



REPUBLIC OF KENYA



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**Mathenge & 8 others v Mbugua & another (Civil Appeal 63 of 2019)
[2025] KECA 387 (KLR) (28 February 2025) (Judgment)**

Neutral citation: [2025] KECA 387 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 63 OF 2019
S OLE KANTAI, JW LESSIT & A ALI-ARONI, JJA
FEBRUARY 28, 2025**

BETWEEN

**PENINAH WAMBUI MATHENGE 1ST APPELLANT
MERCY WANJIRA MURIUKI 2ND APPELLANT
ELIZABETH KAMANA MATHENGE 3RD APPELLANT
MARTHA WANJIRA MATHENGE 4TH APPELLANT
JAMLECK MURIUKI MATHENGE 5TH APPELLANT
PURITY NJERI MATHENGE 6TH APPELLANT
BELLA NYAWIRA MATHENGE 7TH APPELLANT
LUCY WAMBURA NJUKI 8TH APPELLANT
STELLA WANJIKU MURAGE (SUING THROUGH NEXT FRIEND PENINAH
WAMBUI MATHENGE) 9TH APPELLANT**

AND

**EUNICE WANJIRU MBUGUA 1ST RESPONDENT
MATHENGE WARUI 2ND RESPONDENT**

(Being an appeal from the Judgment and Decree of the Environment and Land Court at Kerugoya (E.C. Cherono, J.) delivered on 14th December, 2018 in ELC Suit No. 483 of 2013)

JUDGMENT

1. This is a first appeal from the judgment of Cherono, J. sitting at the Environment and Land Court (“ELC”) at Kerugoya delivered on 14th December, 2018 where the appellants’ suit was dismissed. Our



mandate in such an appeal is to reconsider the evidence, to re-try the case. As Sir Kenneth O’ Connor, P. in the celebrated case of *Peters vs. Sunday Post* [1958] EA 424 stated:

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion.”

2. It was a rather unusual case at ELC where the 1st appellant Peninah Wambui Mathenge was joined by her sisters Mercy Wanjira Muriuki (2nd appellant), Elizabeth Kamona Mathenge (3rd appellant), Martha Wanjira Mathenge (4th appellant), brother Jamleck Muriithi Mathenge (5th appellant) Purity Njeri Mathenge (6th appellant), Bella Nyawira Mathenge (7th appellant), Lucy Wambura Njuki (8th appellant) and granddaughter Stella Wanjiku Murage (9th appellant – suing through her next friend the 1st appellant) against her father Mathenge Warui (the 1st respondent) and an outsider Eunice Wanjiru Mbugua (the 2nd respondent). The whole dispute related to ownership or entitlement to a parcel of land known as Land Parcel-No. Mutithi/Strip/279 (“the suit land”). It was claimed in the amended plaint that the 1st respondent was “... registered to hold the land in trust for himself the plaintiffs herein and their mother...”; that the suit land had since been subdivided into 12 portions Mutithi/Strip/1253 – 1264; that on 19th June, 2013 the 1st and 2nd respondents had fraudulently caused parcel No. Mutithi/Strip/1264 to be transferred to the 2nd respondent. Particulars of fraud were given as: the respondents causing a caution lodged on the suit land to be removed without informing the 1st appellant and that the 2nd respondent had purchased the land at an undervalue. It was further alleged in the amended plaint that the 1st -8th appellants jointly with the 9th appellant’s father, their mother and the 1st respondent had developed the suit land extensively by putting up permanent business premises, planting assorted trees and bananas; that the appellants had learnt that the 1st respondent intended to dispose of the suit land without their consent and for all that they claimed for a declaration that the suit land was trust land; a declaration that the subdivision of the suit land was fraudulent; a declaration that transfer of parcel Mutithi/Strip/1264 to the 2nd respondent was unlawful; cancellation of title to parcel 1264; reconstitution of the resultant titles from the subdivision of the original suit land; determination of trust in respect of the suit land; subdivision of the suit land into 11 equal portions and transfer of resultant portions to the appellants, their mother and the 1st respondent and costs of the suit.
3. The 1st respondent delivered a defence dated 19th August 2013 where he said among other things: “That the Plaintiffs are my children whereas some are grand children together with my wife Stella Mathenge who is alive...” He stated that he bought the suit land on 12th February, 1983 at a public auction when he was issued relevant title documents; that he and his family had never resided on the suit land; that in June, 2013 he subdivided the suit land to portions running from 1253 – 1264 and that he had transferred the last portion (1264) to the 2nd respondent for valuable consideration:-

