfers were done to the Appellant the deceased owner of the suit property was long dead and the Respondent was not the legal representative of the deceased estate. This is from the oral and documentary evidence that the Respondent has informed the Bank that the husband was deceased and further that the Bank had written a letter informing her to go and give a proposal as to how she was to clear the outstanding loan. Therefore, the Bank was aware that they were dealing with the property of a deceased person.
25. See the case of Martev Guest House Ltd v Njenga & 3 others (Civil Appeal No. 400 of 2018) [2022] KECA 539 (KLR) [28<sup>th</sup> April 2022 (Judgment) with dissent – W. Karanja J A) where the court held that:

“the Law of Succession Act does not donate power to the “estate of the deceased person” to deal with property forming that deceased’s estate but donates that power an administrator with a will or a personal representative to the intestate estate of a deceased person to deal with the deceased persons property on his/her death”

26. As earlier stated, when a root of a title is challenged, a party must show how such title was acquired as was held in the case of Munyu Maina v Hiram Gathina Maina [2013] eKLR 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 that is under challenge and the registered proprietor must go beyond the instrument and prove 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.”

27. If a title is found to have been illegally or unprocedurally acquired, then Sections 24, 25, and 26 of the Land Registration Act, cannot protect such a title. Having, said, that, I find that the Trial Magistrate applied the law to the facts and came to a correct conclusion hence there is no good reason to interfere with the judgment. The upshot is that this Appeal is dismissed with costs to the Respondent.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 21<sup>ST</sup> DAY OF JULY 2025.**

**M. A. ODENY**

**JUDGE**

