



**Kositany v Chania Logistics Limited & 3 others (Civil Appeal
E085 of 2022) [2024] KECA 151 (KLR) (16 February 2024) (Judgment)**

Neutral citation: [2024] KECA 151 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL E085 OF 2022
DK MUSINGA, F SICHALE & FA OCHIENG, JJA
FEBRUARY 16, 2024**

BETWEEN

JENIPHER KOSITANY APPELLANT

AND

CHANIA LOGISTICS LIMITED 1ST RESPONDENT

JOSEPH NJAU WATHIGO 2ND RESPONDENT

SOLOMON BOIT 3RD RESPONDENT

CHIEF LAND REGISTRAR 4TH RESPONDENT

(Being an appeal from the Judgment of the Environment and Land Court at Nakuru (Mutungi, J.) delivered on 28th July, 2022 in ELC Cause No. 31 of 2020)

JUDGMENT

1. The 1st respondent instituted a suit, the subject of the present appeal, against the appellant and the other respondents. It claimed that it was the registered proprietor of LR No. Njoro/ Ngata Block 27/21 hereinafter, “the suit land”. It sought orders to the effect that:
 - “a. A declaration be issued that the 1st respondent is the lawfully registered proprietor of the suit land.
 - b. A permanent injunction to restrain the appellant and the other respondents from interfering with the 1st respondent’s quiet and peaceful possession and occupation of the suit land.
 - c. A permanent injunction against the appellant and the other respondents prohibiting them from entering upon, transferring, occupying, leasing,



charging, assigning, or interfering with the 1st respondent's quiet possession of the suit land.

- d. A mandatory injunction be issued directing the 4th respondent to revoke, cancel, or annul any purported title held by the appellant in respect of the suit land within seven (7) days of the judgment.”

2. The appellant in her defence claimed that the 1st respondent had acquired the suit land through fraud. She claimed to be the lawful proprietor of the suit land. She prayed for the following orders in her counterclaim:

- “a. A declaration that she is the lawfully registered proprietor of LR No. 13287/137, IR No. 52023.
- b. A declaration that the conversion of the title in LR No. 13287/137, LR No. 52023 to the suit land was illegal.
- c. An order for the cancellation of the certificate of lease for the suit land, which is held in the 1st respondent's name.
- d. A declaration that the 1st respondent had trespassed on her land, being LR No. 13287/137, IR No. 52023.
- e. General damages for trespass.
- f. An eviction order against the 1st respondent from the suit land.
- g. Costs.”

3. The 4th respondent stated in defence that the records held in the data capture system at the Nairobi central registry showed that the suit land was initially owned by one, Caleb Kipkemei Kositany. The suit land was thereafter transferred to the 1st respondent on 18th June 2019.

4. The 1st respondent's case was that: PW1, Sgt. Patrick Oyalo, met PW2 on 31st March 2020 when PW2 went to report at Rongai police station that some people had trespassed on the suit land. He conducted investigations by visiting the suit land and interviewing the appellant, Caleb Kositany, and people from the ADC. He also sought clarification from government agencies regarding the suit land by interrogating various documents from the ADC and the land office. He informed the court that he obtained correspondence from the Nakuru Land Registrar, the Chief Land Registrar, and the ADC, and there was no record that the appellant had been allocated the suit land.

5. From his investigations, the suit land previously belonged to Caleb Kositany, who later transferred it to the 1st respondent. The ADC had confirmed that Caleb Kositany was allotted the suit land. In a letter dated 18th June 2020, the Chief Land Registrar, Nairobi, indicated that the appellant was the owner of the suit land, though there were no documents in support of the assertion. He concluded that the suit land belonged to the 1st respondent.

6. PW2, Joel Ashiachi Kusimba, was one of the 1st respondent's directors. The other director was Caleb Kositany. He informed the court that the 1st respondent carried out due diligence before purchasing the suit land at Kshs. 25,000,000/-. He restated PW1's testimony that Caleb Kositany was the owner of the suit land before it was sold to the 1st respondent. The original title had been issued to Caleb Kositany on 22nd February 1991. Transfer of the suit land from Caleb Kositany to the 1st respondent



was done on 18th June 2019 and conversion was done in February 2020. They cultivated maize and kept livestock on the suit land.

