



Kibui & another v Kibui (Administrator of the Estate of Mary Wangechi Kibui) & 6 others (Civil Appeal E087 & E094 of 2022 (Consolidated)) [2025] KECA 1149 (KLR) (20 June 2025) (Judgment)

Neutral citation: [2025] KECA 1149 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL E087 & E094 OF 2022 (CONSOLIDATED)
S OLE KANTAI, JW LESSIT & A ALI-ARONI, JJA
JUNE 20, 2025**

BETWEEN

JAMES KIONGO KIBUI APPELLANT

AND

PRISCILLA WANJA KIBUI (ADMINISTRATOR OF THE ESTATE OF MARY WANGECHI KIBUI) 1ST RESPONDENT
LAND REGISTRAR NYERI 2ND RESPONDENT
CHARLES WAMBUGU GITONGA 3RD RESPONDENT
THE HON ATTORNEY GENERAL 4TH RESPONDENT
ECOBANK KENYA LIMITED 5TH RESPONDENT

**AS CONSOLIDATED WITH
CIVIL APPEAL E094 OF 2022**

BETWEEN

PRISCILLAH WANJA KIBUI (ADMINISTRATOR OF THE ESTATE OF MARY WANGECHI KIBUI) APPELLANT

AND

JAMES KIONGO KIBUI 1ST RESPONDENT
CHARLES WAMBUGU GITONGA 2ND RESPONDENT
LAND REGISTRAR NYERI 3RD RESPONDENT
THE HON. ATTORNEY GENERAL 4TH RESPONDENT



(Being appeals from the Judgment of the Environment and Land Page 2 of 21 Court at Nyeri (Waithaka, J.) delivered on 16th June, 2022 in ELC Case No. 200 of 2016)

JUDGMENT

1. By an order of this Court made on 11th February, 2025 with the consent of counsel on record for the various parties this appeal and Nyeri Civil Appeal No. E094 of 2022 were consolidated and it was ordered that this be the lead file. The appellant in this appeal is James Kiongo Kibui (he was the 1st defendant in the trial court and will hereafter be referred to as “James”) while the appellant in Civil Appeal No. E094 of 2022 is Priscilla Wanja Kibui (she was the plaintiff in the trial court and will hereafter be “Priscilla”).

2. Being a first appeal our mandate as donated by rule 31 of the Court of Appeal Rules, 2022 is to re-appraise the evidence and to draw inferences of fact; to retry the case. That mandate has been captured in various pronouncements of this Court in such cases as *Nairobi Bottlers Limited vs. Imbuga (Civil Appeal E661 of 2022)* [2024] KECA 434 (KLR where it was stated:

“Our mandate in a first appeal as donated by rule 31 of the Court of Appeal Rules, 2022 is to re- appraise the evidence and to draw inferences of fact; to retry the case. That mandate has been the subject of various judicial pronouncements in such cases as *Nicholas Njeru vs. Attorney General & 8 Others* [2013] eKLR where it was stated: “[In] a first appeal, we are required to re-evaluate the evidence and arrive at our own independent findings and conclusions of the matter.”

3. By a plaint filed at the High Court of Kenya at Nyeri (the suit was later transferred and became Nyeri Environment and Land Case (“ELC”) No. 200 of 2016) Priscilla (suing as the administrator (administratrix) of the estate of Mary Wangechi Kibui (deceased) took action against her brother James, a purchaser of the disputed land, Charles Wambugu Gitonga (hereinafter “Charles”), the Land Registrar, Nyeri (the Land Registrar), the Honourable Attorney General (Attorney General) and Eco Bank Kenya Limited (the Bank). It was alleged in the plaint that Mary Wangechi Kibui (the deceased) was the widow of the late John Batista Kibui (Batista) and that she had during her lifetime inherited from him a half- undivided share of a parcel of land known as Nyeri Municipality Block II/224 (‘the suit land’) comprising 0.1444 hectares which she (the deceased) held in trust for herself and Priscilla together with her siblings. It was further alleged that the deceased and James owned the suit land as tenants in common; that the deceased died on 23rd October, 2003 and that her half undivided share remained unadministered until the matters in issue in the suit arose; that between 2009 and 2010 James without Priscilla and her siblings’ consent purported to sell to Charles the whole of the suit land

“...including the half undivided share owned by the plaintiff’s deceased mother during her lifetime and which had not yet been administered, thereby disinheriting the plaintiff and her siblings without taking into account their beneficial interest in the suit land...”

