



REPUBLIC OF KENYA



**KENYA LAW**  
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**Daniel v Musyimi (Civil Appeal 661 of 2019)  
[2025] KECA 1454 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1454 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 661 OF 2019  
DK MUSINGA, M NGUGI & GV ODUNGA, JJA  
JULY 31, 2025**

**BETWEEN**

**ELIJAH MUTHOKA DANIEL ..... APPELLANT**

**AND**

**JUSTUS MUTUA MUSYIMI ..... RESPONDENT**

*(Being an appeal from the judgment of the Environment and Land Court at  
Makueni (C. G. Mbogo, J.) dated 22nd November 2018 in ELC No. 17 of 2017)*

**JUDGMENT**

1. This appeal relates to the appellant's claim of entitlement to land parcel number Makueni/Unoa 3640 (hereafter 'the suit property') and the decision of the Environment and Land Court (ELC) in Makueni (Mbogo, J.) declining to grant various orders in respect thereto in his favour. By his plaint dated 18th November 2015, the appellant, Elijah Muthoka Daniel, had prayed for an injunction restraining the respondent, whether by himself, his agents and/ or servants from interfering or otherwise dealing with the suit property, which was registered in his name; general damages for loss of use of the land; special damages of Kshs. 370,922.20; costs of the suit and interests at court rates.
2. The appellant's case as set out in his plaint was that he was at all material times the registered owner of the suit property; that on or about 19th March 2011, he entered into a sale agreement with one David Dick Musyimi (David) for sale of a parcel of land to be excised from all that parcel of land known as Makueni/Unoa/2467; that prior to entering into the sale agreement, David had acquired title to the suit property by way of inheritance upon the passing on of his mother, one Grace Kanini Musyimi.
3. The appellant averred further that upon the parties meeting their obligations under the sale agreement, he assumed possession of the suit property pending successful mutation, subdivision and issuance of title deeds by the Ministry of Lands; that upon successful completion of the subdivision process, a mutation form from the District Land Surveyor was issued permitting the appellant and David to



proceed and register the mutation and subsequently have a separate title deed issued over the suit property. It was his case that separate titles have since been procured and he had been registered as the bona fide owner of the suit property.

4. According to the appellant, the respondent, who is a brother of David, in protest at the sale of the land to the appellant by David, had embarked on a malicious mission to destroy the investments made by the appellant on the suit property in a bid to frustrate him and lead him to abandon the suit land. The appellant had reported the matter to Makueni Police Station, leading to Criminal Case No. 760 of 2014 (though he does not indicate whether it is against the respondent), for malicious damage to property.
5. The appellant gave particulars of special damages sought from the respondent, amounting to Kshs. 186,673, being the value of the property destroyed by the respondent as assessed by the Kenya Forest Service; valuation and assessment fees and cost of transport; and Kshs. 189,249.20 being the cost of opening and building an access to the suit property; mutation and subdivision of the suit property and planting of indigenous trees.
6. In his defence and counterclaim dated 23rd June 2016, the respondent averred that the registration of the appellant as the owner of the suit property was illegal, null and void ab initio; that L.R. No. Makueni/Unoa/2467 initially belonged to his mother, one Kanini Musyimi (deceased); that on 4th September 1983, he was given a portion of land in Kangundo by his grandmother as a gift, which his brother, Stephen May Musyimi (Stephen), sold illegally and without his consent; that Stephen thereafter started pushing for the subdivision of Makueni/Unoa/33 (it appears from the documents on record that the correct title number is Makueni/Unoa/335) among the three of them; that the brothers agreed that a portion of land equivalent to the Kangundo land would first be extracted from Makueni/Unoa/ 335 and given to him; and that thereafter they would share the remainder of the land equally.
7. According to the respondent, Stephen was not happy about this proposal and he instigated the respondent's arrest on allegation of robbery, a crime he had not committed; that his brothers, Stephen and David, were witnesses in the case against him, being Makueni PMCR No. 628 of 2010; that he was convicted and sentenced to seven years' imprisonment; but that he appealed against the conviction and sentence and was acquitted in a judgment delivered on 13th March 2014.
8. The respondent stated that upon leaving prison, he learnt that his mother had already passed away; that L. R. No. Makueni/Unoa/335 had already been subdivided to create Makueni/Unoa/ 2464, 2465, 2466, 2467 and 2468; and that parcel number Makueni/Unoa/ 2467 was registered in the name of his brother David who had sold a portion to the appellant pursuant to the agreement dated 19th March 2011. It was his averment that the criminal allegations against him were intended to get him out of the scene so that his brothers could get a free hand in subdividing the land and deprive him of his heritage, both at Kangundo and Makueni.
9. The respondent contended that the subdivision of Makueni/Unoa/335 was illegal, null and void ab initio, and he sets out the particulars of fraud and illegality against the appellant as being: purchasing a portion of land to be excised from Makueni/Unoa/2467 while he knew or ought to have known that the land was illegally obtained, and that the seller did not have good title thereto; and colluding with the seller to clandestinely and hurriedly purchase the land in order to defeat and/or extinguish the respondent's proprietary interests thereto.
10. In his counterclaim, the respondent reiterated the contents of his defence and prayed for a declaration that the sale and registration of the suit property in favour of the appellant was null and void; cancellation of the titles to the parcel from the subdivision of Makueni/Unoa/335, thus reverting to the original title number Makueni/Unoa/335; and for the costs of the suit.



