



REPUBLIC OF KENYA



**Njoroge v Karuku (Civil Appeal E069 of 2022)
[2024] KECA 553 (KLR) (24 May 2024) (Judgment)**

Neutral citation: [2024] KECA 553 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E069 OF 2022
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA
MAY 24, 2024**

BETWEEN

DOUGLAS MUNGAI NJOROGE APPELLANT

AND

STEPHEN KIMONDO KARUKU RESPONDENT

(Being an appeal against the Judgement of the Environment and Land Court at Mombasa (L. L. Naikuni, J.) dated 28th April 2022 in Environment and Land Court Civil Suit No. 32 of 2012)

JUDGMENT

1. By a plaint dated 27th February 2012, Douglas Mungai Njoroge, the appellant, sued Stephen Kimondo Karuku (the deceased) seeking the following orders:
 - a. A declaration that the property known as Mombasa/block/MS/III/462 belongs to the appellant.
 - b. An order of injunction restraining the Defendant by himself and/or agents from interfering with. Moving into, laying claim or in any manner interfering with the appellant's peaceful occupation of property known as Mombasa/ Block/ MS/III/462.
 - c. Any other and further Order this Court deems fit to grant.
 - d. Costs and interest.
2. Following the death of the deceased, the respondent, his son and legal representative, was substituted in his place. The appellant's case as pleaded was that he was at all material times the proprietor of land parcel known as Mombasa/Block/MS/III/462 (the suit property) which he bought from one Peter Kamau Nguatha (the vendor). The appellant's complaint was that the respondent, consistently and without any justification or reason, trespassed onto the suit property thereby causing him loss and damage on the pretext that the suit property belonged to him.



3. In his amended defence and counterclaim dated 22nd April 2013, in which he joined the vendor herein as the 1st defendant while the appellant was named as the 2nd defendant, the respondent, while denying the allegations made by the appellant, stated that, by an agreement dated 17th September 1988, the vendor leased a portion of Mombasa M.S Block III/98 to the late Stephen Kimondo Karuku (the deceased) at a monthly land rate of Kshs 1,500; that the deceased was permitted to renovate the semi-permanent structure constructed on the said property and further carried out developments thereon to the tune of Kshs 3,600,000; that, by a sale agreement dated 13th February 1994, the vendor offered to sell to the deceased the developed portion of Mombasa M.S Block III/98, then occupied by the deceased, at an agreed consideration of Kshs 650,000; that, as a result, the vendor engaged the services of a surveyor to subdivide the said property into two sub-plots, the portion to be transferred to the deceased measuring 0.23 Ha; that, after the subdivision, the portion that was occupied by the deceased and which ought to have been transferred to him was Mombasa /MS/Block III/462 (the suit property); that, prior to his death, the deceased was paying rates to the Municipal Council of Mombasa and was in occupation of the suit property, which he had substantially developed and had the option to purchase, and which right he duly exercised; that both the appellant and the vendor were well aware that the deceased was in occupation of the suit property, and having paid some consideration towards the transfer thereof; that, notwithstanding this, the vendor went ahead and transferred the suit property to the appellant; that the vendor misrepresented to the appellant that he was the registered owner of the suit property including the developments made by the deceased; and that the said sale and transfer was fraudulent and of no legal consequence.
4. The particulars of fraud and misrepresentation were set out as follows:
 - i. The 1st Defendant to the Counter Claim knew very well that the Plaintiff was in occupation of MBSA/MS/BLOCK III/462 with his express consent and had accepted the 1st offer to purchase the same on agreed terms and conditions.
 - ii. The 1st Defendant in the Counter Claim failed to disclose that he had offered the property for sale to the late Stephen Kimondo Karuku and had even accepted money from the late Stephen Kimondo Karuku as part of the agreed consideration.
 - iii. The 1st Defendant in the Counter Claim who had earlier on surrendered the parent title in respect of MBSA/MS/BLOCK III/ 98 to the late Stephen Kimondo Karuku took it from the late Stephen Kimondo Karuku for the sole purpose of registering new titles after the sub – division had been finalized and went ahead to fraudulently transfer it to the 2nd Defendants to the Counter Claim.
 - iv. The 1st Defendant to the Counter Claim failed to execute the transfer in favour of the late Stephen Kimondo Karuku upon the conclusion of the sub – division process.
 - v. The 1st Defendant fraudulently had the Caution that was registered against the suit property on 15th March, 2002 by the late Stephen Kimondo Karuku removed without the requisite procedure being followed.
 - vi. The 1st Defendant in the Counter Claim misrepresented to the 2nd Defendant that the late Stephen Kimondo Karuku was only a tenant on the suit property while knowing very well that the late Stephen Kimondo Karuku was not a tenant on the suit property.
 - vii. The 2nd Defendant to the Counter Claim knew very well that the Plaintiff to the Counter Claim was in occupation of the suit property but went ahead to purchase the same.