4. It was averred in the plaint that the purported sale of the said half undivided share of the suit land to Charles was void because James was not the administrator of the estate of the deceased; that the suit land had subsequently been registered in James’ name by the Land Registrar without regard to Priscilla and her siblings interest; that the said registration should be set aside and the certificate of lease issued to



- Charles be revoked. Particulars of fraud on the part of Charles were set out to include: presenting fake transfer forms to the Land Registrar which were not signed by the deceased or by Priscilla; forging the deceased's signature to procure registration of the suit land in favour of Charles by the Land Registrar and uttering false documents to the Land Registrar in order to procure the said registration.
5. The Land Registrar was accused in particulars of fraud of colluding with Charles to procure registration of the suit land in favour of Charles; agreeing to register Charles as owner of the suit land and negligently and recklessly agreeing to register Charles as the owner of the suit land.
 6. The Attorney General was held liable by Priscilla on behalf of the Land Registrar as the Chief Legal Advisor of the Government of Kenya.
 7. It was said that Charles had knowledge that the suit land was owned by a person who was deceased and he was not an innocent purchaser for value without notice; that Charles had subsequently charged the suit land to the bank to secure a loan thereby making the suit land a commodity for sale "...in the event of a default in repaying the loan." Priscilla therefore prayed for a permanent injunction to issue against Charles and the bank to restrain them from selling or alienating the suit land in a manner inconsistent with the beneficial interest of Priscilla and her siblings; an order that the certificate of lease issued by the Land Registrar to Charles be revoked and cancelled; an order that the suit land be re-registered in the manner it was before 21st January, 2010 to facilitate succession proceedings in the estate of the deceased; an order directed at Charles to account for and deliver up to Priscilla all the mesne profits realized from the suit land from 21st January, 2010 till the date of judgment and that there be an order on costs of the suit.
 8. Amongst the documents filed with the Plant was a limited Grant of letters of administration ad Litem issued on 27th July, 2016; a letter from a sub-chief, Gatura sub Location listing children of the deceased; death certificate for John Batista Kibui; grant of letters of administration intestate in the estate of the late John Batista Kibui; certificate of confirmation of grant in the estate of the late John Batista Kibui; lease issued to Mary Wangeci Kibui over a half undivided share in the suit land; death certificate of Mary Wangeci Kibui and certificate of lease issued to Charles Wambugu Gitonga over the suit land.
 9. In denying the claim Charles in a statement of defence denied any knowledge of Priscilla's claim or that of her siblings; he stated that he bought the suit land from James "... free from any encumbrances or 3rd party interest of the plaintiff or the estate of Mary Wangeci Kibui or any knowledge of any interest and puts the plaintiff to strict proof thereof." He stated further:

"Without prejudice to the foregoing paragraph of the defence the 2nd defendant will claim that if the Plaintiff has any claim it is against the 1st defendant alone on the proceeds of sale of Plot No. Nyeri/Block 11/224 and not otherwise."
 10. He prayed that the suit be dismissed with costs.
 11. Amongst the documents he attached to the statement of defence was a certificate of Official Search in respect of the suit land dated 8th March, 2007; an agreement dated 14th April, 2007; evidence of payment of rates, a transfer of lease; letter from James dated 15th December, 2009 requesting transfer; an agreement dated 21st May, 2007; a certificate of lease dated 21st January, 2010; letter of consent dated 4th July, 2007; bundle of receipts and acknowledgments and an addendum agreement dated 4th February, 2008 and a rent clearance certificate.