“That all my daughters are married and lives (sic) with their families at Kiangdegwa village and cultivates my rice holding No. 3744 Unit 1 Karaba Section b of the National Irrigation Board...”
4. Further, that he had recently constructed 5 rooms on the suit land which he had let to tenants:-

“That the land in issue is mine which I bought with my own money and its not registered in trust to anyone and that as a registered proprietor I have every right to enjoy my land....”



5. There was also a joint statement of defence of the same date (19th August, 2013) drawn by M/s Kiguru Kahigah & Co., Advocates for the defendants/respondents here where it was averred that the 1st respondent was the absolute proprietor of the suit land which was later sub-divided and that he did not hold that land in trust for the appellants; that he (the 1st respondent) as such proprietor had every right to utilize or alienate the suit land as he pleased, that he had sold one of the sub-divisions (1264) to the 2nd respondent; that the respondents were not party to removal of the caution by the Land Registrar; that it was only the 1st respondent who had developed the suit land and there were no other developments on it. It was prayed that the suit be dismissed with costs.
6. There were witness statements filed in the case before ELC.
7. The 1st appellant repeated what is in the amended plaint - that the 1st respondent (her father) was the registered owner of the suit land which he held in trust for himself, her mother, herself, her siblings and for the granddaughter (9th appellant). She asked for the orders in the plaint. The other appellants repeated the same averments in their witness statement.
8. The 1st respondent's witness statement dated 19th August, 2013 repeated what he had stated in the defence.
9. Kelvin Mungai Mbugua, son of the 2nd respondent, in his witness statement stated that he and his mother had been approached by the 1st respondent on 8th February, 2013 who offered to sell to them 1 acre of land from the suit land; that the suit land was subdivided and parcel No.1264 was transferred to the 1st respondent in June, 2013.
10. The 2nd respondent also found it fit to make a witness statement in which she repeated what her son Kelvin had stated. She asked that the suit be dismissed.
11. The 1st respondent decided to change tack slightly over a year after his witness statement. By his statement dated 30th September, 2014 he identified the appellants as his children but:

“The 2nd Defendant is a stranger to me. ...”
11. He stated that the suit land was his:

“That at one time, I wanted to dispose of a portion of the said Title. I consulted several brokers Mwangi and Kimani who later introduced me to another broker KELVIN who was to get a buyer for me.

The said Kelvin used to take me to a bar and confuse me by bringing me several documents and make me sign the same.

I was surprised to learn later that a portion of my land has been transferred to the 2nd Defendant whom I don't know and other subdivisions thereof....”
12. He added that the suit land belonged to him and his family; that all subdivisions were unlawful; and he denied ever attending Land Control Board for consent for any transaction. He disowned the earlier statement asking the court to nullify the transaction.
13. There is a witness statement by Lois Njeri Mukuu, who states that she knew both the 1st and 2nd respondents (the former was a matatu driver while the latter is her sister) who was asked by her sister in February, 2013 to identify land which the sister could purchase. When she identified the land on offer by the 1st respondent she introduced Kelvin Mungai Mbugua to him who did the transaction. She witnessed the 1st respondent receiving part of the purchase price.