- viii. The 1st Defendant to the Counter Claim did not issue a notice to the Plaintiff to complete the conveyance prior to transferring the same to the 2nd Defendant to the Counter Claim.
5. According to the respondent, the said action was meant to deprive him of the suit property which had been his home since 1988; and, as a result of the said fraudulent dealings between the appellant and the vendor, he suffered loss and damage arising from his investments in the suit property, which he particularised as totalling to Kshs 3,600,000. He therefore sought the following orders:
1. A declaration that the transfer of property known as Mombasa/block/MS/III/462 by the 1st Defendant to the Counter Claim to the 2nd Defendant to the Counter Claim was null and void ab initio and the registration be cancelled.
 2. An order that the parcel of land known as Land reference numbers Mombasa/block/MS/III/462 be transferred to the appellant in the Counter Claim.
 3. In the alternative and without prejudice to the above a refund of the sum of Kshs, 3, 649, 646. 65 being special damages.
 4. Costs of the suit and this Counter Claim.
 5. Interest on (c) and (d) above at the Courts rates.
 6. Any other relief that the Court may deem fit and just to grant.
6. In his reply to defence and defence to counterclaim, the appellant joined issues with the respondent in his defence and denied all the allegations made in the counterclaim, particularly the allegations of fraud and bad faith. He averred that he was a stranger to the dealing between the respondent and the vendor as well as the expense incurred by the respondent. He prayed that judgement be entered in terms of his plaint and that the counterclaim be dismissed.
7. By his defence to the counterclaim dated 20th May 2012, Peter Kamau Nguatha, the vendor and 1st defendant to the counterclaim, denied the allegations made against him by the respondent. According to him, he offered his property for sale and the respondent offered to buy, but failed to fully pay for it. It was his case that no valid consent was ever obtained and, therefore, the agreement lapsed whereupon he sold the suit property to the appellant. He therefore prayed that the counterclaim be dismissed with costs.
8. At the hearing of the case, both the appellant and the respondent called 3 witnesses each. We find it unnecessary to reproduce their evidence as adduced before the trial court since the facts of the case were well summarised by the learned Judge in his judgement.
9. The appellant's case was that he was the registered proprietor to the suit property having bought it from the vendor. He produced a Certificate of Title showing that he was issued with a title on 29th December 2011. It was his case that he was unaware of the transaction between the vendor and the deceased notwithstanding the fact that the agreement entered into between them clearly alluded to the removal of a caution from the suit property. The appellant's case was supported by the vendor who explained that, prior to selling the suit property to the appellant, he had initially entered into a lease agreement with the deceased in which the deceased operated a bar and restaurant business for a long period at the agreed rent of Kshs 1,500 per month. The deceased later expressed an interest in buying the suit property, which was a subdivision of the original larger parcel of land. A sale agreement was entered into in respect of the suit property in the sum of Kshs 650,000 out of which the deceased paid a sum of Kshs. 290,700, leaving a balance of Kshs. 359,300, which was to be paid by monthly instalments



- of Kshs 5,000, the last date being 28th February 1998. However, the deceased subsequently defaulted in payment of the balance of the purchase price and started evading the vendor. Consequently, the vendor engaged the appellant with a view to selling the suit property to him, and a sale agreement was entered into between the vendor and the appellant, culminating in the acquisition of title by the appellant to the suit property.
10. On the other hand, the respondent's case was that the deceased entered into a tenancy agreement with the vendor in 1988 and, in the year 1994, the tenancy agreement was terminated and a sale agreement entered into between the deceased and the vendor for the purchase of the suit property at an agreed price of Kshs. 650,000 out of which Kshs. 359,300 was paid leaving a balance of Kshs. 342,700, which was to have been paid on or before 28th February 1998. According to the agreement, the balance was to be settled by instalment of Kshs. 5,000 per month, and that these payments were distinct from the previous rental remittances. According to the respondent, the deceased stopped making further payments and insisted on being shown an access road to his property since a squatter had erected a house all along the access road. Upon learning that the suit parcel was being sold off to a third party, the deceased registered a caution against the title to the suit property to protect his purchaser's interest.
 11. From the evidence, it is clear that the vendor and the appellant made several attempts to remove the Caution, which were vehemently resisted by the deceased; that, eventually, the Land Registrar issued a notice to the deceased to show cause why the Caution should not be removed; that the deceased insisted that he would only pay the balance of the purchase price upon the vendor making provision for the access road to the suit property; that, in his ruling, the then Land Registrar directed that the beacons be re-positioned in order for the deceased to have an alternative access road after which the Caution would be removed; that the said Land Registrar never removed the Caution; that, later on, by a Certificate of Title Deed issued on 29th December 2011, the suit property was registered in the appellant's name; that, from the evidence of the Land Registrar, the records at the Land Registry prior to the said registration, including part of the green card, were tampered with and went missing; and that, notwithstanding the registration, the respondent continued in occupation of the suit property, and that it was this occupation that triggered the suit.
 12. In his judgement, the learned Judge found that the issues for consideration were:
 - a. Whether the appellant demonstrated that he was the absolute and legally registered proprietor of all that parcel of land known as Land Reference numbers known as MOMBASA/BLOCK/MS/III/462 with indefeasible rights, interest and rights over it.
 - b. Whether there existed any specific performance from the Conveyancing transaction guided by the duly executed sale agreement between the appellant and the respondent.
 - c. Whether the parties were entitled to the prayers sought in their pleadings.
 - d. Who to bear the costs of the suit.
 13. In his judgement, the learned Judge found that the appellant acquired his title from the vendor, Peter Kamau Nguatha; that this transaction was vehemently challenged by the respondent on the ground that the title was acquired by irregularities, illegalities, fraud, omission or mistake and collusion and conspiracy with the officers at the Land Registry, Mombasa; and that, on the other hand, the appellant insisted that he was an innocent bona fide purchaser who acquired the title deed through consideration and value without notice of any defect in the vendor's title.
 14. The learned Judge noted that, although the respondent set out in detail in his defence and counterclaim the particulars of fraud and/or misrepresentation of facts by the appellant and the vendor, the vendor



did not attempt to controvert those allegations in his pleadings. In his judgement, the learned Judge set out in full the provisions of section 26(1) of the [Land Registration Act](#) and relied on the case of Joseph Komen Somek v Patrick Kennedy Suter (2018) eKLR as spelling out the purpose of the said provisions as being to protect the real title holders from being deprived of their title by subsequent transactions. However, he held that where the Certificate of Title or, in this case, the Lease is doubtful, suspect or obtained by fraud or forgery, un-procedurally, illegally or by corrupt means or by mistake or omission as envisaged under the provision of section 143 of RLA (now section 26(1) of the [Land Registration Act](#)), the provisions of section 80(1) & (2) of the [Land Registration Act](#) providing for the cancellation and rectification of the title comes to play.