12. James delivered a statement of defence which he drew in person. He stated, amongst other things:
- “ 4. In answer to paragraph 10 of the plaint, the defendant aver that he and his late father jointly owned the property Nyeri municipality block 2/224 comprising of 0.1444 hectares as tenants in common in equal shares and upon the death of his late father, the family applied for letters of administration for the estate of their father and in particular for the half share in Nyeri municipality block 11/224.
 5. Upon confirmation of the grant the said property was registered in the joint names of the 1st defendant for his shares and his mother who was to hold the same in trust the said half shares of entire family included the 1st defendant.
 6. In reply to paragraph 11 of the plaintiff, (sic) the 1st defendant avers that he only sold to the 2nd defendant his half share in the property and his only shares which was his entitlement in his father’s estate with the remaining share to be inherited and to be distributed to the plaintiff and others sisters (sic).
 7. The 1st defendant avers that the 2nd defendant fraudulently and with assistance of officers at the lands office at Nyeri transferred the entire property into his name.”
13. He gave as particulars of fraud on the part of Charles: procuring and presenting for registration fake transfer forms allegedly executed by him; transferring the property to Charles’ name without consent and without executed transfer forms by the deceased; transferring the suit land after the death of the deceased without letters of administration or documents necessary for transfer; that there was no consent of Nyeri Municipal Council.
14. He admitted to selling his half share of the suit land to Charles but claimed that Charles had the whole suit land transferred to himself; he claimed that Charles was only entitled to a refund of half the amount paid as per agreement. He asked that the suit by his sister (Priscilla) be dismissed with costs and the court was asked to declare that the transfer of the property to Charles was fraudulent and illegal:
- “... and therefore allow the plaintiff’s prayer in part to the extent the only a portion of the property was valid (sic) acquired by the 2nd defendant.”
15. In James’ list of documents were: Certificate of Death of John Batista Kibui; Lease for the suit land and a letter forwarding the lease; letters of administration dated 17th March, 1992; Death certificate of Mary Wangeci Kibui; a Green Card; a Sale Agreement dated 14th April, 2007; a Sale agreement dated 21st May, 2007; acknowledgements dated 30th June, 2007; and a Certificate of Official Search dated 8th March, 2007.
16. In denying the claim the bank delivered a defence where it stated that it was approached by Charles for a loan of Kshs.26,000,000 and that he offered the suit land as security for the loan; that it had, as part of due diligence, carried out a search of the suit land and found that Charles was the registered owner; that after being satisfied that the suit land had no encumbrances it proceeded to disburse funds and had registered a charge dated 1st December, 2011 over the suit land; that Charles had been repaying the loan and there was no threat to sell the suit land. It prayed that the suit against it be dismissed. Amongst the documents accompanying the defence were a copy of the Certificate of Official Search for the suit land; a copy of the lease in respect of the same and a copy of the charge.



17. The Attorney General delivered a defence on behalf of that office and that of the Land Registrar where the claim was denied. An application to amend the defence to make it more elaborate was dismissed. It was prayed that the suit be dismissed with costs.
18. The suit was heard by Waithaka, J. who found no merit in it and dismissed it in the judgment delivered on 30th May, 2022 which findings provoked these appeals by James and Priscilla.
19. Let us start with the Memorandum of Appeal by James. He drew a Memorandum of Appeal in person where he set down 16 grounds of appeal. He says that the Judge erred in law and fact when she did not find that he had proved allegations of fraud against Charles; that the Judge erred in finding a document marked “PEX 5” was a forgery without any expert evidence to that effect; that there was an error of law where a witness statement referred to a search conducted on 8th March, 2007 which time was before the suit land was registered; that the Judge erred in failing to find that registration of transfer was through fraud; that the Judge erred in failing to consider all the witness documents by all the parties; that the Judge erred in failing to find that Charles was an innocent purchaser for value without notice; that the Judge did not understand the import of agreements for sale dated 14th April, 2017, 21st May, 2007 and acknowledgement dated 30th June, 2007 between him and Charles; he says on grounds 10, 11 and 12 of Memorandum of Appeal:
 - “ 10. That the Honourable Trial Judge erred in law in failing to find that I could not have transferred the suit land to the 2nd respondent without him having paid the entire purchase price in full; the alleged transfer of the suit land to him was therefore fraudulent.
 11. The Honourable trial Judge erred in law in failing to find that the suit land being partly owned by the deceased person could not have been transferred to the 2nd Respondent without Succession cause for the same having been commenced and concluded.
 12. The Honourable Trial Judge erred in law in finding that I had transferred the entire suit land to the 2nd respondent, yet in the relevant sale agreement there was a proposed subdivision of the same to transfer half a portion to him.”
20. James, in other grounds faults the Judge for finding that consent of Municipal Council of Nyeri was not necessary; that the Judge should have considered a report by Director of Criminal Investigations on the suit land “... confirming that the same belonged to me and my mother Mary Wangechi Kibui (deceased) as tenants in common in equal shares...” He accused the Judge in the penultimate ground of appeal of failing to find that Charles charged the suit land to the bank for two loans when there were subsisting orders maintaining status quo, and, finally, he faults the Judge for condemning him to pay costs of the suit.
21. Priscilla’s Memorandum of Appeal is drawn for her by her lawyers M/s S. B. Otieno & Company Advocates where 15 grounds of appeal are set out. She sets the following on grounds 1-3 (inclusive):
 - “ 1. That the learned judge of the superior court erred in law failing to appreciate that the suit property was held in common and that since one of the tenants in common was dead and their estate had not been administered, the surviving tenant in common (the 1st respondent) did not have the capacity to sell the entire suit property to the 2nd respondent.