11. Upon hearing the suit, the ELC, in its judgment dated 22nd November 2018, dismissed the appellant's suit and entered judgment for the respondent on his counterclaim. The trial court noted that while the appellant was the registered proprietor of Makueni/Unoa/3640, he had not established the root of his title.
12. The trial court relied on the decision of this Court in *Munyu Maina v Hiram Gathiha Maina* [2013] KECA 94 (KLR) to hold that the appellant had failed to go beyond the instrument of title to prove its legality. It observed, *inter alia*, that the certificate of closure of title number Makueni/Unoa/335 showed that Makueni/Unoa/2467 and others were issued without indicating their proprietors, and there was no evidence that Makueni/ Unoa/ 335 had been validly transferred to David.
13. The court found that in the absence of proof of how David obtained Makueni/Unoa/2467, his capacity to subdivide and sell the suit property to the appellant was doubtful. The court found therefore that the appellant had not established his case and dismissed his suit. It found that the respondent had proved his counterclaim against the appellant and issued orders as prayed in the counterclaim.
14. Aggrieved by the decision, the appellant filed the present appeal in which he raises four grounds of appeal in his undated memorandum of appeal. He contends that the trial court erred in law and fact in: dismissing his case and in finding that he had failed to prove the legality of the title he held as a bona fide purchaser; taking into consideration irrelevant matters and misguiding himself with issues of succession wrongly tabled before him; misinterpreting facts and the law and in granting too much weight to the respondent's submission while failing to consider the appellant's evidence; and in failing to interrogate, recognize or correctly interpret and enforce principles protecting a bona fide purchaser of land.
15. He contends, finally, that on the whole, the learned judge misguided himself, and the judgment and decree is inexplicable on the facts, pleadings, evidence and the law. The appellant prays that the judgment be set aside and that he be awarded the costs of the appeal and of the proceedings before the ELC.
16. In submissions dated 28th February 2025, the appellant identified four issues as arising for determination: whether he proved the legitimacy of his claim to the suit property as a bona fide purchaser; whether the respondent proved his case as laid out in the counterclaim against the appellant on a balance of probabilities; whether the trial court's decision should stand; and who should bear the costs of the appeal.
17. The appellant submitted that he had placed before the trial court documents in support of his claim, including: copies of: the title deeds for Makueni/Unoa/2467 and Makueni/Unoa/3640; the sale agreement dated 19th March 2011 between him and David Dick Musyimi; the deed plan showing the suit land; application to subdivide Makueni/Unoa/2467; and a letter of consent to subdivide; the mutation form approved on 14th July 2015. The appellant further submitted that the suit property, Makueni/Unoa/3640, was excised from Makueni/Unoa/2467, which was registered in the name of the vendor, David Dick Musyimi, and the title issued on 28th June 2011. The title to the suit property was registered in the name of the appellant on 23rd September 2015.
18. The appellant submitted further that the vendor, David, applied on 28th August 2014 to the Land Control Board for consent to subdivide Makueni/Unoa/2467 into two portions and was given consent by the letter issued on 28th August 2014.
19. It was submitted that the appellant had purchased the suit property for valuable consideration; that the appellant also presented a copy of a mutation form dated 15th July 2015 which indicated that



Makueni/Unoa/2467 had been subdivided into two parcels: Makueni/Unoa/3640 and Makueni/Unoa/3641, the former of which was transferred to the appellant. It was his submission, therefore, that he had satisfied the threshold to prove that he was an innocent purchaser for value without notice of any defects in the mother title; and that he had regularly, procedurally and legally acquired the suit land from David Musyimi.