15. According to the learned Judge, under sections 104, 107 and 112 of the [Evidence Act](#), since the respondent challenged the Certificate of Title issued in the appellant's name, there was a need to keenly interrogate the respondent's claims in order to arrive at a proper decision. The learned Judge noted that the respondent's allegations such as effecting the registration despite there being a caution registered against the title deed, the failure to produce certain important registration documents, such as the consent from the Land Control Board as required pursuant to section 6(1) of the [Land Control Act](#), the failure to produce the payment receipts for Stamp Duty by the appellant, and the failure by the vendor to issue the deceased with a completion notice for the termination of the sale agreement as required by law, were all matters that required to be interrogated.
16. It was the learned Judge's view that the existence or absence of the Caution can only be determined by conducting an official search; that evidence on the balance of probability showed that the respondent registered a caution on 28th March 2002, but that no evidence was produced in court demonstrating that the appellant carried out any form of due diligence, such as an official or personal search prior to acquiring the suit property; that, on cross examination, the appellant admitted that he had been informed by the deceased that there was registered a caution on the parcel and that, from the numerous correspondence with the Land Registrar and efforts to remove the registered caution, he could not feign ignorance of the existence of the Caution; and that all parties agreed that no registration of any instrument can be legally possible where a caution is validly registered, and that such registration has to be properly and procedurally removed in accordance with the provisions of section 73(2) of the [Land Registration Act](#).
17. The learned Judge found that the respondent took trouble to scientifically and by way of law demonstrate how the title was acquired fraudulently, by omission or mistake to disapprove the title being held by the appellant. He cited the definition of the term "bona fide Purchaser" in Black Law Dictionary and the case of *Katende v Haridas and Company Limited* [2008] 2 EA 173., where the same term was described, as well as this Court's decision in the case of *Mwangi James Njehia & Another v Simon Kamanu*, Civil appeal no. 177 of 2019 where it was held that the definition of the same term in *atende v Haridas and Company Limited* (supra) was no longer adequate, and found that the appellant was not an innocent purchaser for value as he was fully aware of an existing sale agreement, and that the deceased was already in occupation of the suit property for many years. According to the learned Judge, the first agreement between the deceased and the vendor, which had never been legally terminated, still subsisted and took precedence, and was intact and unenforceable by law.
18. Additionally, the learned Judge took notice of the fact that, from the pleadings and the evidence adduced in court, the appellant failed to produce the prerequisite empirical evidence associated with such legal land transfers, such as the Letter of Consent from the Land Control Board, duly executed transfer forms, Clearance Certificates, application form and KRA Pay in Slips. He also took note of the fact of the missing records from the land registry. In those circumstances, he concluded that the process



of the transfer and the issuance of the Certificate of the Title deed to the appellant was not bona fide as it was full of mistakes, fraud and/or omission, and was hence illegal, irregular and wrongful.

19. Regarding the second issue as to whether there existed any specific performance from the conveyancing transaction guided by a duly executed sale agreement between the appellant and the respondent, the learned Judge noted that specific performance, like other equitable remedies, is discretionary and its grant is based on the existence of a valid, enforceable contract. In the instant case, he found that there was a duly executed sale agreement dated 19th March 2017. However, he noted that the remedy will not be granted if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable, and cited Halbury's Laws of England, 4th Edition at Paragraph 487 Vol. 44 as to the circumstances under which specific performance may be granted. The learned Judge found that there existed a tenancy agreement between the vendor and the deceased in respect of the suit property where the deceased was carrying out a bar and restaurant business on a monthly rent and resided therein with his entire family; that he carried a lot of improvements thereon and even sub leased it to a Church; that this was an indication that he was already in occupation of the suit property for several years with the knowledge and consent of the vendor, unlike the appellant who had never taken possession; that subsequently, arising from their good relationship with the deceased, they entered into a sale agreement for the purchase of the sub-divided portion; that the said agreement was not completed on the due date due to blame games by both parties; that, since the Sale Agreement did not specifically stipulate that time was of the essence, instead of the vendor taking up the proper legal and direction for such conveyancing transaction as provided for in law, particularly, the Law Society Condition of Sale (1989) edition, of issuing a 21 days' notice of termination of the transaction to the deceased, the appellant took the law into his hands and entered into a second land sale agreement with the appellant out of rage and frustration notwithstanding the apparent illegal and irregular processes undertaken; and that, since no notice of termination of the sale transaction was issued, the original sale agreement over the suit property entered into between the vendor and the deceased on 19th March 2017 remained intact, valid and enforceable.
20. According to the learned Judge, the vendor never cited any frustration or severe hardship he encountered in transferring the title to the deceased; that, all along, there was intention by the vendor to pass the possession and title to the deceased; that the vendor owed the deceased, who had been in physical occupation and possession of the suit property for over twenty years (20) years, his part of the bargain by passing the title to the suit property to him; and that, on the other hand, the estate of the deceased should be compelled to pay the outstanding balance to the vendor at the Court interest rate computed for all those years to the date of the judgement.
21. As regards the issue as to whether the parties were entitled to the prayers sought, the learned Judge found that the appellant did produce before the court a copy of a title to the suit property issued on 29th December 2011 and all other documents, including several official searches indicating that the suit property belonged to the appellant, but that the same was vehemently challenged by the respondent on the grounds aforesaid; that the respondent was entitled to the suit property where they had occupied and taken possession for all those years on the legitimate expectation that the land was theirs; that the appellant had never taken possession thereof, and the court was not impressed about the manner and the process through which the appellant acquired his title deed, which was marred by gross irregularities and procedural transgressions contrary to law; and that the court was left with no choice but to call for the cancellation of the said title deeds, and to rectify the land register.
22. In the end, the learned Judge issued the following orders:



- a. That a declaration that the property known as Mombasa/block/MS/III/462 based on the specific performance be registered in the names of the Defendant in the Plaintiff and appellant in the Counter Claim being the estate of the late Stephen Kimondo Karuku.
 - b. That an order of Specific Performance be and is hereby issued compelling the 1st Defendant in the Counter Claim to transfer the parcel of land known as land reference MOMBASA/BLOCK/MS/III/462 to the estate of the deceased – the late Stephen Kimondo Karuku within the next Sixty (60) days from the date of this Judgement.
 - c. That in default to cause the said transfer by the 1st Defendant, the Deputy Registrar of this Court shall duly execute all the prerequisite documents pertaining to this sale of land transaction to be registered in the names of the estate of the deceased.
 - d. That the appellant in the Counter Claim as the duly appointed Legal Administrator to the Estate of the late Stephen Kimondo Karuku shall bear the costs of the Stamp Duty and Registration fees.
 - e. That the Defendant in the Plaintiff and who is also the appellant in the Counter Claim is directed to pay the appellant in the Counter Claim the outstanding balance of the purchase price being a sum of Kenya Shillings Three Fourty Two Thousand Seven Hundred (Kshs. 342, 700.00) plus interest accrued for the past 23 years by the time of filing the case at the Court rate of twelve per cent (12%) per annum within the next Sixty (60) days from the date of this Judgement.
 - a. That the Land Registrar Mombasa be and is hereby directed pursuant to the provisions of Section 80 (1) and (2) of the *Land Registration Act*, No. 3 of 2012 to cancel the title deed and any other land registration documents in all that parcel of land known as Land Reference Numbers Mombasa/block III/462 in the names of Douglas Mungai Njoroge and rectify the records by registering it in the names of the duly appointed Legal Administrator of the estate of the late Stephen Kimondo Karuku within the next Sixty (60) days from the day of this Judgement.
 - b. That an order of permanent injunction restraining the appellant in the Plaintiff by himself and/or agents from interfering with. Moving into, laying claim or in any manner interfering with the appellant's in the Counter Claim peaceful occupation of all that parcel of land known as Land reference Numbers Mombasa/block/MS/III/462.
 - c. That Costs and interest of the suit to be awarded to the Defendant in the Plaintiff and 1st Defendant in the Counter Claim by the appellant in the Plaintiff herein.
23. Dissatisfied with the said decision, the appellant lodged the instant appeal in which he contended that the learned Judge erred in fact and in law: in holding that the Land Registrar never removed the Caution on the suit property; in holding that the Certificate of Title issued to the appellant is doubtful, suspect or was obtained by fraud or forgery, unprocedurally, illegally or corrupt means or by mistake or omission; in holding that the respondent had demonstrated that the appellant's title was acquired fraudulently or by omission or mistake; in holding that the appellant was not a bona fide purchaser for value without notice; in holding that the appellant had failed to produce the prerequisite empirical evidence associated with the legal land transfer; in holding that a letter of consent from the Land Control Board was necessary to effect a transfer when the suit property was not an agricultural land at all; in holding that the agreement between the deceased and the vendor dated 19th March 1997 was not bound by time when the agreement itself expressly stipulated that the balance of the purchase price



- was to be paid on or before 28th February 1998; in associating the appellant with the acts of tampering with land records at the Land Registry; in wrongly evaluating the evidence on record hence coming to a wrong determination; in issuing orders to the Land Registrar who was not a party to the suit; in ordering that the respondent pays himself the outstanding balance of the purchase price being Kshs 342,700 together with the accrued interest; in ordering the appellant to pay the costs of the suit.
24. We were urged to allow the appeal with costs.
 25. We heard this appeal virtually on the Court's GoTo platform on 7th December 2023 when learned counsel, Mr. Magolo, appeared for the appellant while learned counsel, Ms. Kabole, held brief for Mr. Njoroge for the respondent.
 26. Mr. Magolo relied on the submissions dated 13th September 2023 filed by J. O. Magolo & Co Advocates for the appellant, and which he briefly highlighted. In those submissions, it was contended that the learned Judge erred in finding that the Land Registrar never removed the Caution on the suit property. According to the appellant, the Land Registrar, pursuant to section 73(2) and (3) of the [Land Registration Act](#), notified the deceased of his intention to remove the Caution, but that the deceased did not respond thereby prompting the Land Registrar to remove the Caution. It was further submitted that the learned Judge's finding that stamp duty was not paid was erroneous since the Stamp Duty Declaration Assessment and Pay-in-Slip together with the Banker's Cheque and the executed transfer form were duly exhibited. As for the issue of failure to obtain the consent of the Land Control Board, it was submitted that the suit property was not agricultural land, hence the Consent was not required. In any case, it was submitted, pursuant to the decision of this Court in [Aliaza v Saul Civil Appeal 134 of 2017](#); [2022] KECA 583 (KLR), that lack of Land Control Board's consent does not void a land transaction.
 27. The learned Judge was faulted for finding that the agreement between the vendor and the deceased dated 19th March 1997 never provided any time frame and was not time bound hence making the contract valid. According to the appellant, the agreement dated 19th March 1997 confirmed that the agreed purchase price was Kshs 650,000 out of which Kshs 290,700 was deposited, leaving Kshs 359,300 to be paid on or before 28th February 1998, which balance was never paid. In the appellant's view, the deceased breached the terms of the sale agreement, notwithstanding the fact that the title documents were handed over to him. The appellant relied on the case of *Sagoo v Dourado* [1983] KLR 365 where it was held that time will not be considered of the essence unless the parties expressly stipulate that conditions as to time must be strictly complied with. He also relied on *Chitty on Contracts*, 27th Ed. Vol. 1 General Principles Sweet & Maxwell 1994 at page 1029, submitting that a party may treat the contract as repudiated if the other party's performance was not completed on the date stipulated under the contract. Accordingly, it was submitted that when a party to a contract promises to do a certain thing at a specified time but fails to do so, the contract becomes voidable. In this regard, the appellant relied on this Court's decision in the case of *Wagichiengo v Gerald* [1988] eKLR.
 28. It was the appellant's contention that, under section 26 of the [Land Registration Act](#), a certificate of title is conclusive evidence of proprietorship and, in this case, the appellant produced a title deed issued on 29th December 2011 in respect of the suit property, Mombasa/Block MS/III/462, showing that the property was registered in his name. He also produced a certificate of search dated 23rd January 2012 confirming that position. It was contended that the learned Judge erred when he issued orders in respect of plot nos. Mombasa/Block/MS/III/462 and Mombasa/Block III/462 while the actual plot was Mombasa/MS/BLOCK III/462. The appellant also faulted the learned Judge for ordering the respondent to pay himself the outstanding balance of the purchase price of Kshs 342,700 together with the accrued interest.