7. He told the court that the transfer had been done before the conversion of the suit land. This was done at the instance of the government vide a letter dated 17th December 2019 which required that the land be registered under the Land Registration Act, 2012. The 1st respondent was in possession of the suit land. An invasion by 2nd and 3rd respondents had failed.
8. The 4th respondent's case was through Edwin Wafula, the Registrar of Titles, who testified as DW1. He informed the court that he was aware of the provisional title held by the appellant, which was issued on 22nd February 1991. In the gazette notice dated 10th August 2018, there was an objection by the 1st respondent to a request for reconstruction of register of LR No. 13287/137, IR No. 52023 by the appellant, and that as a register cannot be reconstructed where an objection has been raised and not heard. The gazette notice dated 23rd November 2018 was about the issuance of a provisional title and invited objections to be made within 60 days. The 1st respondent objected to the same through their letter dated 6th December 2018. He stated that the issuance of the provisional title on 25th February 2019 was irregular, as it had been issued after an objection had been lodged.
9. He informed the court that the appellant had reported the loss of the original title by producing a police abstract, and therefore, the original title was not available at the time of reconstruction. He confirmed that the suit land belonged to ADC. He further stated that there was no record to show that the suit land was transferred from ADC to the appellant. He told the court that the suit land had been acquired by Caleb Kositany from ADC on 22nd February 1991 and consent from the Land Control Board was issued to that effect.
10. Mr. Wafula informed the court that he knew Kimutai from the Ministry of Lands, but that he was not familiar with the letter he authored dated 18th June 2020. Referring to the letter dated 17th December 2019 from the director of surveys, he stated that the suit land was included among the titles to be converted.
11. The appellant's case was advanced through Ben Kemboi Komen, (DW2), who had the appellant's power of attorney to testify on her behalf. He informed the court that he knew about the suit land as his father was the caretaker therein. He did a search at Ardhi House on 18th February 2022 which indicated that the appellant was still the registered owner of the suit land. He urged the court to cancel the title issued to the 1st respondent, and that the 1st respondent be evicted from the suit land.
12. He told the court that the appellant had purchased the suit land from ADC for Kshs. 58,000/- but he did not have the sale agreement or receipt to that effect. He stated that although he knew the suit land was agricultural land, he did not have any consent from the Land Control Board. He also did not have an allotment letter from ADC. He informed the court that he had not made an application or paid for the search in his bundle of documents. He stated that the documents relating to the appellant's ownership of the suit land had been reconstructed in 2018 and the appellant was issued with a provisional title in January 2019. He stated that the appellant obtained the suit land by way of transfer as per entry No. 94 on the abstract of the search.
13. DW3 was Brian Kimutai, the Land Registrar. He informed the court that he authored the letter dated 18th June 2020 in response to a letter from the DCI. He stated that he forwarded to the DCI the documents that were presented by the appellant for the reconstruction of the register. He stated that the title surrendered was a forgery, but he did not give a basis for the said conclusion. He mentioned that the loss of the appellant's title was gazetted on 10th August 2018. He denied having seen the 1st



- respondent's objection letter dated 27th August 2018. He stated that he did not forward to the DCI the 1st respondent's letter dated 6th December 2018 objecting to the issuance of the provisional title.
14. DW4, Agola Okinyo, informed the court that he was a retiree from ADC where he had worked for 14 years. He stated that he supplied some documents to the DCI while still an employee of ADC.
 15. The 2nd and 3rd respondents did not participate in the proceedings.
 16. The learned Judge framed the following issues for determination:
 - a. Who between the 1st respondent and the appellant was the lawful owner of the suit land?
 - b. Whether the appellant's counterclaim was merited.
 - c. Whether the 1st respondent was entitled to the reliefs sought in the plaint.
 17. The learned Judge held that there was uncontroverted evidence through the letter dated 18th April 1990 that the 1st respondent was allocated the suit land by the ADC. The learned Judge observed that evidence had been led before the court that Caleb Kositany, one of the 1st respondent's directors, had applied to the ADC to be allocated the suit land vide a letter dated 14th March 1990. The ADC in their letter dated 3rd June, 1991 demanded payment of the purchase price of Kshs. 58,236.55 and other conveyancing fees. In a letter dated 11th June, 1991 a banker's cheque No. 334068 for Kshs. 58,236.55 was forwarded to ADC, and ADC acknowledged receipt of the same through their letter dated 19th June 1991.
 18. The learned Judge noted that DW2 had no sale agreement or receipt of payment of Kshs. 58,000/- to ADC. The appellant did not have an allotment letter from ADC, but she had somehow acquired title to the suit property. The learned Judge observed that the evidence of DW4 did not show how the appellant was allocated the suit land by ADC, as his evidence was limited to how he had supplied the DCI with documents from ADC, which documents formed part of the 1st respondent's bundle of documents.
 19. The learned Judge held that the matter before him related to competing titles held by separate individuals over the same parcel of land. The learned Judge observed that in the instance, the court had to look beyond the titles exhibited and look through the process and procedure through which the titles were acquired. The learned Judge cautioned himself that it was not enough where there was a challenge to the title to wave a title and claim indefeasibility simply because one held a registered title.
 20. The learned Judge referred to the provisions of section 26(1) of the *Land Registration Act* in finding, that it was not sufficient for either the appellant or the 1st respondent to produce titles to prove ownership of the suit land, they had to establish the root of their respective titles by showing how they acquired the said titles. The learned Judge noted that it was trite that, if a party fraudulently caused a title to be issued to him or her, that cannot make one the owner of the property they may have acquired merely because they now held a title.
 21. The learned Judge cited the case of *Munyu Maina v Hiram Gathiba Maina* [2013] eKLR in holding that there was clear evidence as to how Caleb Kositany acquired title to the suit land before he sold and transferred it to the 1st respondent. The learned Judge pointed out that Caleb Kositany in a letter dated 14th March 1990 applied to the ADC to be allocated the suit land; the ADC through a letter dated 18th April 1990 notified Caleb Kositany that he had been allocated the suit land measuring 19.64 hectares; an application was made to the Nakuru Land Control Board on 14th August 1990 to transfer the suit land to Caleb Kositany, and consent was issued on 15th August 1990; and a transfer dated 21st January 1991 was registered as I.R No. 40236/94 on 22nd February 1991.