2. That the learned judge of the superior court erred in law and in fact ignoring the evidence contained in the certificate of confirmation of grant issued to the appellant's deceased mother showing that she had inherited half undivided share of the suit property from John Baptista Kibui and as such, the land was held in common with the 1st respondent before the impugned sale.
 3. That the learned judge of the superior court erred in law and in fact in upholding the alleged sale of the entire suit property by the 1st respondent yet the only evidence on record was to the effect that the 1st respondent had only allegedly sold his half of the property (which sale the appellant also pleads was irregular).”
22. The Judge is faulted in other grounds for expunging what are called crucial documents from the record; that the Judge was wrong to find that the suit land was jointly owned by James and the deceased when evidence showed tenancy in common; that the Judge's holdings favoured Charles who did not tender evidence; that the Judge erred in law and in fact in failing to reconcile conflicting evidence contained in the certificate of confirmation of grant with the Judge's finding that there was no evidence to show that the suit land was held in common; that the Judge erred in law and fact in upholding a lease issued to Charles which was not produced as an exhibit at trial and which contradicted materially with other items of evidence adduced at trial; that the judgment had inconsistencies and arrived at a wrong outcome; that the Judge erred in holding that the lease produced by Priscilla was a forgery. Priscilla states at ground 11-13 (inclusive) of her Memorandum of Appeal:
- “ 11. That the learned judge of the superior court erred in law and in fact in ignoring the presumption of likely events set out at Section 119 of the *Evidence Act* and in failing to appreciate that the only way the entire suit parcel of land could have ended up in the ownership of the 2nd respondent without the participation of the appellant's deceased mother who also owned the land in common was through fraud and or a corrupt scheme that could not have taken place without the participation of the 2nd and 3rd respondents.
 12. That the learned judge of the superior court erred in law and in fact in holding that the 2nd respondent was an innocent purchaser without notice yet the 2nd respondent had not led any such evidence to buttress such a finding.
 13. That the learned judge erred in law and in fact in placing reliance on a search certificate dated 8th March 2007 which was patently inaccurate as to the acreage of the parcel of land and which placed side to side with the 2nd respondent's purported lease cast doubt on the 2nd respondent's lease.”
23. It is said penultimately that the Judge failed to analyse the evidence and, finally, that the Judge failed by disregarding the evidence and arriving at an outcome that is wrong in law. Priscilla prays that we allow her appeal, set aside the judgment and decree of the trial court and we substitute therefore an order allowing her appeal with costs.
24. When the appeal came up for hearing before us on 11th February, 2025, Mr. Otieno, learned counsel appeared for Priscilla, learned counsel Mr. Thige appeared for the bank while James appeared in person as appellant in this appeal.