20. The appellant submitted further that no evidence of fraud or corrupt schemes under section 26 of the [Land Registration Act](#) was tendered against him to taint his acquisition of the property; and that the acquisition was done after due diligence which showed that he intended to buy the suit property in good faith and fulfilled all the ingredients of a bona fide purchaser for value without notice. He therefore submitted that the trial court erred in holding that he had failed to prove the legality of the acquisition of his title.
21. The appellant submitted further that the trial court erred in finding that there was a lacuna in how David came to acquire Makueni/Unoa/2467 and in dismissing the appellant's suit without evidence to link the purported lacuna in the acquisition of the mother title to him. He submitted, however, that even if there was such a lacuna in the acquisition of the mother title by David, it was unfair to dump the consequences of such lacuna on his shoulders as he was not aware of the lacuna at the time of purchase of the suit property; that he was a third party who paid valuable consideration for the suit land and deserved the protection of the law. The appellant cited the case of Eunice Grace Njambi Kamau & another v Attorney General & 5 others [2013] eKLR, in which the court was guided by the words of the court in Fletcher v Peck 10 U.S 87 (1810) to reiterate his contention that he was an innocent purchaser for value, whatever may be the guilt of others with respect to the acquisition of the title to the suit property.
22. When the matter came up for hearing on 19th March 2025, learned counsel, Mr. Kiprotich, holding brief for learned counsel, Mr. Kinyanjui, appeared for the appellant. There was no appearance for the respondent despite service, nor were there submissions filed on his behalf.
23. In highlighting the appellant's submissions dated 28th February 2025, Mr. Kiprotich condensed the appellant's grounds of appeal into two issues: whether the appellant proved the legitimacy of his claim for title to the suit property as a bona fide purchaser for value without notice; and whether the respondent proved his case as laid down in his counterclaim, on a balance of probabilities.
24. Mr. Kiprotich submitted that the trial court did not consider the evidentiary burden of proof that the appellant surmounted in claiming that he was a bona fide purchaser for value without notice. He referred to section 26 of the [Land Registration Act](#) which he submitted lays down the presumption of sanctity of title that emanates from Article 40 of [the Constitution](#) to submit that he had demonstrated in the trial court that he held a certificate of title; that he purchased the property in good faith; and that he did not have knowledge of the fraud alleged by the respondent.
25. Mr. Kiprotich submitted that the suit property, Makueni/Unoa/3640, is a subdivision of title No. Makueni/Unoa/2467, which was registered in the name of David Dick Musyimi, who sold the suit property to the appellant after subdivision; and that at the time of the sale, the said David Dick Musyimi held a valid title to the property. He further submitted that the appellant had done a search on the title and got confirmation that the said David Dick Musyimi was the registered owner. It was his submission that the trial court had omitted this evidence, which was available in the appellant's list of documents.
26. Mr. Kiprotich confirmed that David Dick Musyimi was not a party to the suit; that he did not own Makueni/Unoa/335 but owned Makueni/Unoa/2647; but he maintained that the appellant was ignorant of any allegation of impropriety or fraud as the respondent alleged in the trial court; that



he had entered into a sale agreement with David Dick Musyimi and that the agreement indicated at clauses 13.9 to 13.11 that the said David Dick Musyimi was the legitimate owner of the suit property. He prayed that this Court finds that the appellant was a bona fide purchaser for value without notice, and upholds his title to the suit property.