22. The learned Judge also pointed out that on 3rd June 1991, the ADC wrote to Caleb Kositany and notified him that his documents of title had been registered, and requested him to pay Kshs. 58,236.55 for the documents to be released to him; on 11th June 1991 Caleb Kositany wrote to the ADC forwarding payment as requested; and on 19th June 1991, the ADC wrote to Caleb Kositany acknowledging receipt of payment. From the foregoing, the learned Judge held that Caleb Kositany was properly and validly allocated the suit land and that he was lawfully registered as the owner, and had acquired a good title to the suit land.
23. The learned Judge held that the appellant's evidence as to how she acquired the suit land was not sufficient to prove that she was the lawful owner of the suit land. The learned Judge observed that though the appellant claimed that she was allocated the suit land by ADC, paid for it and she was issued with a certificate of title, I.R No. 52023, which she had misplaced and was later issued with a provisional certificate on 25th January 2019; other than the transfer instrument dated 21st January 1991 the appellant did not produce any other document to show that she dealt with the ADC concerning the suit land.
24. The learned Judge further held that the appellant's transfer was presented to the lands registry on 22nd February 1991 at 12:43 pm while Caleb Kositany's transfer was presented on the same date at 12:39 pm, which meant that Caleb Kositany's transfer was earlier. The learned Judge held that since the transfers related to the same property, the transfer that had been lodged earlier ought to have taken precedence, and the later instrument rejected.
25. The learned Judge further held that whilst the transaction in favor of Caleb Kositany was supported by an application for allotment, an allotment offer, Land Control Board consent, and proof of payment of the purchase price, the appellant did not adduce any evidence to show that she had been allocated the suit land by ADC or that she had paid the requisite purchase price. In the result, the learned Judge held that due process was followed in the registration of Caleb Kositany as the owner of the suit land, while the process followed by the appellant was irregular and unprocedural, hence the registration and issuance of title to the appellant was a nullity.
26. As regards the reconstruction of the register, the learned Judge held that the process was flawed, as there was evidence that Caleb Kositany objected to the application for reconstruction and issuance of a provisional certificate of title through the letters dated 27th August 2018 and 6th December 2018. The learned Judge held that once the objections were lodged, the Registrar of Titles could not properly proceed to effect the reconstruction without giving a hearing to the objector. The learned Judge found DW3 who stated in his testimony that he never saw any of the objection letters, not to be truthful, as the letters were received by the office of the Chief Land Registrar, as evidenced by the receipt stamps.
27. The learned Judge held that Caleb Kositany had the right to transact with the 1st respondent, as he was properly and lawfully the registered owner of the suit land. The learned Judge held that the transfer dated 13th June 2019 and registered on 18th June 2019 was lawful, and a good title was passed to the 1st respondent.
28. As regards the conversion of the suit title to registration under the [Land Registration Act](#), the learned Judge held that there was clear evidence that the Ministry of Lands and Physical Planning embarked on the exercise in light of Section 105 of the [Act](#); and in a letter dated 17th December, 2019 the suit land was among the parcels of land scheduled for conversion. This was followed by the letter dated 7th February 2020 from the Chief Land Registrar who forwarded eight (8) lease documents including one in favor of the 1st respondent for the suit land. The learned Judge was satisfied that the lease in favor of



