



**Kingori v County Government of Nairobi & 2 others (Civil Appeal
254 of 2019) [2025] KECA 62 (KLR) (24 January 2025) (Judgment)**

Neutral citation: [2025] KECA 62 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 254 OF 2019
SG KAIRU, GWN MACHARIA & LA ACHODE, JJA
JANUARY 24, 2025**

BETWEEN

SUSAN NYOKABI MWANGI KINGORI APPELLANT

AND

COUNTY GOVERNMENT OF NAIROBI 1ST RESPONDENT

CHRISTOPHER MAINA CHEGE 2ND RESPONDENT

PETER KUNG'U NG'ANG'A 3RD RESPONDENT

*(Being an appeal from the Judgment and Decree of the Environment and Land Court
of Kenya at Nairobi (K. Bor, J.) dated 26th July, 2018 in ELC Case No. 418 of 2010)*

JUDGMENT

1. The appellant, Susan Nyokabi Mwangi Kingori, is aggrieved by the judgment delivered by the Environment and Land Court (ELC) (Bor, J.) on 26th July 2018 dismissing her claim for, among other reliefs, a declaration that she is the rightful owner of the properties known as Land Reference No's. 209/6604/3, 209/6604/4 and 209/6604/5 situated in Ofafa, Maringo, within the City of Nairobi.
2. Based on the pleadings and the evidence presented before the trial court, the appellant's case is that by three separate letters of allotment dated 3rd May 1996, Nairobi City Council (the predecessor of the 1st respondent, the County Government of Nairobi) allocated her three plots then identified as 'Plot No. A, B, C part of LR No. 209/6604'. She fulfilled the conditions stipulated in the allotment letters including payment of stand premiums, survey fees and legal charges which she paid on 8th July 1996.
3. A few months later, the City Council of Nairobi issued the appellant with leases dated 30th October 1996 in respect of L.R No's. 209/6604/3, 209/6604/4 and 209/6604/5 which the City Council of Nairobi was required to register with the Lands Office, the Department of Lands. It was her case that



the City Council of Nairobi assured her that it was pursuing the registration of the leases in her favour but was experiencing a few delays.

4. Approximately 14 years later, in February 2010, the appellant was shocked to discover that Christopher Maina Chege and Peter Kung'u Ng'ang'a, the 2nd and 3rd respondents respectively, had encroached on the properties and began construction of building works on the basis that they were the registered proprietors as lessees of the properties. The appellant's husband, John Mwangi King'ori (as PW2) testified that on discovering the encroachment by the 2nd and 3rd respondents, he reported the matter to the then Criminal Investigation Department.
5. The appellant subsequently instructed her advocates to take up the matter who by a letter dated 18th February 2010 addressed to the Town Clerk, Nairobi City Council (in which the appellant was described as "her Worship...former Mayoress of Nairobi City") demanded stoppage of building works on the property and the eviction of the 2nd and 3rd respondents from the properties.
6. On 9th September 2010, the appellant instituted suit against the respondents before the High Court asserting that the appellant is the genuine allottee of the properties entitled to possession; that 2nd and 3rd respondents were "in wrongful and illegal occupation of the suit property"; and that the 1st respondent had colluded with the 2nd and 3rd respondents to fraudulently deny the appellant of her rights. The particulars of fraud pleaded against the 1st respondent were that it caused the purported registered leases in favour of the 2nd and 3rd respondents to be issued in disregard of the law; obtaining money from the 2nd and 3rd respondents as consideration of the properties; and denying the appellant access to the properties.
7. As against the 2nd and 3rd respondents, the particulars of fraud pleaded were that: they fraudulently obtained registration documents of the properties in disregard of the law; fraudulently took possession of the properties under the pretense of owning the same and commencing construction thereon; and fraudulently making payments to the 1st respondent in consideration of the plots when they knew that the appellant was the legal owner of the properties.
8. The appellant sought judgment against the respondents for: a declaration that she is the rightful owner of the properties; an injunction restraining the 2nd and 3rd respondents from interfering with the properties; an order compelling the 1st respondent to transfer the properties to the appellant; an order restraining the 2nd and 3rd respondents from undertaking further construction on the properties; an order compelling the 1st respondent to instruct the Director of City Inspectorate to evict the 2nd and 3rd respondents; and an order compelling the 1st respondent to facilitate the finalization of the registration process in favour of the appellant at the land ministry.
9. The City Council of Nairobi in its statement of defence dated 28th October 2010 denied the appellant's claim. It pleaded that the City Council was the registered owner of the mother title of the property L. R. No. 209/6604 which was leased to Young Women Christian Association for a period of 14 years from 1st January 1988; that the said 14 year lease expired in 2002 and it could not therefore have allocated the property to any other party prior to the expiry of the 14 years; and that the mother title was then subdivided into 3 portions which were then leased to Michelle Musindi, Evans Nyaberi and Josephine, Maina Nyaga, and Francis Kariuki Ndirangu respectively.
10. The City Council of Nairobi pleaded further that it had approved the architectural drawings submitted by the 2nd and 3rd respondents who were the owners of the properties.
11. In their statement of defense, the 2nd and 3rd respondents denied the claim by the appellant. They asserted that they are strangers to the claim that the appellant was allotted the properties. They averred