27. With respect to the second issue, whether the respondent had proved his counterclaim on a balance of probabilities, Mr. Kiprotich submitted that the trial court had reached the conclusion that the respondent had satisfied the court that, on a balance of probabilities, he had a cause of action against the appellant, and proceeded to nullify the subdivision of Makueni/Unoa/335 and the resulting subdivisions, including 2467 and 3640. It was submitted for the appellant that the conclusion by the trial court was arrived at without an analysis of the facts or evidence presented in support of the allegations in the counterclaim.
28. Mr. Kiprotich submitted that the judgment of the trial court did not meet the requirements of Order 21 rule 4 of the Civil Procedure Rules, which requires that judgments must contain concise statements of the case, the points for determination and the decisions and should, for that reason, be set aside.
29. We have considered the judgment of the trial court impugned in this appeal, the proceedings before the trial court, and the submissions, oral and written, by the appellant. This being a first appeal, our mandate is anchored in rule 31(1) (a) of the Rules of this Court as read with section 78 of the *Civil Procedure Act*, which provides that a first appellate court is under a duty to re-evaluate the evidence before the trial court and reach its own conclusions. In doing so, we have to bear in mind that we did not have an opportunity to see and hear the witnesses, which the trial court did. See also *Selle v Associated Motor Boat Co.* [1968] EA 123 and *Peters v Sunday Post Limited* [1958] EA 424.
30. The appellant has identified two issues which he seeks determination of, which can be summarised as being:
  - i. whether the appellant proved that he was a bona fide purchaser for value of the suit property; and
  - ii. whether the respondent proved his counterclaim against the appellant on a balance of probabilities.
31. We consider, first, the position of the appellant. His case was that he was a bona fide purchaser for value of the suit property, and had no notice of any fraud, illegality or impropriety with respect to the capacity of the seller, David Dick Musyimi, to sell the property to him. For his case to succeed, the appellant was required to satisfy the burden of proof under section 107 of the *Evidence Act*, which provides that:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
32. The appellant’s case before the trial court was that he purchased the suit property from David Dick Musyimi, who was the registered proprietor of Makueni/Unoa/2647, which he subdivided into two and sold to him the suit property, Makueni/Unoa/3640. The evidence that he placed before the trial court in support of his case comprised his oral evidence in court, in which he adopted his written, undated statement filed in court, and the evidence of PW1, Stephen Munyao Mwanza, a forest officer, Mbooni East. The evidence of PW1 related to the value of indigenous trees alleged to have been damaged by the respondent. Pertinent to his claim of being an innocent purchaser for value are the documents that he produced in court, and the written statement.



33. We have considered the statement and examined the documents relied on by the appellant. He stated that he entered into a sale agreement with David on 19th March 2011 for sale of the suit property. The property sold, according to the sale agreement, is ‘a portion of land title number Makueni/Unoa/2467’. This portion, from the evidence before the court, resulted from a subdivision of Makueni/Unoa/355.
34. The appellant submitted that the sale agreement, at clauses
13. 9 to 13.11, indicated that David Dick Musyimi was the registered proprietor of the suit land, which resulted from a subdivision of Makueni/Unoa/335. We note, however, that the pages containing these clauses have been omitted from the record of appeal. At any rate, we note that as at that date, Makueni/Unoa/355 was registered in the name of Grace Kanini Musyimi, the mother of both David and the respondent. This is evident from the Land Certificate in the appellant’s bundle of documents indicating that ‘Kanini w/o Musyimi’ was registered as the proprietor of ‘Makweni/Unoa/335’ on 11th March 1974; and receipts issued to ‘Grace Kanini Musyimi’ on 29th October 2010 by the Department of Lands.
35. From the evidence, therefore, at the time the appellant entered into the sale agreement with David, the mother title, Makueni/Unoa/335, was still registered in the name of Grace Kanini Musyimi. It was asserted by the respondent, who produced a death certificate in evidence, that Grace Kanini Musyimi died on 15th August 2011. The capacity of David to subdivide Makueni/Unoa/335 and sell a portion thereof to the appellant, title in respect of which was issued on 23rd September 2015, is highly doubtful. The trial court was, therefore, correct in finding that the appellant had not established his root of title.
36. The appellant has cited the provisions of section 26 of the *Land Registration Act* which provides that:
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.
37. He has also cited the case of Eunice Grace Njambi Kamau & another v Attorney General & 5 others (supra) and the decision cited therein to support his contention that he was a bona fide purchaser and should get the protection of the court.
38. We have considered the decision cited and the provisions of section 26 of the *Land Registration Act* set out above. Despite his protestations of innocence, however, we note that the appellant’s own witness statement demonstrates, in no uncertain terms, that he was not a bona fide or innocent purchaser for value. He stated as follows in his written witness statement, which he adopted as his evidence before the trial court:
- “ 3. That Mr. David Dick Musyimi and I entered into a sale agreement on the 19th March 2011 with regards to purchase of the suit property herein.



