Katana & 2 others v Land Registrar Kilifi & another (Civil Appeal E010 of 2021) [2024] KECA 495 (KLR) (26 April 2024) (Judgment)

Neutral citation: [2024] KECA 495 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CIVIL APPEAL E010 OF 2021

P NYAMWEYA, KI LAIBUTA & GV ODUNGA, JJA

APRIL 26, 2024

BETWEEN

STEPHEN BEN NGUMBAO KATANA ..... 1ST APPELLANT

KARISA KATANA IHA ..... 2ND APPELLANT

ROBERT TISHO THOYA ..... 3RD APPELLANT

AND

THE LAND REGISTRAR KILIFI ..... 1ST RESPONDENT

KAZUNGU MASHA BIRYA ..... 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of the Environment and Land Court of Kenya at Malindi (J. O. Olola, J.) delivered on 15th October 2020 in E.L.C Suit No. 75 of 2014)

JUDGMENT

1. This is a first appeal from the judgment and decree of the Environment and Land Court at Malindi (J. O. Olola, J.) delivered on 15th October 2020 in ELC Suit No. 75 of 2014 in determination of the claim by Kazungu Mash Birya (the 1st respondent) over the suit property known as Plot No. Kilifi/ Mtondia/169.

2. By a plaint dated 16th April 2014 and amended on 8th October 2014, the 1st respondent, Kazungu Masha Birya, instituted proceedings against Stephen Ben Ngumbau Katana (the 1st appellant), Karisa Katana Iha (the 2nd appellant), Robert Tisho Thoya (the 3rd appellant) and the Land Registrar Kilifi (the 2nd respondent), praying for:

    (a) a permanent injunction restraining the appellants and the Registrar, their servants, agents employees and/or anybody acting through them from selling, leasing, cultivating, transferring,

letting and/or sub- letting or in any other manner dealing with property on title No. Kilifi/ Mtondia/169 (the suit property);

(b) an order directing the 2nd respondent to cancel the title deed issued to the appellants and register the same to the 1st respondent' deceased father and/or the 1st respondent and his brothers;

(c) costs and interest at court rates; and

(d) any other relief that the court deems fit to grant.

3. The 1st respondent's case was that he was the administrator of the estate of his late father, Kahindi Masha Mumba (the deceased); that the deceased was the owner of plot No. Kilifi/Mtondia/170; that the 2nd respondent allegedly changed the plot number to Kilifi/Mtondia/169 in response to a letter dated 17th April 2007 addressed to him by the District Lands Adjudication and Settlement Department; that the suit property was registered in the 1st respondent's deceased father's name under the settlement scheme programme; and that the 1st respondent and his brothers had resided thereon to date; that the deceased had inherited the suit property from his deceased father; that the appellant's, through their deceased brother (Mwakamsha Katana), who then worked at the Kilifi Lands Registry fraudulently manipulated and altered the records to disinherit his father and/or change ownership thereof in favour of the appellants; that the appellants have no right of claim thereon; that, except for the description on two title documents as plot No. 169 and 170, the two title deeds refer to the one and the same property; that the Lands Office and the 2nd respondent deliberately issued two title deeds over the suit property and, yet, he knew, or ought to have known, that the suit property belonged to Kahindi Masha Mumba (the deceased); that the 2nd respondent was openly biased, corrupt and malicious by endorsing wrong names on the Green Card and eventually issuing the title deed to the suit property to the wrong people; and that the appellants have refused or failed to facilitate amicable settlement of the dispute.

4. The particulars of the alleged fraud and misrepresentation pleaded in the 1st respondent's suit as against the appellants and the 2nd respondent are, in summary: wrongly altering the records at the Lands Registry; giving wrong names to the Registry; colluding with the 2nd respondent to cancel the deceased's title deed; cancellation of the names in the Green Card and inserting the names of the appellants therein; deliberately issuing a title deed in the appellants' names, and subsequently cancelling the particulars to read plot No. 169 on the ground report; issuing the title deed to the 1st respondent's father and thereafter cancelling the same; obtaining title deed without payment of rates clearance or obtaining clearance certificate; using/or forging the 1st respondent's deed plan No. 222406; and making a misrepresentation that the suit property was bought from the 1st respondent for a sum of KShs. 70,000. He urged the trial court to grant the reliefs sought.