- the 1st respondent was properly and regularly issued and registered, hence the learned Judge held that the certificate of lease registered on 14th February 2020 in favour of the 1st respondent was valid.
29. The learned Judge held that the 1st respondent had proved its case on a balance of probabilities and was entitled to the judgment, while the appellant had failed to prove her counterclaim and was therefore not entitled to the reliefs sought therein.
30. The learned Judge issued the following final orders:
- “ a. A declaration that the 1st respondent is the lawfully registered proprietor of the suit land.
 - b. A permanent injunction restraining the appellant and the other respondents from interfering with the 1st respondent’s quiet and peaceful possession and occupation of the suit land.
 - c. The Chief Registrar to revoke, cancel, or annul any title held by the appellant.
 - d. The appellant’s counterclaim is dismissed.
 - e. Parties to bear their own costs of the suit and the counterclaim.”
31. Being dissatisfied with the judgment, the appellant lodged the present appeal in which she raised three (3) grounds of appeal, to wit:
- “ a) The learned Judge erred in law and fact in holding that: the appellant never acquired valid interest from the ADC over the suit land; the 1st respondent’s predecessor in title acquired valid interest over the suit land, which it lawfully transferred to the 1st respondent; the appellant’s title was illegally and unprocedurally acquired; the reconstruction of the appellant’s ownership records and issuance of a provisional title was illegal; and the purported conversion of the suit land by the 1st respondent was lawful and procedural.
 - b. The learned Judge misdirected himself in issuing permanent orders restricting the appellant from the suit land.
 - c. The learned Judge misdirected himself in holding that the ADC supplied documents confirming the validity of the 1st respondent’s ownership.”
32. When the appeal came up for hearing on 26th September 2023, Mr. Otieno, learned counsel holding brief for Mr. Orwenjo, learned counsel, appeared for the appellant; Mr. Karanja, learned counsel, and Mr. Rapando, learned counsel, appeared for the 1st respondent and Ms. Shika, learned counsel appeared for the 4th respondent. Counsel relied on their respective written submissions.
33. The appellant submitted that the facts of this appeal were largely not in dispute. The appellant reiterated that she was the lawful owner of the suit land and held a copy of the title to that effect. She was of the view that even without producing evidence of an allotment letter and proof of payment of the purchase price, she produced an instrument of transfer dated 21st January 1991 between the appellant and the ADC. The appellant submitted that the execution of the transfer instrument was succeeded by the registration and issuance of a certificate of title in favor of the appellant.



34. The appellant submitted further that no evidence had been tendered before the court to show that she had acquired the suit land through fraud, to warrant her being stripped of interest in the suit land. She had filed a deed of indemnity on 25th May 2018 and gazette notice No. 8140 which demonstrated that the land register in respect of the suit land was reconstructed on 9th November 2018.
35. The appellant submitted that she also filed gazette notice No. 12069, an excerpt of the Daily Nation Newspaper of 16th April 2018, a police abstract dated 14th March 2018, and two (2) affidavits to show that she was validly issued with a provisional title.
36. The appellant submitted that the Chief Land Registrar received the 1st respondent's letters of objection to the reconstruction of the land register and the issuance of a provisional title.
37. The appellant reiterated that the reconstruction of the land register and the issuance of a provisional title were done as per the law; and particularly, in compliance with section 33 of the [Land Registration Act](#) and rule 28 of the [Land Registration \(General\) Regulations](#), 2017.
38. As regards the ownership of the suit land, the appellant submitted that she holds title over the suit land, and she is the registered owner as per the provisions of Sections 24, 25, and 26 of the [Land Registration Act](#).
39. On whether the certificate of title was acquired illegally and unprocedurally, the appellant submitted that no evidence was tendered by the 1st respondent in that regard. Citing the cases of [Richard Kipkemei Limo v Hassan Kipkemboi Ngeny & 4 others](#) [2019] eKLR and [Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others](#) [2019] eKLR, the appellant submitted that how she acquired title to the suit land was within her knowledge, and it was upon her to demonstrate the same, and even without proof of payment, she produced an instrument of transfer. The appellant faulted the trial court for failing to hold that she was a bona fide purchaser of the suit land. The appellant was of the view that if the 1st respondent had any valid interest in the suit land, the government would not have reconstructed the register upon receiving the objections.
40. Citing the case of [Lawrence P. Mukiri Mungai v Attorney General & 4 others](#) [2017] eKLR, the appellant submitted that it was not legally possible to have two valid title documents in existence, over the same parcel of land. In this instance, the appellant pointed out that since no documents had been tendered to demonstrate that she had acquired her title through fraud and that she had obtained her title to the suit land regularly, the trial court erred in directing the cancellation of her title to the suit land.
41. The 1st respondent submitted that section 107 of the [Evidence Act](#) provides that, whoever desires to have any court give judgment about any legal right or liability, which depended on the existence of facts which he asserts, must prove that those facts exist. While relying on the decision in the case of [Richard Kipkemei Limo v Hassan Kipkemboi Ngeny & 4 Others](#), (*supra*), the 1st respondent submitted that the appellant was enjoined to present before the trial court, evidence to show that she had a valid interest over the suit land, that was capable of legal protection and that the alleged provisional title that was under challenge was valid.
42. Relying on the cases of [Dr Joseph Arap Ngok v Justice Moiwo Ole Keiwa & 5 others](#) [1997] eKLR and [Wreck Motors Enterprises v The Commissioner of Lands & 3 others](#), CA No. 71 of 1997 (unreported), the 1st respondents noted that it was not in dispute that the suit land previously belonged to the ADC, a State corporation under section 3 of the [Agricultural Development Corporation Act](#). As such, the 1st respondent submitted that the appellant was enjoined to demonstrate that the ADC issued her with a letter of allotment offering the suit land for sale; she complied with the conditions in the offer letter,