- that they are the rightful and lawful owners as lessees of the properties having purchased the same from the previous registered proprietors; that prior to purchasing the properties they exercised due diligence to establish that the previous owners from whom they purchased were the registered proprietors with mandate to sell; they conceded that they were carrying on construction and development on the properties having obtained the necessary approvals and consent from the 1st respondent. They maintained that they are rightfully and legally in occupation of the properties and denied any fraud on their part.
12. The trial proceeded before the late Justice L. Onguto. The appellant produced the letters of allotment, receipts in respect of the payments of stand premium, survey and legal fees, Deed plans in respect of the properties, and the unregistered leases in her favour in respect of the properties executed on behalf of the City Council by the Mayor and Town Clerk, as well as correspondence exchanged between the City Council and the Department of Lands and the Criminal Investigation Department.
 13. Under cross examination, the appellant stated that it was her husband (PW2) who asked her to apply for the plots and that he did so on her behalf. She stated that in 1996, her husband was the Mayor of Nairobi and that he (the husband) was one of the signatories to the unregistered leases issued to her. She stated that she did not know anything about the registered leases in favour of the 2nd and 3rd respondents who had fenced off the property and began construction and that she had engaged the police through her husband to investigate the matter, but she did not know the outcome of the investigations.
 14. The evidence of appellant's husband, John Mwangi King'ori (PW2) aligned with that of the appellant. Under cross examination, he stated that he was the Mayor of Nairobi in 1996; that he did not allocate the properties himself but made the application for allotment; and that at that time, the plots only had alphabetical numbers. He stated that he was issued with Deed Plans for the properties by the Director of Survey. He denied that he abused his office or that he "grabbed the...properties". He stated that he was not aware that the mother property had been leased to Young Women Christian Association and that the claim to that effect was a cover up. He stated that the 2nd and 3rd respondents became known to him when he learnt of the encroachment and reported them to the CID.
 15. The 1st respondent, Christopher Maina Chege, was the sole witness for the defence. He testified on his own behalf and on behalf of the 3rd respondent, his business partner. He adopted as his evidence in chief the contents of his witness statement dated 26th November 2012 and produced the bundle of documents itemized in the 2nd and 3rd defendants list of documents. His testimony was that he purchased plot No. 209/6604/4 from Justin Maina Nyaga in September 2007 and produced the agreement for sale and the registered transfer in respect of the same in his favour. He stated that on 4th March 2008, jointly with the 3rd respondent, they purchased plot No. 209/6604/5 from Francis Kariuki Ndirangu. He produced the sale agreement and the registered transfer in their favour. He maintained that he and the 3rd respondent are bona fide purchasers for value of the properties in question. The 3rd respondent filed a witness statement dated 26th November 2012 stating that he purchased Plot No. No. 209/6604/3 from Michelle Musimbi, Evans Nyaberi and Josephine Anyango Okoth who were the joint registered owners.
 16. Under cross examination, he stated that he purchased plot No. 209/6604/4 in his own name but teamed up with the 3rd respondent in buying plot No. 209/6604/5. He maintained that he and the 3rd respondent are innocent purchasers for value without notice.
 17. After the close of the defence case, directions were given on filing of written submissions but unfortunately Onguto, J. died before concluding the matter. Parties agreed to have the ELC proceed with the matter from where it had reached and submissions were tendered before K, Bor, J. who, upon