5. In their defence and counterclaim dated 7th July 2014 and amended on 21st October 2014, the appellants denied the 1st respondent's claim and averred that they were registered jointly with their deceased brother, Mwakamusha Katana (Deceased), as proprietors of the suit property, having lawfully acquired the same from the 1st respondent's deceased father in 1974; that the 1st respondent's deceased father was allotted plot no. 170 sometime in 1968; That, sometime in 1974, the deceased moved to Ziwa la Ng'ombe (Bombolulu) in Mombasa with his family; and that, before he moved, the deceased sold to the 1st appellant his 16 cashew nut trees, 2 coconut trees and 1 mango tree in Plot No. 170.

6. In addition to the foregoing, the appellants stated that, at that time, the practice prevalent in Kilifi was that, in land transactions, a purchaser would buy the vendor's trees in the parcel of land being sold and, in turn, he would acquire the right of ownership in the land; that the transaction between the 1st appellant and the respondent's deceased father was witnessed by the local settlement committee

and one Benjamin Shaha, the then chief of Tezo/Roka location; that, sometime in 1987, the 1st respondent's grandmother died while undergoing treatment in Kilifi, and was buried in her relative's plot near the suit property; that the 1st respondent's father brought his family to the suit property and requested to be accommodated thereon for some time before moving back to his rural home in Ganze with his family; and that the 1st respondent's father died in 1996 while still living with his family on the suit property.

7. According to the appellants, they were issued with a title deed to Plot No. 170 jointly with their deceased brother in 1996 after transfer from the 1st respondent's deceased father was registered in their favour at the conclusion of an exercise to determine the ground status and the location of plot numbers 169, 170, 171 and 172 in Mtondia Settlement Scheme against the records at the Lands Registry; that the exercise was conducted in 2007, and that it was established that, on the ground, the appellants were in occupation of plot no. 169 instead of 170; that, acting on the recommendation of the District Land and Settlement Officer's report, the title deed issued on 18th October 1996 was cancelled whereupon the appellants and their deceased brother were issued with the title deed to the suit property on 17th April 2007.

8. In view of the foregoing, the appellants lodged a counterclaim claiming: that they are the rightful owners of the suit property; and that the 1st respondent, who had been living in their parcel of land together with his mother and siblings with the appellants' consent, was in the process of disposing of parts of the suit property to third parties. They prayed: (i) that the 1st respondent's suit be dismissed with costs; (ii) that judgment be entered against the 1st respondent for injunctive orders to restrain him from interfering with the appellants' quiet possession of the suit property; and (iii) for orders directing the 1st respondent to hand over possession of the portion of the suit property of which he was in occupation.

9. The 2nd respondent (who was the 4th defendant in Malindi ELC Case No. 75 of 2014) also filed a defence dated 6th March 2015 stating: that the suit property (Kilifi/Mtondia/ 169) was initially Plot No. 170 originally registered in the name of the Settlement Fund Trustee (the SFT) on 8th September 1980; that the SFT transferred the suit property to Kahindi Masha Mumba (Deceased) on 18th October 1996; that, on the same day, the suit property was transferred to Stephen Ben Ngumbao Katana, Karisa Katana Iha, Robert Tisha Thoya)the appellants) and one Mwakamusha Katana (Deceased); that a title deed was issued in their favour; that, on 17th April 2007, the records were amended following a report ascertaining the ground position, which necessitated change of plot no. 170 to 169, whereupon the registered owner of Plot no. 170 surrendered the title deed for correction to read plot No. 169; and that all the allegations made against the 2nd respondent were baseless as they were in possession of the supporting documents confirming that the amendment was not fraudulent.

10. Apart from the written rival submissions filed by the appellants and the respondent in the ELC, the record as put to us does not contain any defence to the appellants' counterclaim or a reply to the appellants' defence or that of the 2nd respondent.

11. In its judgment dated 15th October 2020, the trial court (J. O. Olola, J.) allowed the 1st respondent's claim against the appellants. According to the learned Judge:

> "Section 3(3) of the *Law of Contract Act* stipulates that any disposition of land or any transaction involving land must be reduced in writing and must be signed by both parties thereto in the presence of independent witnesses. There was no evidence that this requirement was adhered to prior to the transfer of the suit property in the names of the 1st, 2nd and 3rd defendants. In the premises, I did not find an iota of evidence to back the