- including payment of the purchase price; and that a valid title was thereafter issued to her. The 1st respondent submitted further that, the appellant was expected to show that the consent of the Land Control Board was obtained before the alleged transfer from ADC.
43. Citing the provisions of section 13(2)(c) of the [Agricultural Development Corporation Act](#), the 1st respondent submitted that land belonging to the ADC is not to be gifted but sold, and disposed of for valuable consideration. The 1st respondent pointed out that where one alleges acquisition of land from the ADC, they must establish, through documentary evidence, that they made payment of the agreed purchase price. In this instance, the 1st respondent pointed out that the appellant had conceded that there was no evidence to prove payment of the purchase price, and there was also no letter of allotment of the suit land to the appellant.
 44. The 1st respondent submitted that in the absence of proof of allocation of the suit land to the appellant by the ADC and proof of payment of the requisite purchase price, the appellant failed to demonstrate that she has a valid interest in the suit land.
 45. As regards the provisional title acquired by the appellant, the 1st respondent relied on the decision in the cases of [Munyu Maina v Hiram Gathiba Maina](#), (*supra*), and [Richard Kipkemei Limo v Hassan Kipkemboi Ngeny & 4 others](#), (*supra*), in submitting that the appellant was enjoined to establish that her property was lawfully and procedurally acquired to claim protection under section 26(1) of the [Land Registration Act](#), but that she had failed to demonstrate that her title to the suit land was obtained legally, formally and free from any encumbrance. The 1st respondent was of the view that the appellant was expected to go beyond her alleged title and demonstrate the legality of how she acquired the suit land; and this included demonstrating that the process of the alleged transfer of the suit land from the ADC, a consent from the Land Control Board was obtained as provided for under section 6(1) of the [Land Control Act](#). In this regard, the 1st respondent submitted that the trial court had correctly made a finding that the appellant did not have a valid claim over the suit land.
 46. The 1st respondent drew our attention to the fact that DW1, the Land Registrar, testified that it is a requirement that an original title is to be provided before a register can be reconstructed. In this instance, the 1st respondent pointed out that the original title was not produced, and that the objections by the 1st respondent and Caleb Kositany were not considered when the provisional title was issued. The 1st respondent relied on the provisions of section 33 of the [Land Registration Act](#); Regulation 28 of the [Land Registration \(General\) Regulations, 2017](#); and the case of [Republic v Registrar of Title ex parte Ruth Mayoyo & 2 others; New Karen Ventures Limited](#) [2022] eKLR in support of this submission.
 47. The 1st respondent urged the court to uphold the decision of the trial court that, the reconstruction of the purported land register on 9th November 2018 and the issuance of a provisional title to the appellant on 25th January 2019 was irregular and unprocedural, given that objections were duly received by the 4th respondent, who failed to consider the same and denied the objectors a hearing.
 48. The 1st respondent submitted that they produced documents in evidence to demonstrate on a balance of probabilities that the 1st respondent holds a valid legal title and that the acquisition of the suit land by Caleb Kositany was legal, formal, and free from any encumbrance.
 49. The 1st respondent was of the view that the appellant's claim over the suit land is without merit, as she has failed to demonstrate that she was allocated the suit land by the ADC, or that she complied with the imposed conditions, if any. The 1st respondent urged the court to dismiss the appeal in light of the foregoing, and award it costs of the appeal. To buttress this submission, the 1st respondent cited the case of [Jabir Singh Rai & 3 Others v Tarlocham Singh Rai & 4 others](#), Petition No. 4 of 2012.