reviewing the evidence and considering the submissions delivered the impugned judgment on 26th July 2018 dismissing the appellant's suit.

18. The appellant has challenged that judgment on eight grounds set out in the amended memorandum of appeal and which were canvassed before us by learned counsel for the appellant, Mr. Mwangi Chege who orally highlighted his written submissions. Counsel submitted that the learned Judge failed to evaluate the facts and evidence before her and failed to discern the fraudulent scheme by the 1st respondent's officers in collaboration with the 2nd and 3rd respondents. It was urged that the fact that the 2nd and 3rd respondents were the registered proprietors of the properties was not sufficient to prove ownership and that the process through which the titles were obtained, or the root of the title is key.
19. It was submitted on the strength of the case of Munyu *Maina vs Hiram Gathiba Maina, C.A. No. 239 of 2009* [2013] eKLR that Section 26 of the Registration of Titles Act is not absolute and when the title is under challenge, the proprietor must prove the legality of how the same was acquired, and the 2nd and 3rd respondents did not, in this case prove the root of the titles they held.
20. It was submitted that although the 1st respondent had claimed that the Deed Plans could not be found, the same Deed Plans were used to register leases and transfers in favour of the persons who then sold the properties to the 2nd and 3rd respondents; that those persons, already mentioned, namely Justin Maina Nyaga, Francis Kariuki Ndirangu, Michelle Musimbi, Evans Nyaberi and Josephine Anyango Okoth who purportedly sold the properties to the 2nd and 3rd respondents were not called to give evidence; that neither did the 1st respondent adduce any evidence thereby shielding itself from cross examination which would have shed light on the corrupt scheme.
21. It was submitted that unlike the appellant, the 2nd and 3rd respondents did not produce the letters of allocation or the receipts of payment of stand premiums; and that the Deed Plans they produced were those the 1st respondent claimed to have lost and no evidence was adduced how they obtained them.
22. Counsel concluded by urging this Court to find that there was an elaborate corrupt scheme amongst the respondents to grab otherwise legally allocated plots from the appellant and that the 2nd and 3rd respondents were not innocent purchasers for value as they claimed.
23. Although the 1st respondent was duly served with notice of hearing of the appeal, there was no appearance.
24. Learned counsel for the 1st and 2nd respondents, Miss. Wakarura Irungu in highlighting her written submissions urged that the appellant did not establish any nexus between the plots referred to in the letters of allotment as Plots. A, B and C, and the properties the subject of the leases in favour of the 2nd and 3rd respondents and the resultant Deed Plans. Citing the persuasive decision of the High Court in the case of Caroline Awinja Ochieng & Another vs. Jane Anne Mbithe Gitau & 2 Others [2015] eKLR, it was submitted that it was incumbent upon the appellant to establish a nexus between the plots allegedly allocated to her and referred to as Plot Numbers A, B and C and the duly registered parcels and the Deed Plans and that she failed to do so; that she did not establish how Plot Numbers A, B and C became Land Reference No's. 209/6604/3; 209/6604/4 and 209/6604/5.
25. It was submitted that if indeed the appellant believed that Justin Maina Nyaga, Francis Kariuki Ndirangu, Michelle Musimbi, Evans Nyaberi and Josephine Anyango Okoth took properties to which she rightfully had a claim, it was incumbent upon her to sue them; that although the appellant claims to have been issued with leases on 30th October 1996, she did not for a period of over ten years follow up in order to obtain registration.