Defendants' defence and Counterclaim. This Court was however satisfied on a balance of probabilities that the suit property belonged to the Plaintiff's father and that there was merit in the Plaintiff's suit. Accordingly, the Counterclaim is dismissed and I hereby enter Judgment for the Plaintiff as follows: -

a. An order is hereby given directing the 4th Defendant Land Registrar Kilifi to cancel the title deed issued to the Defendants and register the same in the name of the Plaintiff's deceased father.

b. An order of eviction is hereby issued requiring the 1st, 2nd and 3rd Defendants to vacate the suit property Kilifi/Mtondia/169 within 90 days from today.

c. An order of permanent injunction is hereby issued restraining the 1st, 2nd and 3rd Defendants, their servants, agents, employees or anybody acting through them from selling, leasing, cultivating, transferring, letting and or subletting or in any other manner dealing with the property known as Kilifi/Mtondia/169.

d. The Plaintiff shall have both the costs of this suit and of the Counterclaim."

12. Aggrieved by the learned Judge's decision, the appellants moved to this Court on appeal on 7 grounds set out in their memorandum of appeal dated 17th February 2021 faulting the learned Judge for: dismissing the appellants' counterclaim and allowing the 1st respondent's claim: failing to appreciate Giriama cultural practice on the prevailing system of land tenure relating to acquisition of land; by skewing facts in favour of the 1st respondent, and by making findings in his favour; failing to appreciate that the 1st respondent's father had abandoned possession of the suit premises by dint of the arrangement with the appellants' family and vacated to alternative land upon being compensated; imputing a fraudulent claim on the part of the appellants without any evidentiary basis; failing to interrogate the role of the Land Settlement Committee in relation to the disputed portion of land; and for shifting the burden of proof on fraud on the appellants and proceeding to rely on his own surmises instead of evidence.

13. Learned counsel for the appellants, M/s. Said Mgupu & Company, filed undated written submissions in support of the appeal. Counsel submitted that purchasing trees on the suit property amounted to purchase of the property in accordance with the Giriama customs. The appellants relied on Article 2(4) of *the Constitution*, section 2 of the *Community Land Act* No. 27 of 2016, and the decision in Virginia Edith Wamboi Otieno vs. Joash Ochieng Ougo & Another (1987) eKLR on the recognition and significance of customary law in Kenya.

14. According to learned counsel, as of 1974, the position regarding Giriama customs was that the purchase and acquisition of trees (such as cashew trees and mango trees) on one's parcel of land, would confer on the purchaser proprietary rights over that parcel of land. They contended that evidence of ownership and the application of Giriama customs was not controverted by the 1st respondent, and that there was nothing to show that the practice was contrary to law and morality.

15. On the issue of fraud, counsel cited the cases of Richard Akwesera Onditi vs. Kenya Commercial Finance Co. Ltd [2010] eKLR; Eviline Karigu (Suing as Administratrix of the estate of the late Muriungi M'chuka alias Muiriungu M'Gichuga) vs. M'Chabari Kinoro [2022] eKLR; Vijay Morjaria vs. Nansingh Madhusingh Darbar & Another [2000] eKLR; and Kuria Kiarie & 2 Others vs. Sammy Magera [2018], submitting that fraudulent conduct must be distinctly alleged and proved since it is not acceptable to leave fraud to be inferred from the facts. They urged us to allow the appeal with costs.

16. On their part, learned counsel for the 1st respondent, M/s. Ombachi Moriasi & Co., filed written submissions dated 14th August 2023 in opposition to the appeal, but cited no judicial authorities. Counsel submitted that there was no evidence to show that the 1st respondent's father had disposed of the suit property under the Giriama customary practices. According to counsel, the suit property had an indefeasible title deed, and was lawfully acquired by the 1st respondent's deceased father under an established system of land tenure, namely the repealed Registered *Land Act* (Cap. 300). Counsel submitted further that the 1st respondent provided uncontroverted evidence that his deceased father was the first allottee of the suit property, and that he was registered as proprietor thereof, a fact admitted by the appellants. According to counsel, the appellants failed to demonstrate how the suit property and the title deed thereto came to be registered in their names.

17. In addition to the foregoing, counsel submitted that the 2nd respondent pointed to glaring irregularities relating to entries in the Green Card and the alteration of ownership in the title deed. Accordingly, fraud was proved as pleaded and particularised in the plaint. In conclusion, counsel pointed out that transfer by transmission of the suit property to the estate of the 1st respondent's deceased father has since been registered at Kilifi Land Registry, and that the property had been duly subdivided and distributed to the beneficiaries of the deceased's estate, and to third parties not joined in the suit in the trial court, or in the instant appeal. In effect, the appeal herein has been overtaken by events. Consequently, he urged us to dismiss the appeal with costs and uphold the impugned judgement.