50. The 4th respondent submitted that the appellant’s account of how she acquired the suit land was conflicted. The 4th respondent pointed out that the appellant claimed to have acquired the suit land at a consideration of Kshs. 58,236.55 but she failed to produce a sale agreement or a receipt of payment of the purchase price; and she relied wholly on the provisional title, whose issuance was also in contention. The 4th respondent submitted that the appellant had failed to adduce any evidence to show that her alleged title was obtained from the ADC lawfully and procedurally.
51. Citing the case of *John Kamau Gachina v Safia Salim Karama* [2021] eKLR, the 4th respondent submitted that it is trite that when the root title is challenged, it is not sufficient for a litigant or an affected party to just dangle the instrument of title without demonstrating how the interest so claimed was acquired.
52. The 4th respondent submitted that the trial court record demonstrated that the 1st respondent had discharged the legal burden of proving the legality of the root title from which it had acquired its interest over the suit land, unlike the appellant who admitted that she did not even procure a Land Control Board consent, despite the consent being mandatory when dealing with agricultural land. The 4th respondent was of the view that, on this basis alone, the appellant’s purported interest in the suit land would have been a nullity. The 4th respondent relied on the decision in the case of *Emmanuel Ngade Nyoka v Kitbeka Mutisya Ngata* [2017] eKLR in support of this submission.
53. The 4th respondent submitted that the appellant had failed to demonstrate to the required legal standard, that she had acquired or held valid legal interest over the suit land, capable of enforcement.
54. As regards the reconstruction of the register and the issuance of a provisional title to the appellant, the 4th respondent submitted that section 33 of the *Land Registration Act* deals with the powers of the registrar to reconstruct any lost or destroyed register. However, the 4th respondent drew our attention to the fact that DW1 and DW3 testified that the failure to consider the objections lodged against the reconstruction of the register of the suit land in favor of the appellant was a fatal procedural omission. The 4th respondent submitted that the process of reconstruction and the issuance of a provisional title to the appellant over the suit land was unprocedural and illegal.
55. The 4th respondent submitted that the process of conversion of the suit land was initiated by the government through the letter of the director of surveys dated 17th December 2019. The 4th respondent pointed out that this evidence had not been controverted.
56. The 4th respondent submitted further that the permanent injunction issued by the trial court was merited, as it is meant to protect the proprietary interests of a successful litigant as envisaged under article 40 of the *Constitution*.
57. The 4th respondent submitted that the learned Judge’s finding that Caleb Kositany acquired a valid interest over the suit land capable of being transferred to the 1st respondent relied on the evidence on record, as was corroborated by the records held by the 4th respondent over the suit land. In support of this submission, the 4th respondent relied on the case of *Philemon L. Wambia v Gaitano Lusita Mukofu & 2 others* [2019] eKLR.
58. This being a first appeal, rule 31(1)(a) of the *Court of Appeal Rules*, 2022 provides that:
- “On an appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power—
- (a) to re-appraise the evidence and to draw inferences of fact; and...”



59. It follows that the primary role of this Court as a first appellate court is to re-analyze and re-evaluate the evidence that was placed before the learned trial Judge and draw its inferences of fact.

However, in doing so, we bear in mind that the trial court had the advantage of seeing and hearing the witnesses and we give allowance for the same. In the case of *Peters v Sunday Post Ltd* [1958] EA 424, at P 429 O'Connor P. stated thus:

“An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand.”

60. We have carefully considered the appeal, submissions by counsel, the authorities cited, and the law. The main issue for determination is whether or not the appellant is the lawful proprietor of the suit land.

61. Both the appellant and the 1st respondent, through Caleb Kositany, claimed that they were duly allotted the suit land by the ADC, they paid all the requisite fees and completed the formalities; that they lodged and paid for the registration of the requisite documents and were issued with a registration number and certificate of title to the suit land. It follows, therefore, that to determine the true and lawful ownership of the suit land, we have to look at the root of the title; the procedure of obtaining the title; and the title that was issued first.

62. Section 26(1) of the *Land Registration Act* provides that:

“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.”

63. Evidence before the trial court was that Caleb Kositany applied to the ADC to be allocated the suit land vide a letter dated 14th March, 1990. The ADC in their letter dated 3rd June, 1991 demanded payment of the purchase price of Kshs. 58,236.55 and other conveyancing fees. In a letter dated 11th June, 1991 a banker's cheque No. 334068 for Kshs. 58,236.55 was forwarded to the ADC. The ADC acknowledged receipt of the same through their letter dated 19th June, 1991. A consent from the Land Control Board was also obtained in favour of Caleb Kositany.

64. The appellant confirmed that she did not have an allotment letter from the ADC, proof of payment of the purchase price or a consent from the Land Control Board, that she had title to the suit land. No evidence was led before the trial court on how the appellant was allocated the suit land by the ADC or how she obtained a certificate of title, save that she successfully reconstructed the register to the suit land by claiming that she had lost the original title.



