



**Komolmoi & another v Lokwang (Civil Appeal 132 of 2019)  
[2024] KECA 1299 (KLR) (20 September 2024) (Judgment)**

Neutral citation: [2024] KECA 1299 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT ELDORET  
CIVIL APPEAL 132 OF 2019  
SG KAIRU, FA OCHIENG & WK KORIR, JJA  
SEPTEMBER 20, 2024**

**BETWEEN**

**POWON LOKWANG KOMOLMOI ..... 1<sup>ST</sup> APPELLANT**

**JOEL KEDITUKEI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**SUSAN CHEPATET LOKWANG ..... RESPONDENT**

*(An appeal from the judgment of the Environment and Land Court at Kitale  
(M. Njoroge, J) dated 20th November 2018 in Kitale ELC No. 166 of 2013)*

**JUDGMENT**

1. The 1<sup>st</sup> appellant, Powon Lokwang Komolmoi and the 2<sup>nd</sup> appellant, Joel Keditukei, are dissatisfied with the judgment delivered on 20<sup>th</sup> November 2018 by M. Njoroge J. of the Environment and Land Court (E&LC) at Kitale. They have raised 10 grounds of appeal as follows:
  - i. The learned trial judge erred in law and fact in finding that the entire suit had only one main issue for determination when in fact there were several of them to be determined;
  - ii. The learned trial judge erred in law and fact in failing to determine the issues raised by the 2nd appellant in his defence and evidence.
  - iii. The learned trial judge erred in law and fact in failing to find that the 2nd appellant was an innocent purchaser for value of the suit property who did due diligence before paying the purchase price hence his title for WEST POKOT/CHEPKONO/401 was neither irregular nor unlawful.



- iv. The learned trial judge erred in law and fact in failing to determine who should be liable to refund the purchase price of Kshs 625,000/= to the 2nd Appellant upon cancellation of the appellants' title deed for the suit property.
  - v. The learned trial judge erred in law and fact in finding that the respondent is the 2nd wife of the 1st appellant when the evidence on record states that the respondent was living with her husband on the suit land who is not the 1st appellant.
  - vi. The learned judge erred in law and fact in failing to appreciate the 2nd Appellant's evidence that he was only introduced to one Mary Chepkogei as the only wife of the 1st appellant who executed the sale agreement to the suit land.
  - vii. The learned judge erred in law and fact in holding that the respondent was the 2nd wife of the 1st appellant when there was no evidence of customary marriage and or divorce of the said marriage.
  - viii. The learned judge erred in law and fact in finding that the suit property is a matrimonial property contrary to sections 5 and 8 of the *Matrimonial Property Act* 2013.
  - ix. The learned trial judge erred in law and fact in ordering that a new title deed to the suit property be issued to the respondent in the absence of any evidence of her contribution to the suit land, marital status and in disregard of the 1st appellant's interest and rights to the suit property.
  - x. The learned judge erred in law and fact in entering judgment for the respondent against the appellants in total disregard of the weight of the evidence on record.
1. The suit before the E&LC was instituted by the respondent, Susan Chepatet Lokwang, vide a plaint dated 9<sup>th</sup> September 2013 where she sought, among other orders, a declaration that LR No. West Pokot/Chepkono/401 (the suit property) was matrimonial property, cancellation of the 2<sup>nd</sup> appellant's title to the suit property and an order of eviction of the 2<sup>nd</sup> appellant from the suit property. It was the respondent's case that she got married to the 1<sup>st</sup> appellant in 1987 and they were blessed with 5 children. Later, the 1<sup>st</sup> appellant left her and married a second wife with whom he stayed with in Lelan. Her averment was that in 2001, the 1<sup>st</sup> appellant sold the matrimonial property to the 2<sup>nd</sup> appellant without her consent. She only got to know of the sale in 2011 when she found that the land had been transferred to the 2<sup>nd</sup> appellant.
  2. In a defence dated 28<sup>th</sup> October 2013, the 1<sup>st</sup> appellant denied ever marrying the respondent, asserting that he only had two children with her out of wedlock. Further, that the respondent's attempt to attribute the fatherhood of all the five children to him had been determined against the respondent by the Principal Magistrate's Court at Kapenguria. The 1<sup>st</sup> appellant also asserted that he had legally transferred the suit property to the 2<sup>nd</sup> appellant as it was not matrimonial property.
4. In a statement of defence and counterclaim dated 26<sup>th</sup> October 2013, the 2<sup>nd</sup> appellant confirmed purchasing the suit property from the 1<sup>st</sup> appellant but denied that the same was matrimonial property. The statement of defence came with a counterclaim through which the 2<sup>nd</sup> appellant prayed for the eviction of the respondent from the suit property.
  5. At the hearing of the case, the respondent called 3 witnesses. The respondent who testified as PW1 stated that she was married to the 1<sup>st</sup> appellant under Pokot customary law and dowry was paid. She testified that upon her marriage, she lived with the 1<sup>st</sup> appellant on the suit property and only came to know of its sale when the 2<sup>nd</sup> appellant visited the land with surveyors in 2010. It was her evidence that