4. That the Defendant is a biological brother of the vendor, Mr. David Dick Musyimi and had consented to the subdivision of the said parcel of land.
  5. That the Defendant had acquired ownership of the suit property herein by way of inheritance upon the passing on of Grace Kanini Musyimi who was his mother. (Emphasis added)
39. With his own words, in his signed witness statement filed with his claim against the respondent, the appellant destroys his own claim to being a bona fide purchaser for value without notice. His statement is conclusive proof that he knew that the property he was purchasing belonged to the respondent who ‘had acquired ownership of the suit property herein by way of inheritance upon the passing on of Grace Kanini Musyimi who was his mother.’
40. In fact, not only does he destroy his own core claim, he also bolsters the claim by the respondent in his counterclaim: that he had inherited the land from his mother; that his two brothers, David Dick Musyimi and Stephen May Musyimi, had conspired to have him charged in court with the offence of attempted robbery with violence, and had testified against him, in order to defraud him of his inheritance from his mother.
41. We note that among the documents that the appellant attached and relied on as showing his expenses related to the suit property are receipt issued by Geospace Surveyors and the County Government of Makueni for construction of an access road in respect of the suit property which, as noted, the appellant acknowledged belonged, ‘through inheritance’, to the respondent. It is interesting that the appellant contends that he bought the property from David, that there was consent from the respondent-though no evidence in this regard is tendered; and he tenders receipts issued to Stephen May Musyimi who, according to the respondent, was David’s co- conspirator against him. All these matters, in our view, establish the respondent’s claim on a balance of probabilities. While he was in prison, his siblings purported to subdivide the land he had inherited from his mother, one subdivision of which they sold to the appellant.
42. The appellant has argued, finally, that the decision of the trial court should not stand as it was not only erroneous but also structurally defective as it did not comply with the requirements of Order 21 of the Civil Procedure Rules. We note, however, that this was not a ground raised in the memorandum of appeal filed before us, and we shall therefore not spend any time on it in view of the provisions of rule 107
- (a) of the Rules of this Court, which provides that at the hearing of an appeal:
- no party shall, without the leave of the Court, argue that the decision of the superior court should be reversed or varied except on a ground specified in the memorandum of appeal or a notice of cross-appeal... (Emphasis added)
43. That notwithstanding, we note that the trial court did, in its conclusion, as contended by the appellant, deal with the success of the counterclaim as flowing naturally from the failure of the appellant’s claim. It cited the case of *Munyu Maina v Hiram Gathiha Maina* (supra) which, we believe, represents the correct position of the law on the issue, in which this Court stated:
- “...when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how



he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”

44. The trial court then went on to state that:

“24. In the matter before me, the Plaintiff who is the registered proprietor of Makueni/Unoa/2467 (sic) has failed to go beyond the instrument of title so as to prove the legality of how he acquired the title. Given the above circumstances, his claim against the Defendant must fail. I am satisfied that the Defendant has on a balance of probabilities satisfied this Court that he has a cause of action against the Plaintiff as pleaded in the counterclaim.”

45. While the trial court did not enter into an analysis of the respondent’s counterclaim, our own consideration of the evidence leads us to the conclusion that the trial court reached the correct determination in respect thereto. The appellant produced the title to Makueni/Unoa/3640, but he did not join the seller of the property to the suit; he did not call him as a witness to his claim; his statement and documents support the respondent’s counterclaim that he had inherited the mother title, Makueni/Unoa/335, from his mother, but had been deprived thereof by his two brothers in what appears to be a rather devious conspiracy against him.

46. In the circumstances, we find no reason to depart from the conclusions reached by the trial court. The appellant’s appeal is without merit, and we hereby dismiss it with costs to the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 31<sup>ST</sup> DAY OF JULY, 2025.**

**D. K. MUSINGA (PRESIDENT)**

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**JUDGE OF APPEAL**

**MUMBI NGUGI**

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**JUDGE OF APPEAL**

**G. V. ODUNGA**

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**JUDGE OF APPEAL**

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

*Signed*

Deputy Registrar