65. It is common ground that the suit land is an agricultural land. As such, the suit land was within a land control area which stood voided in the absence of the necessary consent. Section 6(1) of the [Land Control Act](#) provides that:
- “ Each of the following transactions that is to say—
- a. the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;
 - b. the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the [Development and Use of Land \(Planning\) Regulations](#), 1961 (L.N. 516/1961) for the time being apply;
 - c. Deleted by Act No. 22 of 1987, Sch. is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.”
66. In the case of *Leonard Njonjo Kariuki v Njoroge Kariuki alias Benson Njono*, Civil Appeal No 26 of 1979 (unreported), this Court affirmed that once the land in question was proved to be agricultural land within a controlled area, transactions affecting it were controlled transactions which in law became void in the absence of consent from the Land Control Board.
67. In *Karuri v Gitura* [1981] KLR 247, the Court concluded that the provisions of the [Land Control Act](#) are imperative to the extent that there is no room for the application of any doctrine of equity to soften its provisions.
68. Similarly, in the case of *Kariuki v Kariuki* [1983] KLR 225, Law, JA. affirmed that:
- “When a transaction is stated by the express terms of an Act of Parliament to be void for all purposes for want of necessary consent, a party to that transaction cannot be guilty of fraud if he relies on the statute to argue that the transaction is void.”
69. Further, in *Simiyu v Watambamala* [1985] KLR 852, the court held as follows:
- “Here, the appellants had to obtain consent for the controlled transaction. They did not and so the agreement was void for all purposes including attempting to set up estoppel.”
70. It follows therefore that for one to purchase agricultural land, one must first obtain consent from the Land Control Board unless the Board expressly determines otherwise. In this instance, the 1st respondent produced the consent from the Land Control Board in evidence whereas the appellant did not obtain consent from the Board. We find that the transaction between the ADC and the appellant was void for want of consent from the Land Control Board.
71. Further, the appellant’s transfer document was presented to the lands registry on 22nd February 1991 at 12:43 pm while the transfer document for Caleb Kositany’s transfer was presented on the same date at 12:39 pm. As the transfers related to the same property, we find that the transfer that was lodged first in time took precedence. In this instance, the instrument by Caleb Kositany came earlier, hence the instrument by the appellant which came later ought to have been rejected.



72. As regards the reconstruction of the register, section 33 of the *Land Registration Act*, 2012 provides that:

- “1. Where a certificate of title or certificate of lease is lost or destroyed, the proprietor may apply to the Registrar for the issue of a duplicate certificate of title or certificate of lease, and shall produce evidence to satisfy the Registrar of the loss or destruction of the previous certificate of title or certificate of lease.
2. The Registrar shall require a statutory declaration to be made by all the registered proprietors, and in the case of a company, the director, where property has been charged, the chargee that the certificate of title or a certificate of lease has been lost or destroyed.
3. If the Registrar is satisfied with the evidence proving the destruction or loss of the certificate of title or certificate of lease, and after the publication of such notice in the Gazette and in any two local newspapers of nationwide circulation, the Registrar may issue a duplicate certificate of title or certificate of lease upon the expiry of sixty days from the date of publication in the Gazette or circulation of such newspapers; whichever is first.
4. If a lost certificate of title or certificate of lease is found, it shall be delivered to the Registrar for cancellation.
5. The Registrar shall have powers to reconstruct any lost or destroyed land register after making such enquiries as may be necessary and after giving due notice of sixty days in the Gazette.”

73. Similarly, rule 28 of the *Land Registration (General) Regulations*, 2017 provides that:

- “1. On loss or destruction of the land register, a person claiming to be a registered proprietor may apply to the Registrar for the reconstruction of the register in Form LRA 14 set out in the Sixth Schedule.
2. Where the applicant under paragraph (1) is a body corporate, the application shall be accompanied by a statutory declaration in Form LRA 15 set out in the Sixth Schedule.
3. Where the applicant under paragraph (1) is a natural person, the application shall be accompanied by a statutory declaration in Form LRA 16 set out in the Sixth Schedule.
4. An applicant under paragraph (1) shall provide an indemnity in Form LRA 17 set out in the Sixth Schedule to the Registrar.
5. Upon receipt of an application made under paragraph (1), the Registrar shall notify the loss by notice in the Gazette in Form LRA 18 set out in the Sixth Schedule.
6. After the expiry of the notice in paragraph (3), the Registrar shall obtain clarification on the parcel status from-
 - a. the office or authority responsible for survey;
 - b. the office or authority responsible for land administration; and



c. any other office the Registrar may deem necessary.

7. Upon clarification under paragraph (4) and no objection has been raised against the application made under paragraph (1), the Registrar may reconstruct the land register.”