29. Based on the foregoing, we were urged to allow the appeal and grant the orders sought in the plaint.
30. The respondent's submissions were dated 29th November 2023 and filed by Njoroge & Katisya Advocates. During the hearing, Ms. Kabole briefly highlighted them. According to the respondent, his main challenge to the appellant's title was that a transfer was registered and a title issued notwithstanding the existence of the Caution earlier registered; that there was no evidence that the Caution was removed; that, having discharged the burden by showing the registration of the Caution, the burden then shifted to the appellant to prove that the Caution had been removed prior to the time he acquired the land; that no such evidence was adduced since the green card was tampered with and the land records missing; and that had the appellant produced a certificate of official search obtained before he entered into a sale agreement, signed by land registrar and sealed by the land registry, showing no impediments, the court would have been persuaded of the prior removal of the Caution. In support of the submissions, the respondent relied on *Lawrence Mugambi Rutere v Nelly Wachira & Another* [2019] KLR and *S.A.Q v JFMN & Others* [2018] KLR for the legal proposition that any registration meant to subvert a caution is a nullity.
31. It was noted that the sale agreement dated 1st December 2011 between the appellant and the vendor made reference to a caveat, which is synonymous with a caution, and that the two parties reserved Kshs 400,000 for the removal of the caveat, showing that they knew of the impediments registered against the title by way of an existing caution; that the vendor could only enter into another agreement after terminating the existing one between him and the deceased; that, in this case, the appellant was aware of the existing agreement between the vendor and the deceased; that no evidence was led to show that time was of the essence or that the requirement for the issuance of a 21 days completion notice as per the existing Law Society Conditions of Sale had been waived; that failure to issue the completion notice or to terminate the first agreement meant that the vendor lacked capacity to enter into a second agreement in respect of the same property; and that the first agreement was still in force and remained valid.
32. In the respondent's submissions, once a title is impeached in any suit, it is the duty of the title holder to demonstrate his root to a good title. Reliance was placed on *Dina Management Limited v County Government of Mombasa & 5 Others* [2023] KESC 30 eKLR for the proposition that it is simply not enough to waive a bare title and claim its indefeasibility. In this case, it was submitted that the appellant failed to demonstrate that he paid any stamp duty or registration fees for the transfer since there were no records of such payment at the Lands Registry.
33. Since the appellant admitted that he was aware of the deceased's occupation of the suit property, it was submitted that he could not have acquired the same innocently. However, the respondent admitted that transfer of the suit property did not require consent of the Land Control Board since it was within the former Mombasa Municipality, but submitted that that was not an issue before the trial court. The respondent also took issue with the appellant's bona fides arising from his reliance on a statement not signed by himself and understating the value of the purchase price in order to pay less stamp duty. It was submitted that since the vendor had not appealed against the decision of the trial court, there is no reason to disturb the obligations placed upon him. In view of the foregoing, the respondent submitted that the order for specific performance was properly issued and that, since the sale agreement between the appellant and the vendor has an indemnity clause, the appellant would be entitled to a refund of the purchase price paid to the vendor.
34. We were urged to dismiss the appeal with costs.
35. We have considered the submissions put to us by the parties herein as well as the material placed before us. In a first appeal, such as the one before us, we are enjoined to consider the submissions made before us as well as the record of the proceedings before the trial court and, in doing so, we are under a legal



duty to analyse and re-assess the evidence on record and reach our own conclusions on the issues for determination in the appeal. In carrying out our mandate, we must be cognisant of the fact that, unlike the trial court, we had no benefit of seeing or hearing the witnesses testify. We must therefore give allowance for that handicap. This position was restated in *Selle v Associated Motor Boat Co.* [1968] EA 123 where this Court held that:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v Ali Mohamed Sholan* (1955), 22 E. A. C. A. 270).”

36. However, the Court, sitting as the first appellate court, must always appreciate that while undertaking its said obligation, as held in *Alfarus Muli v Lucy M Lavuta & Another* [1997] eKLR, it will interfere with the findings of the first trial court:

“only if it is shown that there was absolutely no evidence or that the evidence that was there could not possibly support such a finding...Even if a Judge does not give his reasons for his finding the appellate Court can find the same in the evidence.”