- the caution she had earlier placed on the suit property was removed without her consent before the land was transferred to the 2<sup>nd</sup> appellant. She also testified that the 1<sup>st</sup> appellant deserted the matrimonial home and went to live with the 2<sup>nd</sup> wife by the name Mary Chepkasa at Lelan.
6. Joel Kitabukua (PW2) on his part testified that he was a village elder and knew the 1<sup>st</sup> appellant and the respondent, who were his neighbours, as man and wife. He stated that the 1<sup>st</sup> appellant married the respondent in 1987 and settled her on the suit property which he had bought earlier in 1982. He further testified that the 1<sup>st</sup> appellant deserted his home upon marrying another wife and later carved out and sold a large portion of the parcel of land.
  7. Clementina Chebet Julius (PW3) stated that she was a midwife and a neighbour to the 1<sup>st</sup> appellant and the respondent who were husband and wife. She recalled that at one time, the 1<sup>st</sup> appellant approached her to mediate a family dispute concerning the disposal of part of the suit property. She also testified that the action of the 1<sup>st</sup> appellant of purchasing another piece of land to host the second wife was in accordance with the Pokot traditions. It was also her evidence that all the respondent's 5 children were sired by the 1<sup>st</sup> appellant and the two never divorced.
  8. In support of the appellants' case, Samuel Okudo (DW1) who was the Executive Office at Kapenguria Law Courts produced the original record of Kapenguria PMCC Children's Case No. 147 of 2010.
  9. The 1<sup>st</sup> appellant who testified as DW2 adopted his witness statement dated 28<sup>th</sup> October 2013. Therein, he stated that he was the sole proprietor of the suit property. He denied ever marrying the respondent but admitted having two children with her. The 1<sup>st</sup> appellant testified that the dispute concerning the two children had been conclusively addressed in Kapenguria PMCC Children's Case No. 147 of 2010. He conceded to selling a portion of the suit property to the 2<sup>nd</sup> appellant and stressed that the respondent had no right to the suit property.
  10. The 2<sup>nd</sup> appellant testified as DW3 and stated that he bought the suit property comprising of 14 acres from the 1<sup>st</sup> appellant on 4<sup>th</sup> February 2007 at a cost of Kshs. 625,000. He testified that the 1<sup>st</sup> appellant was accompanied by and received consent from his wife by the name Mary Chepkosgei and her children as evidenced by the sale agreement. It was also his evidence that he first encountered the respondent when she destroyed his fence, which prompted him to lodge a complaint leading to her prosecution at Kapenguria Magistrate's Court. His testimony was that he bought the property after conducting due diligence.
  11. In his judgment, the trial Judge noted that the respondent had moved to secure her interests in the suit property before the institution of the criminal cases. The learned Judge also held that Kapenguria PMCC Children's Case No. 147 of 2010 was not determined on merit in the 1<sup>st</sup> appellant's favour and that 1<sup>st</sup> appellant had actually acknowledged the respondent as his wife in the documents filed in that case. The trial court consequently determined the suit in the respondent's favour concluding that the suit property was matrimonial property upon which stood the respondent's matrimonial home.
  12. When the appeal came up before us for virtual hearing, learned counsel Mr. Nyakundi appeared for the appellants while learned counsel Ms. Chebet appeared for the respondent. Mr. Nyakundi who had filed two sets of submissions indicated that he would rely on the submissions dated 14<sup>th</sup> November 2023, while Ms. Chebet opted to rely on her submissions dated 18<sup>th</sup> April 2024. Counsel did not make oral submissions.
  13. Submitting on the 3<sup>rd</sup> and 4<sup>th</sup> grounds of appeal, Mr. Nyakundi reiterated that the 2<sup>nd</sup> appellant was an innocent purchaser for value who purchased the land from the 1<sup>st</sup> appellant after conducting due diligence. Counsel faulted the trial court for making an order of rectification of the register arguing that