74. The appellant applied to reconstruct the register to the suit land in 2018. The reason for the reconstruction was that the appellant had lost her original title. Being custodian of the land records or the title abstract, the law gives the 4th respondent the mandate to reconstruct such lost, missing, or damaged title abstracts under section 33(5) of the *Land Registration Act*. Rule 29 of the *Land Registration (General) Regulations*, 2017 provides that:

“1. Where the title documents are lost or destroyed, a person claiming to be a registered proprietor to make an application for reconstruction of the register in Form LRA14 set out in the Sixth Schedule to the Registrar.

2. Where the applicant under paragraph (1) is a body corporate, the application shall be accompanied by a statutory declaration in Form LRA 15 set out in the Sixth Schedule.

3. Where the applicant under paragraph (1) is a natural person, the application shall be accompanied by a statutory declaration in Form LRA 16 set out in the Sixth Schedule.

4. An applicant under paragraph (1) shall provide an indemnity to the Registrar in Form LRA 17.

5. Upon receipt of an application made under paragraph (1), the Registrar shall notify the loss by notice in the Gazette in Form LRA 18 set out in the Sixth Schedule.

6. After the expiry of the notice in paragraph (3), the Registrar shall obtain clarification on the parcel status from-

a. the office or authority responsible for survey;

b. the and office or authority responsible for land administration;

c. any other office the Registrar may deem necessary.

7. Upon clarification under paragraph (a) and no objection has been raised against the application made under paragraph (1), the Registrar may reconstruct the land register.”

75. The Registrar is required to make inquiries as to the loss or destruction of the land register sought to be reconstructed, and after being satisfied of the loss or destruction, the Registrar issues a notice of Sixty (60) days in the Gazette and any local newspapers of nationwide circulation before reconstructing the lost or destroyed land register. The 4th respondent issued a gazette notice dated 10th August 2018 notifying the public of the intention to reconstruct the register to the suit land. Following the gazette notice, the 1st respondent and Caleb Kositany both lodged objections dated 27th August 2018 and 6th December 2018 objecting to the reconstruction and issuance of a provisional title.



Evidence was led by the 1st respondent to demonstrate that its objection was received by the 4th respondent, who stamped a copy of their letter of objection. These assertions were uncontroverted, and the objections were never responded to.

76. Be that as it may, the 4th respondent proceeded to reconstruct the register to the suit land without hearing objections raised. We note with concern that the decision to reconstruct the register was premature as it had not been demonstrated that there was compliance with the requirements listed in section 33 of the [Land Registration Act](#).
77. It is apparent that whereas indeed the decision of whether or not to register any instrument, certificate, document, plan, information, or explanation is an exercise of discretion, the discretion is not unfettered. According to the aforesaid provision, the discretion to register an instrument by the Registrar may be refused where any instrument, certificate, or another document, plan, information, or explanation required to be produced or given is withheld or any act required to be performed under the Act is not performed.
78. After reconstruction of the register to the suit land, despite the 4th respondent having been made aware of the objections, the 4th respondent did not communicate to the 1st respondent and Caleb Kositany that it had already made a decision on the matter. While section 33 of the [Land Registration Act](#) does not direct the 4th respondent to inform objectors that a decision to reconstruct has been reached, it would only have been fair for the 4th respondent to inform the 1st respondent of its decision, and to cite the reasons therefore in line with article 47 of the [Constitution](#).
79. We find that the 4th respondent flouted the procedure in Section 33 of the [Land Registration Act](#) and Rule 28 of the [Land Registration \(General\) Regulations](#), 2017 by refusing to hear the objections raised. The 4th respondent was under an obligation to hear objections raised before proceeding to reconstruct the register. The rules of natural justice make it mandatory for a party to be heard before any decision that is likely to affect and vary/determine their rights is made. We hold that the reconstruction and the issuance of a provisional title to the appellant were unprocedural.
80. In the case of [Moses Lutomia Washiali v Zephania Ngira Angweyi & Another](#) [2018] eKLR, the court held that:
- “Where, however title to property was obtained fraudulently or irregularly in violation of the provisions of the Act, (except a first registration), the same was not sacrosanct, did not enjoy any protection, and the court had power to order rectification of the register.”
81. In the result, we find that the entry denoting transfer of the suit land to the appellant was premised on a provisional certificate of title, fraught with irregularities; was obtained unprocedurally; and is invalid. We uphold the judgment of the trial court, and reiterate that, the title held by the appellant is invalid; the 1st respondent is the lawful owner of the suit land; and we direct the 4th respondent to revoke, cancel or annul any title held by the appellant.
82. For the above reasons, the appeal is without merit and is dismissed with costs to the 1st and 4th respondents.

Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 16TH DAY OF FEBRUARY, 2024.

D. K. MUSINGA, (P)

.....



JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