18. On his part in opposition to the appeal, Mr. Martin M. Munga, Senior State Counsel, filed written submissions dated 23rd November 2023 on behalf of the 2nd respondent. Counsel cited the case of Ester Njeri Gikonyo vs. Margaret Wamboi Mishuri & 3 Others [2020] eKLR, submitting that, in the absence of the compliance documents issued by the Settlement Fund Trustees, the suit property could not have been discharged in favour of the appellants and that, therefore, the appellants could not have lawfully acquired an interest therein.

19. Counsel submitted further that the process of acquisition of title to land, and the procedure therefor, are germane in determining whether the title deed issued to the appellants in respect of the suit property was valid and conferred good title thereto. Counsel for the 2nd respondent submitted that the appellants failed to demonstrate at the trial that the process by which they obtained the title deed was devoid of any element of fraud. Counsel cited the decision in Munyu Maina vs. Hiram Gathiha Maina [2013] eKLR for the proposition that, 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 interests which need not be noted on the register.

20. All said, the 2nd respondent's case is that the learned judge correctly held that the suit property was irregularly and unprocedurally transferred to the appellants. Counsel urged us to dismiss the appeal with costs to the respondents and uphold the decision of the trial court.

21. We take to mind the fact that our mandate on a first appeal as set out in rule 31(1) (a) of the Rules of this Court is to reappraise the evidence and draw our own conclusions.

22. This being a first appeal, this Court is mandated to re-evaluate the evidence before the trial court as well as the impugned judgment and arrive at its independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to fresh and exhaustive scrutiny and make conclusions thereon, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first-hand. This duty was stated in Selle & another vs. Associated Motor Boat

Co. Ltd. & others [1968] EA 123. In effect, a first appellate court has jurisdiction to reverse or affirm the findings of the trial court.

23. In Peters vs. Sunday Post Limited [1958] EA 424, the predecessor of this Court, the Court of Appeal for Eastern Africa, stated that:

> "Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide."

24. Having carefully considered the record of appeal, the impugned judgment, the rival submissions of learned counsel for the appellants and for the respondents, the cited authorities and the law, we find that three main issues commend themselves for our determination, namely: who, as between the appellants and the 1st respondent, has the absolute and indefeasible right of title to the suit property; whether the title document obtained by the appellants was valid on account of the alleged transfer under Giriama customary law relating to rights over immovable property; and what orders ought we to make in determination of the appeal, including orders on costs.

25. On the 1st issue as to the root of title, it is common ground that the 1st respondent's deceased father (Kahindi Masha Mumba) was the first beneficial allottee (under a settlement scheme programme) by the Settlement Fund Trustee of the suit property originally registered as plot No. Kilifi/Mtondia/170. It is not in dispute that the 1st respondent's deceased father had inherited the suit property from his deceased father prior to allotment under the scheme and formal transfer from the SFT and registration in his own name as absolute proprietor thereof as stipulated in section 27 of the repealed Registered *Land Act* (Cap. 300, whose relevant part reads:

> 27. Interest conferred by registration.
>
> Subject to this Act -
>
> (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;

26. According to the 2nd respondent, the suit property was originally registered in the name of the Settlement Fund Trustee on 8th September 1980 before allotment and transfer to Kahindi Masha Mumba (Deceased) on 18th October 1996 and, on the same day albeit subsequently, to the appellants jointly with their deceased brother who was then working at the lands office. The circumstances under which the subsequent transfer of the suit property from the 1st respondent's deceased father's name to the joint names of the appellants and their deceased brother was carried out are the basis of fraud pleaded and particularised in the plaint.

27. The 2nd respondent explained that the title register was subsequently rectified on 17th April 2007 and the plot number changed to Kilifi/Mtondia/169. He stated that the rectification was carried out following a report on an inquiry to ascertain the ground position, which necessitated change of the title number from 170 to 169, whereupon the appellants, who had been inexplicably registered as owners of Plot no. 170 surrendered the title deed for correction to read plot No. Kilifi/Mtondia/169.