37. In this appeal, certain facts are not in dispute. It is not disputed that the deceased and the vendor entered into a sale agreement dated 19th March 1997 in respect of land parcel no. Mombasa/MS/BLOCK III/462 at the agreed purchase price of Kshs 650,000; that a sum of Kshs 290,700 was deposited leaving Kshs 359,300 was agreed to be paid on or before 28th February 1998; that Land Parcel No. Mombasa/MS/BLOCK III/462 was a subdivision from Mombasa/MS/BLOCK III/98 and, before the subdivision, the deceased and the vendor had entered into an agreement in which the deceased leased part of the said land and had been in occupation since 1988; that the deceased’s occupation of the suit property was well known to both the vendor and the appellants; that the deceased did not pay the balance of the purchase price as agreed, and that the vendor then entered into an agreement with the appellant to sell the same parcel of land to the appellant; that, upon realising this, the deceased registered a caution against the title to the suit property; that the fact of registration of the Caution was well known to both the vendor and the appellant and that, in their sale agreement, they expressly set aside a sum of Kshs 400,000 for the purposes of, inter alia, the removal of the Caution which they erroneously referred to as a caveat; that several attempts were made both by the vendor and the appellant to remove the Caution so as to facilitate registration of the land into the name of the appellant, but that they were met with resistance from the deceased; and that, somehow, the appellant managed to have the suit property registered in his name vide a title deed issued on 29th December 2011.
38. In addition, it is not in dispute that it was after the transfer of the suit parcel in the name of the appellant that he filed the suit from which this appeal arises, seeking, among others, the eviction of the deceased from the suit property; that, following the death of the deceased, the respondent was substituted in his place; that the respondent, as we stated at the beginning of this judgement, counterclaimed against both the appellant and the vendor seeking, among others, cancellation of the appellant’s title and the registration of the suit property in his name.



39. From the grounds of appeal and the submissions made before us, we consider the issues for our determination as: whether the Caution registered against the suit property, Mombasa/MS/BLOCK III/462, was lawfully removed prior to the registration of the land into the appellant's name; whether the appellant's title was properly obtained; whether the sale agreement between the deceased and the appellant was lawfully terminated; and whether the learned Judge was correct in granting the impugned orders.
40. From the judgement, it would seem that the fulcrum of the respondent's case was that the Caution registered against the suit property on 28th March 2002 was unlawfully removed prior to the registration of the land into the appellant's name. There is no doubt as to the fact of registration of that Caution. The appellant's case was that, after the Land Registrar issued to the deceased a Notice to Show Cause why the said caution could not be removed, the deceased failed to respond and that the Land Register, acting within his mandate, proceeded to remove the Caution. No evidence was presented to prove that the Caution was in fact removed. To the contrary, DW3, the then Land Registrar, testified that he was the one who issued the Notice to Show Cause and the parties did appear before him and, after hearing them, he directed the vendor to make provision for access road to the deceased and that, only upon doing so, would the Caution be removed. No evidence was presented to show that the vendor complied with this direction and, by the time of DW3's retirement from service, the parties had not returned to him.
41. PW2, the Land Registrar, testified that part of the records held at the lands registry was missing and, therefore, she could not testify as to the state of the records prior to registration of the appellant as the proprietor of the suit property. There was evidence that the deceased appealed against the decision of the Land Registrar, but there is no evidence of the fate of the appeal. There was evidence that, as long as such an appeal was pending, no step would be taken with regard to the removal of the Caution.
42. We appreciate that, under section 107(1) of the *Evidence Act*:
- “ 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.”
43. We are also cognisant of the legal maxim that *omnia praesumuntur legitime facta donec probetur in contrarium* (all things are presumed to have been legitimately done, until the contrary is proved). However, sections 109 and 112 of the *Evidence Act* provide that:
109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.
44. The foregoing provisions were the subject of this Court's decision in *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, in which it was held that:
- “ As a general proposition under section 107(1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act.”



45. Since it was the appellant who was making positive averments that the Caution was removed in order to pave way for his registration as the proprietor of the suit property, it was incumbent upon him to adduce evidence to show that this was actually the position, particularly as the records prior to his registration as the proprietor of the suit property was missing. The respondent could not be expected to prove a negative fact, that the Caution was not removed. He could have only proved that the Caution existed by the time of the registration of the suit property in the name of the appellant, if the records were available. In the absence of the records, his only burden was to prove that the Caution had been registered. It is always a hard task to expect a party alleging a negative to prove the same. We take to mind the decision of Seaton, JSC in the Supreme Court of Uganda case of J K Patel v Spear Motors Ltd SCCA No. 4 of 1991 in which it was held, citing *Constantine Steamship Line Ltd v Imperial Smelting Corp* [1914] 2 All ER 165 (H.L); *Trevor Price v Kelsall* [1975] EA 752 at 761; and *Phippison on Evidence*, 12th Ed Para 91; *Phippison* at Para 95. that:

“The proving of a negative task is always difficult and often impossible, and would be a most exceptional burden to impose upon a litigant. The burden of proof in any particular case depends on circumstances in which the claim arises. In general, the rule which applies is *ei qui affirmat not ei qui negat incumbit probatio*. It is an ancient rule founded on considerations of good sense and it should not be departed from without strong reasons...As applied to judicial proceedings the phrase “burden of proof” has two distinct and frequently confused meanings, (1) the burden of proof as a matter of law and pleading – the burden, as it has been called, of establishing a case, whether by preponderance of evidence, or beyond reasonable doubt; and (2) the burden of proof in the sense of adducing evidence...The onus probandi rests, before evidence is gone into, upon the party asserting the affirmative of the issue; and it rests, after evidence is gone into, upon the party against whom the tribunal, at the time the question arises, would give judgement if no further evidence were adduced.”

46. The same Court reiterated the position in the case of *Sheikh Ali Senyonga & 7 Others vs. Shaikh Hussein Rajab Kakooza and 6 Others* SCCA NO. 9 of 1990, where the Court held that to hold that the negative position must be proved by the respondents would be to impose an unnecessary burden on them.

47. In this case, the appellant clearly failed to discharge his burden. The only evidence on record from the respondent and from the official custodians of records of land records was that there was no evidence of the removal of the Caution. section 71(2) of the [Land Registration Act](#) stipulates that:

A disposition that is inconsistent with the Caution shall not be registered while the Caution is still registered except with the consent of the Cautioner or by the order of the court.