such an order was against the weight of the evidence on record. He referred to the evidence on record and submitted that the 1<sup>st</sup> appellant was the sole proprietor of the suit property because the respondent did not contribute to its purchase. In respect to the 6<sup>th</sup> and 7<sup>th</sup> grounds of the appeal, counsel asserted that one Mary Chepkosgei was introduced to the 2<sup>nd</sup> appellant on 4<sup>th</sup> February 2007 as the only wife of the 1<sup>st</sup> appellant. Further, that the record in Kapenguria PMCC Children’s Case No. 147 of 2010 did not amount to evidence confirming the existence of a marriage between the 1<sup>st</sup> appellant and the respondent. According to counsel, there was no evidence of customary rites or rituals performed to validate the marriage between the two.

14. Turning to grounds 9 and 10 of the appeal, counsel submitted that there was no proof that the respondent contributed towards the acquisition of the suit property. Counsel pointed out that since the suit property was bought in 1982, it could not be said to be matrimonial property as per the provisions of sections 5 and 81 of the [Matrimonial Property Act](#). Counsel argued that the 2<sup>nd</sup> appellant being an innocent purchaser for value was entitled to the suit property. He faulted the learned Judge for cancelling the title and ordering for the rectification of the register, contending that by doing so he had failed to consider the rights of the 2<sup>nd</sup> appellant. Additionally, counsel submitted that the trial court erred by not making an order as to who was to be held liable for refunding the purchase price of the suit property to the 2<sup>nd</sup> appellant. Counsel submitted that the 2<sup>nd</sup> appellant had been rendered helpless, vulnerable and without recourse in respect to the purchase price.
15. Ms. Chebet for the respondent while submitting on grounds 1 and 2 of the appeal urged that the learned Judge did not err in holding that there was only one issue for determination. Counsel referred to the evidence on record and argued that the only issue was whether the suit property was matrimonial property as all other perceived issues were already settled. It was also counsel’s submission that the 2<sup>nd</sup> appellant did not plead that he was a bona fide purchaser, hence the issue was not available for consideration by the trial court. Counsel relied on section 28(a) of the [Land Registration Act](#) in support of the submission that the 1<sup>st</sup> appellant held the suit property in trust for the respondent. Further, that the cited provision ensured that spousal consent was a prerequisite in dealings regarding matrimonial property.
16. Rejecting the argument that the 2<sup>nd</sup> appellant was an innocent purchaser for value, counsel submitted that the transaction between the 1<sup>st</sup> appellant and the 2<sup>nd</sup> appellant was marred with malice and irregularities. To support this argument, counsel pointed to the fact that the transfer was executed a day after the restriction by the respondent was removed and that 2<sup>nd</sup> appellant had also utilized criminal cases to forcibly detain and remove the respondent from the suit property.
17. Regarding grounds 5 and 7, counsel referred to section 43 of the [Marriage Act](#) to submit that there was evidence to support the presumption of marriage between the 1<sup>st</sup> appellant and the respondent. According to counsel, the marriage therefore complied with section 43(2) of the [Marriage Act](#).
18. Additionally, counsel referred to section 82 of the [Matrimonial Property Act](#) and submitted that the suit property fell within the definition of matrimonial property. Counsel relied on section 93(2) of the [Land Registration Act](#) for the submission that the fact that the respondent did not contribute to the purchase of the property did not change the nature of the property. Counsel submitted that there was evidence on record that the respondent was in occupation of the land from 1987 and the order for the rectification of the register was proper having been issued pursuant to section 81 of the [Land Registration Act](#). In the end, it was counsel’s submission that we uphold the findings of the trial court and dismiss the appeal with costs.



19. This being a first appeal, rule 31(1)(a) of the Court of Appeal Rules, 2022 requires us to re-evaluate, re-assess and re-analyse the evidence on the record before reaching our independent determination. In doing so, we must bear in mind and give room to the fact that unlike the trial court we did not have the opportunity of seeing and hearing the witnesses testify in order to gauge their demeanour. In *Abok James Odera T/A A.J Odera & Associates v. John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the operational area of this Court, sitting on a first appeal, was delineated thus:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

20. We have considered the record, the submissions of the parties, the authorities cited and the applicable law. In our assessment, the issues for determination in this appeal are: whether the 1<sup>st</sup> appellant was married to the respondent; whether the respondent’s consent was required in the transaction between the appellants; and whether the 2<sup>nd</sup> appellant was a bona fide purchaser for value.