28. On the authority of Ester Njeri Gikonyo vs. Margaret Wamboi Mishuri & 3 Others (supra), counsel for the 2nd respondent submitted that, in the absence of the requisite compliance documents issued by the

Settlement Fund Trustees, the suit property could not have been discharged in favour of the appellants and that, therefore, the appellants could not have lawfully acquired an interest therein. Citing the case of Munyu Maina vs. Hiram Gathiha Maina (supra), counsel argued that it was not sufficient for the appellants to dangle the instrument of title as proof of ownership of the suit property in the absence of evidence to show that the same was legally acquired. In conclusion, counsel agreed with the learned judge that the suit property was irregularly and unprocedurally transferred from the 1st respondent's deceased father to the appellants.

29. It is noteworthy that, apart from the clear evidence of the alteration of the title deed in respect of the suit property as reflected on the instrument of title, the record as put to us does not contain any written evidence of a contract of sale or other disposition executed by the 1st respondent's father in favour of the appellants or either of them to warrant the alterations complained of. In the absence of a written contract in that regard, the appellants' claim over the suit property is unsustainable.

30. As the learned Judge correctly observed, section 3 of the *Law of Contract Act* (Cap. 23) requires a contract relating to a disposition of an interest in land to be in writing, signed by the parties thereto and witnessed in accordance with section 3(3) of the Act. Accordingly, any attempt to enforce a contract based on an oral agreement relating to disposition of land, as was the case here, would fail for being in contravention of section 3(3) of the Act.

31. In our considered view, the 1st respondent's deceased father was at all material times the bona fide allottee and registered proprietor of plot No. Kilifi/Mtondia/169 which, upon his demise, comprised part of his estate under which the 1st respondent and other beneficiaries lawfully claim. We find nothing on record to suggest that he ever divested himself of title thereto. Indeed, the position in law, and which we are bound to uphold having been previously enunciated by this Court, is that the earlier title held by the 1st respondent's father has primacy over that subsequently held by the appellants which, to our mind, was rightly vitiated by the Judge (see Bandi vs. Dzomo & 76 others (Civil Appeal 16 of 2020) [2022] KECA 584 (KLR); Benja Properties Limited vs. Syedna Mohammed Burhannudin Sahed & 4 others [2015] eKLR; and Wambui vs. Mwangi & 3 others (Civil Appeal 465 of 2019) [2021] KECA 144 (KLR)).

32. The jurisprudential thread running through the afore- cited decisions is that no court of law should sanction and pass as valid any title to property founded on: fraud; deceitfulness; a contrived decree; illegality; nullity; irregularity, unprocedurality or otherwise a product of a corrupt scheme. Neither does the appellants' contention that the deceased was divested of title to the suit property in their favour on account of the alleged sale of cashew nut, mango or other trees in accordance with the customs of the Giriama ethnic community hold. That settles the 1st issue, namely: who, as between the appellants and the estate of the 1st respondent's father, is the rightful owner of the suit property.

33. Our finding on the first issue is decisive of the 2nd. Having found no evidence of any contract of sale or other disposition, we hold that the estate of the 1st respondent's deceased father, or the beneficiaries thereof, remain the absolute and indefeasible owners of the suit property and, in effect, the appellants' claim under Giriama customary law fails, and for good reason.

34. We are not persuaded by the argument advanced by learned counsel for the appellants that, as of 1974, the position regarding Giriama customs was that purchase and acquisition of trees on a plot of land conferred on the purchaser title thereto; and that the practice in issue was not contrary to law and morality. Counsel cited Article 2(4) of *the Constitution*; section 2 of the *Community Land Act* No. 27 of 2016; and the decision in Virginia Edith Wamboi Otieno vs. Joash Ochieng Ougo & Another (1987) eKLR, highlighting the recognition and significance of customary law in Kenya.

35. Whether or not the Giriama custom alluded to by the appellants existed is a question of fact to be proved in evidence. We take to mind the fact that, despite the misplaced notion of such custom viewed against statute law, the trial court nonetheless proceeded to inquire into the veracity of the appellants' basis of their claim and briefly pronounced himself in paragraph 66 of the impugned judgment thus:

> " 66. The same applied to the proposition that it was the practice in Kilifi those days that when one purchased your trees, he would in turn come to own your piece of land. There was no independent evidence placed before me to show that this was the practice and custom by which land was sold and/or disposed of. Neither was there any evidence that the Defendants had purchased any trees from the Plaintiff's father."

36. Section 51 of the *Evidence Act* (Cap. 80) makes provision for the manner in which such customs should be proved. It reads:

> 51. Opinion relating to customs and rights.