13. The surveyor Mbugua B. Gathungu in his witness statement confirmed how he had been approached by the 1st respondent to subdivide the suit land; he did so and eventually caused the portion 1264 to be transferred to the 2nd respondent.
14. Amongst the documents filed by the 2nd respondent in Court were the 1st respondent's copy of national identification card; passport size photograph, PIN, mutation forms, agreement dated 5th February, 2012 where the 1st respondent acknowledged receipt of Kshs.13,500 from Kelvin Mungai Mbugua:

...This is meant to be an advance payment piece of land transaction (No. 279 Mutithi Scheme.)”
15. It is signed by the 1st respondent and witnessed by Joseph Kimani Gatu and Loise N. Mukuu.
16. There is a receipt issued on 6th April, 2013 by Geomatics Services for Kshs.80,000 being payment of M/Strip/279 Survey Work and a receipt by the same firm dated 11th June, 2013 for Kshs.10,000 being payment of M/Strip/279 Title.
17. There is a document dated 6th April, 2013 where the 1st respondent acknowledged receipt of Kshs.80,000 being part- payment for 1 acre out of the suit land. It is thumb-printed by the 1st respondent and Kelvin Mungai Mbugua and witnessed by John Mathenge Kibuchi and Benard Mwai Mwangi.
18. There is an application for consent of Mwea Land Control Board for transfer of 0.41 hectare being Mutithi/Strip/1264 and it is accompanied by a Letter of Consent by the Chairman, Mwea Land Control Board authorizing transfer of parcel 1264 from the 1st respondent to the 2nd respondent.
19. There are acknowledgements of receipt of other sums of money including sums of Kshs.68,000 and Kshs.19,000 and there is a letter dated 14th March, 2013 by the District Land Registrar, Kirinyaga titled “Notice of Intention to Remove Caution.” It is addressed to Mercy Wanjira and 3 Others giving them 30 days’ notice for removal of a caution unless written objection was received from them.
20. When the hearing commenced before Olao, J., the 4th appellant Martha Wanjira Mathenge took the stand and adopted her witness statement and a list of documents. She prayed for the orders in the Plaint. Challenged in cross-examination she stated that she was born in 1976; that they all contributed to the purchase of the suit land but she could not remember who sold the land to them or how much they had paid for it. She said she contributed Kshs.100,000:

...I was doing farming and that is how I raised the money., ...

From the Green Card, it shows my father bought it in 1983 for Ksh.3.000. In 1983, I was seven (7) years old. ...

The 9th plaintiff is my late brother’s daughter.

She was not born. ...”
21. She admitted that none of the appellants resided on the suit land.
22. The other appellant’s adopted what Martha had stated in her testimony after which the appellant’s case was closed.
23. The 1st respondent testified that he bought the suit land for his children. He denied selling part of the suit land to Kelvin stating that the latter had confused him; that he had only leased land to him; that he did not sell land to the 2nd respondent. He denied receiving any purchase price and denied attending