48. Based on the evidence presented before the learned Judge, we agree with his finding that:

“Emphasis is placed in the manner in which the registered caution was removed if at all. Cautions or the absence of it can only be known by way of conducting or carrying out official search. The evidence on the balance of probability shows that the Defendant registered a caution on 28th March, 2002 but no evidence was produced in court demonstrating that the Plaintiff carried out any form of due diligence such as an official or personal search prior to acquiring it. On cross examination, the Plaintiff admitted that he had been informed by the deceased that there was registered a Caution on the parcel though he later on recanted the testimony. Suffice to say, from the numerous correspondences by the Land Registrar and efforts to remove the registered caution no one would ape ignorance on the existence of the Caution. All parties have agreed on the proper legal position that



no registration of any instrument can be possible where a Caution was validly registered. Such registration has to be cancelled for being done before the Caution is properly and procedurally removed in accordance with the provision of Section 73 (2) of the land registration Act, No. 3 of 2012 and Articles 50 (1) and (2) of the Constitution of Kenya on the right to be heard and fair hearing.”

49. Section 73(2) of the Land Registration Act is clear that no disposition is to be registered if it is inconsistent with the Caution as long as the Caution is still registered, unless the consent of the Cautioner is obtained, or there is a court order to that effect. In this case, we have not been shown that either a consent was reached or that the registration was carried out pursuant to a court order. Accordingly, we are persuaded that the registration of the suit property in the appellant’s name was, in those circumstances, unlawful.
50. Did the appellant obtain a properly title? Section 26 of the Land Registration Act 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, un procedurally or through a corrupt scheme.
 2. A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.
51. In view of the foregoing, we reach the conclusion that the appellant’s title was not properly obtained. Apart from the foregoing, it was the respondent’s case that there was no evidence of transfer having been executed, clearance certificates having been obtained, and stamp duty and transfer fees having been paid by the appellant. On his part, the appellant contended that he had exhibited a Stamp Duty Declaration Assessment and Pay-in-Slip together with the Banker’s Cheque as well as a transfer form. The question regarding the indefeasibility of title has now been well settled in this jurisdiction. The myth that hitherto held sway to the effect that, once a person holds a title to land, his proprietorship cannot be successfully challenged, has now been debunked. This Court in Embakasi Properties Limited & another v Commissioner of Lands & another [2019] eKLR appreciated section 26 of the Land Registration Act when it held that:
- “Although it has been held time without end that the certificate of title is: “... conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof,” it is equally true that ownership can only be challenged on the ground of fraud or misrepresentation to which the proprietor named is proved to be a party. See section 23 of the repealed Registration of Titles Act. Section 26 of the Land Registration Act, 2012 though not as emphatic as section 23 aforesaid on the conclusive nature of ownership, confirms that the certificate is prima facie evidence that the person named as proprietor is the absolute and indefeasible owner. It adds that apart from encumbrances, easements, restrictions to which the title is subject, there is no guarantee of the title if it is acquired by fraud or misrepresentation or where it has been acquired “illegally, unprocedurally or through a corrupt scheme.”
52. The Court has explained that the mere fact of issuance of a title deed does not confer the status of indefeasibility of title, and that courts of this country would not hesitate to nullify titles held by those



who stare at the court and wave a title of grabbed land by merely pleading loudly, as the appellant did in this case in reliance on the general principle of the indefeasibility of title. In cases where the very process of acquisition of the land in question is under challenge, it is not enough to simply rely on the instrument of title. In this regard, it was held by this Court in *Munyu Maina v Hiram Gathina Maina* [2013] eKLR 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 that is under challenge and the registered proprietor must go beyond the instrument and prove 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. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant’s testimony.”

53. In the case of *Funzi Development Ltd & Others v County Council of Kwale, Mombasa Civil Appeal No.252 of 2005* [2014] eKLR, this Court held that:

“... a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot on the basis of indefeasibility of title sanction an illegality or gives its seal of approval to an illegal or irregularly obtained title.”

54. The necessity to place the law in its proper perspective was explained by this Court in the case of *Mwangi James Njehia & Another v Simon Kamanu* [2021] eKLR, where this Court distinguished *atende v Haridas and Company Limited* (supra), which was relied upon by the appellant in this appeal, by holding that:

“We nonetheless wish to state that the law, including case law is not static and the above requirements which were crafted over twenty years ago cannot be said to have been cast in stone. We hold the view that (5) above will need to be revisited and the word “apparent” be done away with altogether. We say so because in the recent past and even presently, fraudsters have upped their game and we have come across several cases where Title deeds manufactured in the backstreets have, in collusion of officers in the land registries, been transplanted at the Lands Office and intending buyers have duped to believe that such documents are genuine and on the basis they have ‘Purchased’ properties which later turn out to belong to other people when the correct documents mysteriously reappear on the register or the genuine owner show up after seeing strangers on their properties waving other instruments of title. It is prevalence of these incidents that have necessitated the current overhaul and computerization of the registration systems at the Land registries at Nairobi.”

55. We are not to be understood to be watering down the importance of title to land. Neither are we saying that, once allegations are made, however spurious, the registered proprietor is thereby called upon to prove the root of title. To hold that would open floodgates to those referred to by this Court in *Mirugi Kariuki v Attorney General* [1990-1994] EA 156; [1992] KLR 8 as “busybodies, cranks and other mischief-makers” to conjure up fanciful allegations simply to vex those owning properties in order to achieve their own amusements. Our view is that, where credible allegations are made and basis laid for believing that acquisition of property may have not been made following proper channels, then the registered proprietor is thereby called upon to adduce evidence showing the process through which that title was acquired.