25. Mr. Otieno was the first to go and he highlighted written submissions which he had filed in respect of both appeals. Counsel submitted that fraud had been proved because Priscilla did not at any time either have or execute transfer forms in favour of James or Charles; that she had not sold land to anyone yet the entire suit land had ended up being owned by Charles. Counsel wondered how the entire suit land could end up with Charles as the owner when there was no proper transfer in his favour. According to counsel James and his mother were registered as owners of $\frac{1}{2}$ share each of the suit land after succession proceedings which they held as tenants in common, yet the whole suit land was transferred to Charles in 2010. Counsel thought that a corrupt scheme could be inferred in those circumstances. Counsel questioned the trial Judges' decision to strike out documents without application by any party but was quick to concede that Priscilla had not appealed that ruling. According to counsel it was wrong for the Judge to hold that Charles was an innocent purchaser for value without notice when he (Charles) had not given any testimony in the case.
26. Mr. Thige submitted that there was no evidence to show that the suit land was owned by James and his deceased mother as tenants in common. According to counsel a grant showed that the whole property had passed to Mary Wangeci Kibui (deceased); that James was not mentioned anywhere in the Certificate of Confirmation of Grant. Counsel submitted that by the time the trial Judge ordered maintenance of status quo the suit land had already been charged to the bank.
27. In his address to us James told us that there was an agreement for the sale of 0.45 hectare which he had sold for Kshs.1,000,000 then he had entered a second agreement for sale in consideration of Kshs.850,000 but that there was an unpaid balance of Kshs.300,000. He denied that a signature on an agreement for sale dated 4th February, 2008 was his – that he had reported a case to police but the police file had disappeared. He claimed that Charles and the bank had registered a charge over the suit land when there was a court order maintaining status quo; he wondered how land could be transferred when there was fraud. He wondered why the Judge condemned him to pay costs even to parties who did not attend the hearing.
28. In a brief rejoinder Mr. Otieno submitted that the issue of expunging documents was captured at ground 7 of the appeal.
29. We have considered the whole record, submissions by the parties and the law and this is how we determine this consolidated appeals.
30. It is important in making that determination to examine the root of title to the suit land and status of the same by the time Charles claimed ownership of the suit land and charged the same to the bank.
31. By a Letter of Allotment issued by the Commissioner of Lands on behalf of Nyeri Municipality dated 21st January, 1999 the said office allotted to John B. Kibui and James Kiongo "Extension to Plot No. Block 11/224 Nyeri Municipality" measuring 0.1444 hectare on terms and conditions set out in that letter. As became evident during the hearing before ELC "John B. Kibui" is Batista, father of James Kiongo (James). Batista died on or about 8th July, 1991 as evidenced by Certificate of Death attached to Priscilla's witness statement accompanying the plaint. His widow, Mary Wangeci Kibui took out succession proceedings in respect of the estate of her deceased husband and this culminated in letters of administration being issued to her. The parties were not fair to the trial Judge on how this process was undertaken as documents are scanty and not very clear. What is clear however on page 397 of the soft copy of the record of appeal is that by Lease issued under the Registered [Land Act](#) Cap 300 Laws



of Kenya (now repealed), The President of the Republic of Kenya on behalf of the Government of that Republic in consideration of Kshs.35,000 paid by way of stand premium:

“... Hereby leases to Mary Wangechi Kibui as the administrator to the ½ undivided share of John Batista Kibui (deceased) and James Kiongo of Nyeri (Post Office Box Number 345) hereafter called “the lessee.”

32. The title number shown in respect of that lease is a Title No. Nyeri Municipality/Block 11/224; the acreage is 0.1444 hectare and the term is 99 years from 1st day of August, 1992. The lease appears dated 10th December, 2009 and was produced by Priscilla as part of documents filed with the plaint as well as by James in his documents filed on 24th September, 2018. Even in the event that Priscilla’s document may have been expunged by the Judge during the hearing the document by James was properly on record.
33. According to that lease the same was leased to Mary (deceased) and James, the former as administrator of ½ undivided share of Batista’s share.
34. Section 91 of *Land Registration Act* defines and distinguishes tenancy in common and joint tenancy in the following terms:

“ 91.

- (4) If land is occupied jointly, no tenant is entitled to any separate share in the land and, consequently-
 - a. dispositions may be made only by all the joint tenants;
 - b. on the death of a joint tenant, that tenant’s interest shall vest in the surviving tenant or tenants jointly; or
 - c. each joint tenant may transfer their interest inter vivos to all the other tenants but to no other person, and any attempt to so transfer an interest to any other person shall be void.
5. if any land, lease or charge is owned in common, each tenant shall be entitled to an undivided share in the whole and on the death of a tenant, the deceased’s share shall be treated as part of their estate.”