- any sitting of the Land Control Board. He asked the Court to rely on his witness statement dated 30th September, 2014 and ignore the one dated 19th August, 2013. According to him all his family (the appellants) resided on the suit land where they had homes; he denied engaging the services of a surveyor to subdivide the suit land stating that the title held by the 2nd respondent was not regularly obtained. In cross-examination by the 2nd respondent he stated that he resided in the suit land while the appellants resided in the rice holding No. 3744. Shown the witness statement dated 30th September, 2014 drawn by his lawyer Miss Thungu he denied its contents stating that he did not know how to read or write – he denied the signature on that statement. His case was then closed.
24. Kelvin Mungai Mbugua, who held a power of attorney donated by his mother the 2nd respondent testified that it was he who had carried out the transaction on behalf of the 2nd respondent who was a resident in U.S.A. He agreed to buy 1 acre of land from the 1st respondent for Kshs.500,000 and they signed an agreement for sale in a lawyers office dated 8th February, 2013 where he paid a deposit of Kshs.250,000. On that day he accompanied the 1st respondent to Equity Bank, Wanguru, where the later deposited a sum of Kshs.130,000 in an account he helped him open; later that day they both went to the offices of Geomatics Services in Kerugoya where the 1st respondent gave instructions for the suit land to be subdivided. They later attended land board for consent to subdivide the suit land and transfer - the 1st respondent was accompanied by his wife and a nephew called Githinji. According to him they had not taken possession of the land (1264) because the appellants showed hostility and prevented him from occupying the land which he had paid for fully to the 1st respondent.
 25. Loise Njeri Mukuu was called as 3rd defence witness and she knew the 1st respondent who used to be a matatu driver on a route she used as his passenger. She was instructed by the 2nd respondent to look for land to buy and it is she who identified Kelvin who found the land being sold by the 1st respondent. She was present at a lawyers office when the agreement for sale was drawn and executed and a sum of Kshs.250,000 paid to the 1st respondent. Part of the purchase price (Kshs.19,000) was paid to the 1st respondent in her house and it was her testimony that the 1st respondent was always accompanied by his wife during negotiations for land sale and when those payments were made.
 26. The case was then taken over by Mukunya, J. who took evidence of the last witness, Mbugua Gathungu, a surveyor with Geomatics Services based at Kianyaga. He adopted witness statement which we have already summarized in this judgment and produced various documents as exhibits in the case. It is he who subdivided the suit land upon receiving instructions to do so from the 1st respondent in June, 2013. He also arranged for obtaining of consents from Land Control Board which was attended by the 1st respondent.
 27. The case for the defence was closed and when it came up for mention on 9th October, 2018 the Judge was Cherono, J. who gave a judgment date.
 28. As we have seen the case was dismissed in the judgment delivered on 14th December, 2018 which provoked this appeal drawn for the appellants by their lawyers Magee Law LLP where 6 grounds of appeal are set out where the appellants fault the Judge for making a judgment against the weight of evidence; that the Judge erred in law and fact in failing to fairly evaluate the evidence; that the Judge erred in failing to find that the 1st respondent held the suit land in trust for himself and the appellants; that the Judge should have found that the 2nd respondent had obtained land fraudulently; that the Judge erred in law and fact in disregarding that the 1st respondent had admitted the appellants' claim and, finally, that the Judge erred in law and fact in dismissing the claim. We are asked to allow the appeal and set aside the judgment of ELC and substitute thereof an order allowing the appellants case.



29. When the appeal came up before us for hearing on 15th October, 2024, learned counsel Miss Muturi held brief for Mr. Magee for the appellants but there was no appearance for the respondents who we were satisfied had been served with hearing notice on 18th September, 2024. Counsel for the appellants fully relied on written submissions where the 6 grounds of appeal are condensed to 2 grounds, one of which is whether the Judge was right in not holding that the 1st respondent held the suit land in trust for himself and the appellants and the other being whether the Judge erred in not finding that subdivision of the suit land was fraudulent.
30. It is submitted on the first issue that the suit land was subdivided into 12 parcels without the appellants consent, that the appellants had developed the suit land extensively; that the appellants had proved that they resided on the suit land. It is submitted by the appellants that the suit land is family land which the 1st respondent held in trust for himself and the appellants; that "... trust in an encumbrance on land or an overriding interest and needs not to be noted on the register." The appellants cite section 28(b) of the Land Registration Act, 2012 which provides for trusts and cite a number of case law in support of their submission that the 1st respondent held the land in trust for them.
31. It is submitted on the second issue that the appellants had proved that subdivision of the suit land and transfer of one parcel to the 2nd respondent was fraudulent and the case of Kuria Kiarie & 2 Others vs. Sammy Magera [2018] eKLR is cited in support of that submission.
32. It is further submitted that a caution placed on the title to the suit land was removed fraudulently and the appellants go into a long discussion on the procedure to remove a caution.
33. It is submitted for the 1st respondent that he:

"... is not entirely opposed to this appeal and associates himself with the submissions of the Appellant save to add the following points ..."
34. The 1st respondent submits that he had confirmed in evidence before the Judge that he had purchased the suit land for his family and judgment should have been entered "... on admission ..." Choitram vs. Nazari [1984] eKLR is cited to support the submission that judgment should have been entered on admission.
35. It is further submitted that since the 1st respondent had admitted the appellants claim he held the suit land as a trustee and that a resulting trust had been created.
36. It is submitted for the 1st respondent that the subdivision of the suit land and transfer of part of it was occasioned by fraud and that the transaction between the 1st and 2nd respondents was not above board.
37. The 2nd respondent did not file written submissions despite being required to do so as indicated in the hearing notice that was served on her.
38. We have considered the whole record, submissions made and the law.
39. The appellants have properly condensed the grounds of appeal into 2 thematic areas which cover all the grounds of appeal.