26. It was submitted further that the appellant did not tender any evidence to establish fraud to the required standard of above balance of probabilities. Reference was made to the decision of the Court in *Moses Parantai & Peris Wanjiku Mukuru* suing as legal representatives of the estate of *Sospeter Mukuru Mbeere (deceased) vs. Stephen Njoroge Macharia* [2020] eKLR. Moreover, it was submitted that the 2nd and 3rd respondents' title, absent fraud, is indefeasible as held in *Joseph N. K. Arap Ng'ok vs. Moijo ole Keiwua & 4 others* [1997] eKLR. It was urged that the fact that the 1st respondent did not adduce evidence did not shift the burden of proof from the appellant.
27. Counsel concluded by urging the Court to uphold the decision of the ELC; and that the Judge arrived at the correct decision based on a proper review and evaluation of the evidence.
28. We have considered the appeal and the submissions and have, in that regard, reviewed and re-appraised the evidence with a view to drawing our own conclusions in keeping with our mandate under Rule 31(1)(a) of the Court of Appeal Rules. As was stated in the famous case of *Selle vs. Associated Motor Boat Company* [1968] EA 123:
- “An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif vs. Ali Mohamed Sholan*(1955), 22 E. A. C. A. 270).”
29. Subsequently in *Jabane vs. Olenja* [1986] KLR 664, it was stated thus:
- “More recently, however, this Court has held that it will not lightly differ from the findings of fact of a trial judge who had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.”
30. With those principles in mind, the main issue for consideration is whether the appellant established her case, to the required standard, for the cancellation of the 2nd and 3rd respondents' titles to the properties on the grounds of the same having been fraudulently procured as she pleaded. In dismissing the appellant's suit, the learned Judge stated:
- “The 2nd and 3rd defendants were registered as lessees and issued certificates of lease over the suit properties. Under section 26 of the *Land Registration Act*, the court is to take the 2nd and 3rd defendants' certificates of lease over the suit properties as prima facie evidence that they own the property unless it is demonstrated that there was fraud or misrepresentation in their acquisition which these defendants were party; or if it is shown that the certificates of title were acquired illegally, un-procedurally or through a corrupt scheme. The plaintiff failed to prove these grounds against the 2nd and 3rd defendants.”
31. It is a grim reality that in Kenya today titles to land can hardly be taken at face value as conclusive evidence of ownership of land. There are many contributing factors that account for this, including fraud, corruption and unprocedural acquisition of property. In *Dina Management Limited vs. County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR), the Supreme



Court of Kenya re-affirmed the decision of this Court in *Munyu Maina vs. Hiram Gathiha Maina* (above) 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. The Supreme Court stated further that irregularities and illegalities in allocation of public land cannot be sanctioned based on indefeasibility of title, and it is not enough for a party, in those circumstances to state that they have a lease or title to the property. The Supreme Court expressed that:

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

32. In the present case, the appellant produced letters of allotment issued by the Nairobi City Council, Town Clerk's Department allocating her plot Numbers A, B and C “of L. R. No. 209/6604” on the terms and conditions set out in those letters including payment of stand premiums, “survey fees, rates, legal fees, development charges and all other costs incidental to this transaction.” The offer was open for acceptance and payment of the stipulated stand premium and annual rent within 30 days of the offer.
33. As already indicated, the appellant produced receipts issued by Nairobi City Council on 8th July 1996 acknowledging receipt of payments of stand premium, annual rent, legal charges for preparation of leases, survey fees. She also produced copies of Deed Plans and three unregistered leases dated 30th October 1996 issued to her by The City Council of Nairobi under the hand of the Mayor and Town Clerk in respect of the properties. She however faulted the 1st respondent for failing to facilitate the registration of those leases in her favour with the Lands Ministry stating that the 1st respondent represented to her that the process of registration in her favour was underway “save for a few delays in its planning and legal departments.”; that she then discovered in February 2010, that the 2nd and 3rd respondents had encroached on the properties and began construction.
34. The 2nd and 3rd respondents on the other hand through the testimony of the 2nd respondent demonstrated that the 2nd respondent purchased L.R. No. 209/6604/4 from Justin Maina Nyaga in September 2007; that jointly with the 3rd respondent, they purchased L.R. No. 209/6604/5 from Francis Kariuki Ndirangu, while the 3rd respondent purchased L.R. No. 209/6604/3 from Michelle Musimbi, Evans Nyaberi and Josephine Anyango Okoth. The 2nd and 3rd respondents produced copies of registered Leases dated 20th March 2006 from the City Council of Nairobi in respect of the properties in favour of Michelle Musimbi, Evans Nyaberi and Josephine Anyango Okoth (for L.R. No. 209/6604/3); Justin Maina Nyaga (for L.R. No. 209/6604/4); and Francis Kariuki Ndirangu (for L.R. No. 209/6604/5). In addition, they produced the Agreements for Sale under which they purchased the properties as well as the registered Transfers of the properties in their favour. In effect, the 2nd and 3rd respondents presented credible evidence of how they acquired, and how they became registered as proprietors of the properties and could trace that ownership to the vendors, Michelle Musimbi, Evans Nyaberi and Josephine Anyango Okoth, Justin Maina Nyaga and Francis Kariuki Ndirangu, who it was established were registered lessees from the City Council of Nairobi.
35. In *Torino Enterprises Ltd vs. Attorney General* [2023] KESC 79 (KLR), the Supreme Court held as follows:

“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.”

36. The appellant is right that the allotment letters in favour of the vendors who then sold the properties to the 2nd and 3rd respondents were not produced. However, the vendors, who would have been the parties to produce their letters of allotment based on which they were ultimately registered as owners were not joined in the suit.

37. It is unclear from the record what transpired between October 1996, when the appellant was issued with the unregistered leases by the City Council of Nairobi, and March 2006 when the City Council of Nairobi issued leases which were registered in favour of the vendors from whom the 2nd and 3rd respondents purchased the properties. The appellant asserted that a corrupt scheme was hatched, and that the 1st respondent colluded with the 2nd and 3rd respondents to fraudulently deny her rights. We have reproduced above the particulars of fraud the appellant pleaded in her plaint as against the respondents. Beyond pleading, the appellant had a duty to prove the same. In *Ndolo vs. Ndolo* (2008) 1 KLR (G&F) 742, the Court stated that:

“...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him.

Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”

38. As Tunoi, JA stated in *Vijay Morjaria vs. Nansingh Madhusingh Darbar & another* [2000] eKLR:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts. See *Davy v Garrett* (1878) 7 Ch. D 473 at 489.”

39. Although the 1st respondent did not tender evidence or participate in the trial, it is not clear why the appellant did not summon officials from the 1st respondent to testify why the lease in her favour was not registered and the circumstances under which leases were granted and registered in favour of the vendors who then sold the properties to the 2nd and 3rd respondent. Neither did the appellant join or apply to join the vendors in the suit. In the result, one can only speculate the circumstances under which the vendors obtained the leases from the City Council of Nairobi. There was therefore no cogent evidence tendered to support the claims of fraud and the learned trial Judge cannot be faulted for having rejected the appellant’s claim.

40. As we conclude, we would observe in passing that the allotment of the properties to the appellant, facilitated by and at, the behest of her husband (PW2) during his tenure as Mayor, who then signed the leases in her favour, is itself a matter that raises questions. But that is not a matter before us.



41. All in all, the appeal fails and is dismissed with costs to the 2nd and 3rd respondents.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JANUARY 2025.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.