35. Counsel for the bank referred us to the case of *Mukazitoni Josephine vs. Attorney General Republic Of Kenya* [2015] eKLR where this Court observed on the issue of joint tenancy and tenancy in common:

“When a property is registered in more than one name, in the absence of a contrary entry in the register, the property is deemed to be held in joint tenancy and not tenancy-in-common or tenancy in entirety. A tenancy in common or tenancy in entirety means that the interest of each registered owner is determinable and severable; in a joint tenancy, the interest of each owner is indeterminable, each owns all and nothing.” (Emphasis ours)

36. In the case before ELC records showed that the lease was issued in favour of the deceased (Mary) and James. The specificity of “½ undivided share” shows and means that the two owned the suit land



in common as the share of each is determined. The manner in which ½ the suit land was divested to the administrator of Batista is further evidence that the suit land was owned in common. James, in his statement of defence and witness statement confirmed that he owned only ½ share of the suit land although along the way he seemed to speak from both sides of the mouth alleging, on one hand, that he had only sold his half share to Charles but on the other being met with agreements he had made first selling half of the suit land and later selling the whole land. The agreements, addendum and acknowledgment proved on a balance of probabilities that James sold, firstly half of the suit land but later sold the other half and was paid for it. He (James) had opposed his sisters' (Priscilla's) suit and he cannot now turn around to fault the Judge who dismissed the same suit he had opposed.

37. The next question is whether any good title could pass to Charles in those circumstances.
38. Evidence was placed before the Judge that the whole suit land was sold by James to Charles who charged the same to the bank for considerable loans.
39. The position in Kenya when disputes arise regarding ownership to landed property has been made very clear by the Superior Courts – it is not enough for a title holder to land to wave the title document as proof of ownership of land, he must show how that title was acquired. The Supreme Court of Kenya in *Dina Management Limited vs. County Government of Mombasa & 5 Others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (Constitutional and Human Rights) (21 April 2023) (Judgment) pronounces itself thus:

"To establish whether the appellant is a bona fide purchaser for value therefore, we must first go to the root of the title, right from the first allotment, as this is the bone of contention in this matter.

...The root of the title having been challenged, as we already noted above the appellant could not benefit from the doctrine of bona fide purchaser."

40. That Court in the said case *Dina Management* (supra) case cited with approval a decision of this Court as follows:

"As held by the Court of Appeal in *Munyu Maina v Hiram Gathiha Maina* Civil Appeal No 239 of 2009 [2013] eKLR, where the CoA stated 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."

41. As we have seen the original Allotment Letter was issued to James and his father Batista. Upon demise of Batista a title (99 year lease) was issued to James and his mother Mary – (deceased) and it was clearly noted that the deceased was holding ½ undivided share and James the other share. How James managed to have that share owned by his mother to be transferred to him without going through any process known to law boggles the mind. It must be a process that is the product of a corrupt scheme, to use the language of section 26 of *Land Registration Act*, 2012 which provides:

26.

- (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.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

- 42. These findings, we think run across all the grounds raised in the consolidated appeals and it will not add any value to address any other ground as doing so would be belabouring what we think we have addressed substantially and fully in the said findings.
- 43. The title acquired by James was acquired irregularly and cannot stand the test of time. The ½ undivided share owned by Batista and which was inherited by his widow Mary was irregularly acquired by James who could not pass any good title to Charles. That ½ share remained an asset in Mary’s estate and the Judge was wrong to dismiss Priscilla’s suit. Priscilla’s suit had merit and should have been allowed.
- 44. There is the small matter raised by James who complains that he was ordered to pay costs for all parties even those who did not participate before ELC.
- 45. In dismissing the suit the Judge at ELC said this on the issue of costs:

“...Consequently, I dismiss her suit with costs to the 2nd and 5th defendants to be paid by the 1st defendant whom I find to be solely to blame for the circumstances leading to filing of this suit.”
- 46. It is true that costs are awarded at the discretion of the court and would ordinarily follow the event.
- 47. What we understand the Judge to be saying is that the whole chain of events leading to the suit before her had been stated by James.
- 48. It will however be seen that in the course of the proceedings and after various documents were expunged, the Attorney General’s application to amend his defence was refused and the bank’s application to amend its defence was also refused. The only parties who gave evidence before the Judge were Priscilla and James. In those circumstances we do not think that it was correct for the Judge to exercise her discretion the way she did. Costs should not have been awarded to parties who were not before the Court. We think that where only the two parties who were brother and sister were before the court they should have been ordered to pay their own costs. To that limited extent only does the appeal by James succeed.
- 49. The upshot of our findings is that the appeal by James fails and is dismissed with no order on costs.
- 50. We allow the appeal by Priscilla by setting aside the judgment and decree of ELC and substitute therefore an order allowing her suit before that court. Let each party meet their own costs of the appeal and costs below.

DATED AND DELIVERED AT NYERI THIS 20TH DAY OF JUNE, 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