1. When the court has to form an opinion as to the existence of any general custom or right, the opinions as to the existence of such custom or right of persons who would be likely to know of its existence if it existed are admissible.

2. For the purposes of subsection (1) of this section the expression "general custom or right" includes customs or rights common to any considerable class of persons.

37. In Joyce Atemo vs. Mary Ipali Imujaro [2003] eKLR, the Court of Appeal held that:

> " We must, of course, start from the well known position that he who seeks to rely on any African customary law as the basis of his claim, must prove by evidence the existence of such custom – see Ernest Kinyanjui Kimani v Muiru Gikanga & Another [1965] EA 735 cited by Gicheru, JA (as he then was) in Sakina Sote Kaittany & Another v Mary Wamaitha, Civil Appeal No 108 of 1995 (unreported)."

38. The only question that arises in proper cases, and this is not one of those cases, is as to how the existence of such custom is proved to the satisfaction of the trial court. In SAN vs. GW [2020] eKLR, the Court of Appeal stated that:

> " To prove custom, by section 51 of the *Evidence Act*, evidence of its existence must be called to provide the juridical and philosophical basis. That was the ratio decidedi in Nyariba Nyankomba vs. Mary Bonareri Munge [2010] eKLR where the High Court said that:

'Time and again, it has been stated that in cases resting purely on customary law it is absolutely necessary that experts versed in the customs be summoned to testify so as to assist the court reach a fair verdict since the court itself is not well versed in those customs and traditions.'"

39. It is noteworthy that the appellants did not go beyond the pleadings and restatement of their claim at the trial. The only exception to the requirement for proof of such customary practices is where the custom in issue is so notorious that the trial court takes judicial notice thereof. In Geoffrey Mugambi & 2 others vs. David K. M'Mugambi & 3 others [1992] eKLR, the Court of Appeal held that:

> " The law is that if the custom in question is notorious enough, the Court can take judicial notice of it without evidence being called to prove it. Section 59 of the *Evidence Act* (cap 80) provides that no fact of which the Court shall take judicial notice need be proved. And section 60(1)(a) of the *Evidence Act* provides that the facts of which the Court shall take judicial notice include all written laws, and all laws, rules and principles, written and unwritten, having the force of law. Customary law falls into this category.
>
> The former Court of Appeal for East Africa in the case of Kimani v Gikanga [1965] EA 735, held that where African customary law is neither notorious nor documented it must be established for the Court's guidance by the party intending to rely on it and also that as a matter of practice and convenience in civil cases the relevant customary law, if it is incapable of being judicially noticed, should be proved by evidence or expert opinions adduced by the parties."

40. Be that as it may, the appellants' claim and their Counsel's submission in this regard run against the grain of section 3(1) and (2) of the *Judicature Act* (Cap. 8), which ranks customary law at the bottom of the hierarchy of norms after *the Constitution*, all written laws, common law, doctrines of equity, statutes of general application in force in England on 12th August 1897, in that order. Even if such custom were proved or taken judicial notice of (as the case may be), they would invariably count for

little. Indeed, the Constitutional guarantee and the protection of the right to property, and statute law on land, are by no means subordinate to such customs, which only apply in cases where they are not "... repugnant to justice and morality or inconsistent with any written law".

41. In the same vein, section 2 of the *Community Land Act* (Cap. 287) defines "customary land rights" as "rights conferred by or derived from African customary law, customs or practices provided that such rights are not inconsistent with *the constitution* or any written law". Accordingly, Giriama customary land rights cannot be invoked so as to defeat the mandatory provisions of section 3(3) of the *Law of Contract Act* (Cap. 23) which reads:

> 3. No suit shall be brought upon a contract for the disposition of an interest in land unless—
>
> a. the contract upon which the suit is founded—
>
> i. is in writing;
>
> ii. is signed by all the parties thereto; and
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> b. the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.

42. Having carefully considered the record of appeal, the rival submissions and the law, we reach the inescapable conclusion that the appeal fails. Accordingly, we hereby order and direct that:

a. The appellants' appeal be and is hereby dismissed;

b. The Judgment and Decree of the Environment and Land Court of Kenya at Malindi (J. O. Olola, J.) delivered on 15th October 2020 be and is hereby upheld; and

c. the costs of this appeal be borne by the appellants.

DATED AND DELIVERED AT MOMBASA THIS 26TH DAY OF APRIL, 2024.

P. NYAMWEYA

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

signed

DEPUTY REGISTRAR