(i) Did the 1st respondent hold the suit land in trust for himself and the appellants?

40. The Judge considered this issue and found that the appellants had not shown that they made any contributions towards the acquisition of the suit land directly or otherwise.



41. This is what the 1st respondent stated in his statement dated 19th August, 2013 which was drawn by his lawyers M/s Kiguru Kahiga & Company Advocates:
3. That sometimes on 12.2.2983 (sic) I bought L.R Mutithi/STRIP/279 through a Public Auction and was issued with relevant title documents.
 4. That I and my family members have never resided on the original L.R Mutithi/Strip/279.
.....
.....
 8. That the land in issue is mine which I bought with my own money and its not registered in trust to anyone as alleged and that as a registered proprietor I have every right to enjoy my land.”
42. He signed this statement which is very interesting in view of his protestations before the Judge that he was illiterate.
43. Those statements were repeated in the joint statement of defence drawn the same date by the said advocates.
44. In her testimony before the Judge Martha Wanjira Mathenge (the 4th appellant) alleged that she, her siblings and the 9th appellant (her niece) had bought the land as a family:
- “... we contributed money as a family and the land was registered in his names as trustee ... He was to sub-divide the land among us when we became of age....”
45. However, she could not remember the purchase price; who the land was bought from but alleged that she was a farmer who had been able to raise Kshs.100,000 as part of purchase price. Shown Green Card for the suit land she confirmed that the suit land was bought in 1983 for Kshs.3000:
- In 1983, I was seven (7) years old. ...
The 9th plaintiff is my late brother’s daughter.
She was not born. ...”
46. How the 7 year old and the unborn child were able to raise such money for the purchase price of the suit land boggles the mind.
47. The 1st respondent stated clearly in statement of defence and his witness statement that he had bought the suit land at a public auction. He further stated that the appellants resided elsewhere and not on the suit land. He was bound by his statements and as a party is not in law allowed to shift away from his pleadings. His change of heart later and shifting of position cannot be allowed or sustained. He did not hold the land in trust for his family at all; the suit land was his and as per his own statement, as proprietor he was free to deal with it as he pleased.

ii) Whether subdivision and transfer was fraudulent.

48. The 1st respondent stated in his statement of defence dated 19th August, 2013 that he subdivided the suit land in June, 2013 into 12 portions one of which he had sold to and transferred to the 2nd respondent. There was the evidence of the surveyor Mbugua B. Gathungu to the effect that upon instructions he subdivided the suit land and was party to the transfer of one parcel to the 2nd respondent. Several documents were produced before the Judge including mutation forms, an application for consent of the Land Control Board, consent to subdivide and transfer given by Mwea



Land Control Board. The 1st respondent's documents were produced into evidence including his national identification card, PIN, passport size photographs and acknowledgements on receipt of purchase price.

49. There was the evidence of Loise Njeri who had identified the land and witnessed the agreement for sale being executed at a lawyer's office and part of purchase price being paid. She further testified that the 1st respondent was always accompanied by his wife when the transactions took place and even attended the Land Control Board to obtaining consent to subdivide the land and for transfer.
50. The caution that had been placed on the title to the suit land was removed after the Land Registrar, Kerugoya, had given notice of its removal and there was no objection raised as required in law.
51. It is obvious to us that the 1st respondent freely sold and transferred 1 acre of the suit land after subdivision to the 2nd respondent. It is possible that his family thereafter put pressure on him leading him to try to disown what he had done. That is also evident from the fact that he supports the appeal.
52. Upon our own consideration the Judge reached the correct findings on all issues raised before him. This appeal has no merit and is hereby dismissed. Let each party meet their own costs.

DATED AND DELIVERED AT NYERI THIS 28TH DAY OF FEBRUARY, 2025.

S. ole KANTAI

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