21. While the respondent passionately claimed and testified that she was married to the 1<sup>st</sup> appellant in 1987, her assertion was vehemently denied by the 1<sup>st</sup> appellant who placed her in the category of a lover. According to the 1<sup>st</sup> appellant, he sired two children with the respondent out of wedlock. The emerging issue therefore is whether there was a customary law marriage between the 1<sup>st</sup> appellant and the respondent.

22. The starting point is Article 2(4) of *the Constitution* which recognizes the application of customary law so long as it is not inconsistent with *the Constitution*. Additionally, section 3 (2) of the *Judicature Act*, Cap. 8, approves the application of African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law.

23. Further, section 43 of the *Marriage Act*, Cap. 150 provides as follows:

“43. Governing law for Customary marriage

1. A marriage under this Part shall be celebrated in accordance with the customs of the communities of one or both of the parties to the intended marriage.
2. Where the payment of dowry is required to prove a marriage under customary law, the payment of a token amount of dowry shall be sufficient to prove a customary marriage.”

24. There have also been numerous judicial pronouncements emanating from this Court in relation to presumption of a marriage. For instance, in *Mary Njoki v. John Kinyanjui Muthuru* [1985] eKLR, Nyarangi, JA held that:

“In my judgment, before a presumption of marriage can arise, a party needs to establish long cohabitation and acts showing general repute. If the woman bears a child or better still children, so that the man could not be heard to say that he is not the father of the children, that would be a factor very much in favour of presumption of marriage. Also, if say, the two acquired valuable property together and consequently had jointly to repay a loan over a long period, that would be just what a husband and wife do and so it would be unreasonable



to regard the particular man and woman differently. Performance of some ceremony of marriage would be strong evidence of the general repute that the parties are married. To sum it, there has to be evidence that the long cohabitation is not close friendship between a man and woman, that she is not a concubine but that the cohabitation has crystallized into a marriage and that it is safe to presume that there is a marriage. To my mind, these features are all too apparent in the Yawe and in Mbiti (supra). To my mind, presumption of marriage, being an assumption does not require proof, of an attempt to go through a form of marriage known to law.”

25. The foregoing views are in tandem with those of the Court in Phylis Njoki Karanja & 2 others v Rosemary Mueni Karanja & Another [2009] eKLR that was relied upon by the learned Judge in his judgment. From the record, it is apparent that the 1<sup>st</sup> appellant conceded that he had brought forth children with the respondent, regardless of the number. PW2 who was a village elder and a neighbour in his evidence stated that the 1<sup>st</sup> appellant married the respondent in 1987 having purchased the suit property earlier. He settled her on the suit land as per Pokot customs that required a man to settle a wife on her land. PW3 who was a neighbour corroborated the evidence of PW2 and the respondent that indeed the two got married in 1987. PW3 further explained that under the Pokot customs, a man would be required to buy a second wife a separate parcel of land from that of the first wife. It also emerged from the evidence of PW3 that the 1<sup>st</sup> appellant had sought her intervention to persuade the respondent to accept the disposal of part of the suit property. PW3 also testified that she was the midwife in the birth of 3 of the respondent’s children. Further, that all the respondent’s 5 children were born during the period the 1<sup>st</sup> appellant and the respondent lived together. Indeed, the respondent in her evidence acknowledged that she had a co-wife and that the appellant deserted the home in 2001 or thereabouts.
26. Although the 1<sup>st</sup> appellant could not explain under what circumstances his name was appearing on the respondent’s identity card, he did confirm that in their customs, a married woman would adopt the husband’s name. This was in fact the case with the respondent who had adopted the name Lokwang in her national identity card. From terming the respondent a lover, the 1<sup>st</sup> appellant shifted gears and unconvincingly, in our view, alleged that she was a mere squatter on his farm. This assertion about the respondent being a squatter was not supported by any evidence. Indeed, the 1<sup>st</sup> appellant did not challenge the corroborative and concrete evidence of PW2 and PW3 that the respondent was his wife and their marriage was blessed with children. That PW2 and PW3 were neighbours of the 1<sup>st</sup> appellant was never disputed. Furthermore, the 1<sup>st</sup> appellant even failed to explain how an alleged “girlfriend” lived on his property, sired him children, and continued to live on the property for almost two decades as a squatter. The evidence as highlighted above is enough for us to arrive at the conclusion that there existed a marriage between the 1<sup>st</sup> appellant and the respondent.
27. Even though the record in Kapenguria PMCC Children’s Case No. 147 of 2010 is not before us, we are inclined to accept the analysis of the trial court at paragraph 23 of the judgment that there was no decree in that matter which the 1<sup>st</sup> appellant could show to support his allegation that the matter had ended in his favour. Indeed, the testimony of DW1 was that the file was ordered closed after the respondent who had sought for the custody of the children withdrew the suit. In any case, the 1<sup>st</sup> appellant has not challenged the analysis and conclusions of the learned Judge on the contents of that file but has only asserted that the proceedings at the magistrate’s court cannot amount to evidence of marriage. In our view, this argument is defeatist.