56. In this case, the parties were aware of the existing relationship between the deceased and the vendor, and the fact that the deceased was in occupation of the land for a long time. His development of the land was visible for anyone who cared to check, and he had placed a caution on the title. The documents relating to the land mysteriously went missing save for those in support of the appellant's proprietorship. Without casting aspersions, it is clear to us that there was credible evidence in support of the respondent's case that the process by which the appellant acquired his title to the suit property did not pass muster. In those circumstances, it was only reasonable to call upon the appellant to adduce evidence, which ordinarily ought to have been in his possession, to show how he acquired the suit property. He failed to do so and must face the consequences of his shortcomings. Based on the evidence on record, save for his finding as regards the relevance of the consent of the Land Control Board, which the parties agreed was not necessary, we otherwise agree with the learned Judge when he held that:

“...the Plaintiff was not innocent purchaser for value as he was fully aware of an existing sale agreement and that the deceased was already in occupation of the suit property for many years. The first agreement which had never been legally terminated still subsisted and took precedence. It left the original contract intact and unenforceable by law....the pleadings and the evidence adduced in Court that the Plaintiff failed to produce the prerequisite empirical evidence associated with such legal land transfers. These are the Letter of Consent from the land Control Board, duly executed transfer forms, Clearance Certificates, application form KRA Pay in Slips and so forth as the evidence of DW – 2, the current land Registrar all the records on this suit land were missing and called for the reconstruction of the file. This by itself compels the Honourable Court to emphatically conclude that the process of the transfer and indeed the issuance of the Certificate of the Title deed to the Plaintiff was not bona fide as it was full of mistakes, fraud and/or omission. Hence the same was illegal, irregular and wrongful to say the least.”

57. That brings us to the issue as to whether the sale agreement between the deceased and the appellant was lawfully terminated. To determine this issue, it is important for us to consider whether time was of the essence of the contract between the deceased and the vendor. In their agreement dated 19th March 1997, the deceased and the vendor agreed in clause 4 that:

The balance amounting to Kshs 359,300/= (Kenya Shillings Three Hundred and Fifty Nine Thousand Three Hundred Only) shall be paid on or before the 28th day of February 1998.

58. In the case of *Sagoo v Dourado* [1993] eKLR 365, it was held that:

“The Modern Law in the case of contracts of all types may be summarized as follows. Time will not be considered to be of essence unless (a) The Parties expressly stipulate that conditions as to time must be strictly complied with. (b) The nature of the subject matter of contract or the surrounding circumstances show that time should be considered to be of the essence or (c) A party who has been subjected to unreasonable delay gives notice to the party in default making time of essence.”

59. From our reading of the said agreement, it is clear that, whereas the parties agreed on the last payment date, the parties did not expressly stipulate that the conditions as to time must be strictly complied with.



In those circumstances, we are persuaded as was held by this Court in *Njamunyu vs. Nyaga* [1983] KLR 282 that:

“The principle to be acted upon in such a case is stated in *Halsbury's Laws* (4th edn) p 338, para 482, ie: Apart from express agreement or notice making time of the essence, the court will require precise compliances with stipulations as to time whenever the circumstances of the case indicate that this would fulfill the intention of the parties. Completion not having taken place upon consent as intended by the parties the issue between them then was when thereafter. In a case of this type a party who has been subjected to unreasonable delay may give notice to the party in default making time of the essence. The return of the money by the defendant was notice to the plaintiff that the defendant had made time of the essence and rescinded the agreement. Ordinarily before an agreement of this nature is rescinded the party in default should be notified of the default and given reasonable time within which to rectify.”

60. In our view, the vendor ought to have given a notice to the deceased making time of the essence and only then would the vendor have been entitled to repudiate the contract between him and the deceased. We agree with the learned Judge that:

“It is evident in the instant case that no notice of termination of the sale transaction was issued to date and that means, which is trite law, that the original sale agreement over the suit property duly entered between the Vendor and the deceased on the 19th March, 2017 remained intact, valid and unenforceable.”

61. As to whether the learned Judge was correct in granting the orders in issue, we find no reason to fault the learned Judge in the reliefs granted in the impugned judgment. He was faulted for directing the respondent to pay himself the balance of the purchase price in respect of the agreement between the deceased and the vendor. In terms of the reliefs granted, the learned Judge ordered:

That the Defendant in the Plaintiff and who is also the Plaintiff in the Counter Claim is directed to pay the Plaintiff in the Counter Claim the outstanding balance of the purchase price being a sum of Kenya Shillings Three Forty Two Thousand Seven Hundred (Kshs. 342, 700.00) plus interest accrued for the past 23 years by the time of filing the case at the Court rate of twelve per cent (12%) per annum within the next Sixty (60) days from the date of this Judgement.

62. It is true that the defendant in the plaintiff was also the plaintiff in the Counter Claim and, accordingly, there was no reason for the trial court to direct the same person to make refund to himself. This Court has power under rule 33(a) of the Rules of this Court to vary an order issued by the court below. In exercise of the powers bestowed upon this Court by the said rule, we hereby vary the above-mentioned order by substituting therefor the following order:

That the respondent in this appeal is directed to pay the vendor the outstanding balance of the purchase price being a sum of Kenya Shillings Three Forty Two Thousand Seven Hundred (Kshs. 342,700.00) plus interest accrued for the past 23 years by the time of filing the case at the Court rate of twelve per cent (12%) per annum within the next Sixty (60) days from the date of the judgement.

63. Save for that variation, this appeal fails and is hereby dismissed with costs to the respondent.

64. Orders Accordingly.



DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF MAY, 2024.

A. K. MURGOR

.....

. JUDGE OF APPEAL

DR. K. I. LAIBUTA C.Arb, FCI Arb.

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

. JUDGE OF APPEAL

I certify that this is the true copy of the original

signed

DEPUTY REGISTRAR