First, it was the appellants who called for the production of the Magistrate’s Court record before the E&LC. Secondly, court records are public documents by dint of section 79(1)(a)(iii) of the [Evidence Act](#) and section 38 of the [Evidence Act](#) provides that public records are admissible as evidence. As was



pointed out in *Evangeline Nyegera (Suing as the Legal Representative of Felix M'Ikiugu alias M'ikiugu Jeremia M'Raibuni (Deceased) v. Godwin Gachagua Githui* [2017] eKLR, “the test for admission of evidence is relevancy.” The issue before the trial court, as is the issue before us, was whether there was a marriage between the 1<sup>st</sup> appellant and the respondent and the record in Kapenguria PMCC Children’s Case No. 147 of 2010 confirmed that the respondent and the 1<sup>st</sup> appellant had appeared in court over the custody of the children. This supported the respondent’s claim that she was the 1<sup>st</sup> wife of the 1<sup>st</sup> appellant. In the circumstances, we cannot fault the conclusion by the learned Judge that the respondent was married to the 1<sup>st</sup> appellant.

28. The next issue is whether the respondent’s consent was a mandatory requirement prior to the sale and transfer of the suit property. Before we delve into this issue, we must assess whether the suit property was matrimonial property. The relevant provisions are sections 2, 6(1) and 9 of the *Matrimonial Property Act*, Cap 152. Section 2 defines matrimonial home and matrimonial property thus:

“matrimonial home” means any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property;

“matrimonial property” has the meaning assigned to it in section 6;”

29. Section 6(1) provides the meaning of matrimonial property as follows:

“6. Meaning of matrimonial property

1. For the purposes of this Act, matrimonial property means—
  - a. the matrimonial home or homes;
  - b. household goods and effects in the matrimonial home or homes; or
  - c. any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.”

30. Section 9 of the same Act on the other hand provides as follows:

“9. Acquisition of interest in property by contribution

Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made.”

31. The foregoing provisions are self-explanatory. From the evidence on record, we have no doubt that the suit property became the matrimonial home of the respondent after her marriage to the 1<sup>st</sup> appellant. It was her testimony that she lived on and tilled the land and from the time the land was sold to the 2<sup>nd</sup> appellant, she no longer had enough space to graze her animals. It must be appreciated that in this case we are not interested in the contribution of each spouse but rather the qualification of the suit property as a matrimonial property thereby requiring the consent of the respondent before its disposal. In our minds, we are satisfied that the suit property was matrimonial property within the provisions of section 6(1) as read with section 9 of the *Matrimonial Property Act*.



32. Moving to the third issue, from the outset, we must point out that when dealing with matrimonial property, the Court has to appreciate the equality that is enjoyed by both parties under Article 45 of *the Constitution*. This position has been reiterated by the Court in several decisions, including *V. W. N. v. F. N.* [2014] eKLR where it was stated that:

“The provisions of Sections 2, 6 and 7 of the *Matrimonial Property Act*, 2013 breath life into the rights provided in Article 45 (3). The *Matrimonial Property Act* recognizes that both monetary and non monetary contribution should be taken into account in determining contribution.”

33. The *Land Registration Act*, Cap 300 provides at section 93 as follows:

“93. Co-ownership and other relationships between spouses

Subject to any written law to the contrary, if a spouse obtains an interest in land during the subsistence of a marriage for the co-ownership and use of both spouses or all spouses, such property shall be deemed to be matrimonial property and shall be dealt with under the *Matrimonial Property Act* (Cap. 152).”

34. Returning to the *Matrimonial Property Act*, Cap 152, section 12 thereof provides as follows:

“12. Special provisions relating to matrimonial property

1. An estate or interest in any matrimonial property shall not, during the subsistence of a monogamous marriage and without the consent of both spouses, be alienated in any form, whether by way of sale, gift, lease, mortgage or otherwise.
2. A spouse in a monogamous marriage, or in the case of a polygamous marriage, the man and any of the man’s wives, have an interest in matrimonial property capable of protection by caveat, caution or otherwise under any law for the time being in force relating to the registration of title to land or of deeds.
3. A spouse shall not, during the subsistence of the marriage, be evicted from the matrimonial home by or at the instance of the other spouse except by order of a court.
4. Subject to subsection (3), a spouse shall not be evicted from the matrimonial home by any person except—
  - a. on the sale of any estate or interest in the matrimonial home in execution of a decree;
  - b. by a trustee in bankruptcy; or
  - c. by a mortgagee or chargee in exercise of a power of sale or other remedy given under any law.
5. The matrimonial home shall not be mortgaged or leased without the written and informed consent of both spouses.”



35. Section 93 of the *Land Registration Act*, Cap 300 as read with section 12 of the *Matrimonial Property Act* clearly provides for the protection and preservation of the respondent's interests as a spouse to the 1<sup>st</sup> appellant. It would follow that under section 12(1) and (5), the respondent's consent was necessary before the suit property could be sold to the 2<sup>nd</sup> appellant. In the absence of such consent, the transfer did not receive the stamp of approval from the law.
36. The 2<sup>nd</sup> appellant has argued that he was an innocent purchaser for value. The Supreme Court in *Dina Management Limited v. County Government of Mombasa & 5 others* [2023] KESC 30 (KLR) made the following directive that we find relevant to the 2<sup>nd</sup> appellant's assertion:
- “As held by the Court of Appeal in *Munyu Maina v Hiram Gathiha Maina* Civil Appeal No 239 of 2009 [2013] eKLR, where the registered proprietor's root title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register.”
37. The 2<sup>nd</sup> appellant produced a sale agreement dated 4<sup>th</sup> February 2007 as proof of the transaction for purchase of land. We note that from the green card, the 1<sup>st</sup> appellant received the title to the suit property on 12<sup>th</sup> July 2005. On 19<sup>th</sup> July 2005, the respondent placed a restriction on the title. On 17<sup>th</sup> May 2006, the restriction by the respondent was removed and on 18<sup>th</sup> May 2006 the property was transferred to the 2<sup>nd</sup> appellant and title issued to that effect on 24<sup>th</sup> December 2008. Our curiosity is raised as to how the land was transferred a day after the restriction was removed. It is indicated that the restriction was removed pursuant to a letter from the District Officer. Nowhere is the respondent who had placed the restriction mentioned. The appellants did not explain how the restriction was removed so as to aid the Court in establishing whether the removal was regular or irregular. Additionally, the 2<sup>nd</sup> appellant, other than producing the sale agreement and the title, has nothing to show regarding the due diligence that was allegedly carried out. It is even curious that the sale agreement is dated 4<sup>th</sup> February 2007 long after the land had been transferred to the 2<sup>nd</sup> appellant on 18<sup>th</sup> May 2006. The 2<sup>nd</sup> appellant avers that he knew the 1<sup>st</sup> appellant and his wife but fails to explain the steps he took to establish the position of the respondent who was staying on the suit property at the time he purchased it. In our view, the 2<sup>nd</sup> appellant was merely dangling the title with nothing to show for due diligence on his part. Consequently, we cannot find in his favour.
38. There was an argument by the 2<sup>nd</sup> appellant that the trial Judge ought to have determined who was to refund the purchase price to him. A perusal of the pleadings, and in particular his statement of defence and counter-claim, confirm that the issue of the refund of the purchase price was not among the issues placed before the trial court for determination. The learned Judge could not have delved into issues the parties had not asked him to decide. We therefore find no merit on this ground of appeal.
39. In conclusion, we find no error in the judgment of the trial court. We hereby uphold the same and dismiss this appeal in its entirety.
40. The final issue relates to the costs of this appeal. The general rule is that costs follow the event unless there are sufficient grounds to warrant a departure from this norm. In this case, we find no reason to depart from the rule on costs. As such the respondent is awarded the costs of this appeal.
41. The upshot of the foregoing is that the appeal is hereby dismissed in its entirety with the appellants meeting the respondent's costs of the appeal.



**DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER 2024**

**S. GATEMBU KAIRU, FCIArb**

**JUDGE OF APPEAL**

.....

**F. OCHIENG**

**JUDGE OF APPEAL**

.....

**W. KORIR**

**JUDGE OF APPEAL**

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

**Signed**

**DEPUTY REGISTRAR**

