



**Muchiri v Gachagwa (Environment and Land Appeal E020 of 2022)
[2024] KEELC 1313 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1313 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E020 OF 2022**

LN GACHERU, J

MARCH 7, 2024

BETWEEN

LUCY NJERI MUCHIRI APPELLANT

AND

ESTHER NJERI GACHAGWA RESPONDENT

JUDGMENT

1. The Appellant herein, Lucy Njeri Muchiri, who was a Defendant in Kandara MCL&E No.8 of 2018, was aggrieved by the Judgment of the trial court delivered on 28th September, 2022, by Hon. M. Sudi (P.M), wherein the trial court allowed the Plaintiff's/Respondent's claim in the following terms;
 - a. The Defendant is hereby ordered to vacate and deliver vacant possession of the suit land, Loc 3/ Githumu/1502, and 1503, to the Plaintiff within 30 days of the Judgement, in default of which herself and her agents shall forcefully be evicted from the said suit land.
 - b) Permanent Injunction be and is hereby issued restraining the defendants, her agents, assigns and servants from remaining or occupying the suit land.
 - c) Each party to bear their own costs being a family dispute.
2. The Plaintiff/Respondent in her claim dated 5th of June 2018, had sought for Judgement against the Defendant/Appellant for; -
 - a) an order of permanent injunction restraining the defendant, her agent, employee, appointees and/or successors from trespassing on, entering, digging, erecting and constructing on the said parcel of land,
 - b) eviction order,
 - c) Mesne profits,



- d) costs of the suit
3. Vide a Memorandum of Appeal dated 25th October 2022, but filed on 16th February 2023, the Appellant sought for following orders;
- i. That this Appeal be allowed.
 - ii. That the Judgment and Decree of the Hon. M. Sudi (P.M.) delivered in Kandara MC L&E No.18 of 2018 on 28th September 2022, and all consequential orders be set aside.
 - iii. The suit filed in Kandara MC L&E No.8 of 2018, on 5th June 2018, be dismissed.
 - iv. The costs of the Appeal and costs at the Magistrate's Court be awarded to the Appellant."
4. The facts leading to the filing of this Appeal are; the Respondent as a Plaintiff, and the Appellant/ Defendant in the above aforesaid suit are a daughter in law and a mother in law. The Respondent was married to the late Michael Kinga Muchiri, who was a son to the Appellant herein. The said Michael Kinga Muchiri, died in plane crash in 2011, on his way from Kinshasa(DRC). The property in dispute are land parcels No: - LOC.3/Githumu/1501; LOC.3/Githumu/1502; and LOC.3/Githumu/1503 (the suit property).
5. The above stated parcels of land are in the name of the Respondent herein Esther Njeri Gachagwa, who averred that she solely purchased the said suit properties and she is the sole registered owner of these suit properties, LOC.3/Githumu/1501;LOC.3/Githumu/1502;andLOC.3/Githumu/ 1503. It was her allegation that she had purchased them from James Kamau Gathua, and Beatrice Waithera Nguya, on/or around 30th August 2010. She produced two sale agreements to that effect, and three title deeds in her name, which confirmed that she is the absolute owner of the three parcels of land.
6. That after the Respondent husband passed on in 2011, he was buried in land parcel No. Loc 3/ Githumu/ 1501. Further, that after the death of her husband, she gave accommodation to the Defendant/ Appellant herein in one of the suit properties, but on a temporary basis, pending the provision of a permanent solution, since she was on the verge of being evicted due to rent arrears.
7. However, after being allowed into the suit properties, the Appellant took control of the said parcels of land, and has barred the Respondent from accessing the land, claiming that the same was bought by her son, who is the late husband to the Respondent.
8. Consequently, the Appellant resides on a commercial building situated in one of the parcels of land, and she farms and pick tea on land parcel number LOC.3/Githumu/1501, wherein the Respondent's late husband was buried. That this parcel of land is developed, and the Appellant has become combative in nature, and has threatened the Respondent in many occasions.
9. The Respondent also averred that the Appellant had illegally and without lawful authority trespassed on the said suit properties. She particularized the incidents of trespass in her para 9 of the Plaint. It was her claim that the Appellant's actions had caused her not to enjoy quiet possession of her parcels of land.
10. The said claim was opposed by the Appellant (Lucy Njeri Muchiri), who alleged that the suit properties were purchased by her son, Michael Kinga Muchiri(deceased), who was also the husband to the Respondent.
11. The Appellant had also denied that the Respondent assisted her son, Michael Kinga Muchiri, to purchase the suit properties, nor had she offered to pay rent for the Appellant. The Appellant denied ever receiving any help from the Respondent or accommodation.



12. She admitted to have been living on the suit property since the demise of her son. It was her allegation that her deceased son had purchased the said parcels of land with the intention of settling her thereon during her lifetime, with only occupation rights until her demise.
13. The Appellant also alleged that she had transferred her only land parcel at Makuyu to the Respondent, and she was left landless, and the suit property was purchased by her late son, to allow her to move from Makuyu, and live at Githumu area.
14. The matter proceeded via viva voce evidence, wherein the Respondent gave evidence for herself, and called three more witnesses to support her case. The Appellant gave evidence for herself and reiterated the contents of her claim, that the suit properties were purchased for her by her late son, Michael Kinga Muchiri.
15. Thereafter, the trial court allowed the Respondent's case with costs to be borne by the Appellant herein. The trial Court directed the Appellant to deliver vacant possession of the suit land to the Respondent, within 30 days of the Judgment dated 28th September 2022. It also issued Permanent Injunction restraining the Appellant and her agents from occupying the suit land.
16. This Court admitted the instant Appeal under Section 79B, of the Civil Procedure Act, on 12th June 2023, and thereafter, the Record of Appeal was filed, with annexures thereto.
17. The Appeal is opposed by the Respondent vide her response dated 4th July 2023. These grounds are;
 - a. That the trial Magistrate was right in law and in fact in finding that the Respondent herein was the registered owner of all that parcels of land Number Loc.3/Githumu/1501, and 1503(suit parcels). Therefore, the Appellant had lessor rights to the suit land than the Respondent.
 - b. That the trial Magistrate was correct to hold that the oral agreements between the Appellant, the Respondent and late Michael Kinga Muchiri had been revoked devoid of evidence, since there is not sufficient proof for the same.
 - c. That the trial Magistrate was right in law and in fact in finding that the licensee had no right to impede the owner from exercising possession over the suit premises, since the Appellant allegedly claimed that the land was given instead of the land in Ithanga hence be deemed as an exchange.
 - d. That the trial Magistrate was correct to order the Appellant to vacate and deliver vacant possession of the suit land Loc.3/Githumu/1502 and 1503 to the Plaintiff within 30 days of judgement in default of which herself and her agents shall be forcefully evicted from the said suit land.
 - e. That the trial Magistrate was correct to hold that the Respondent had proved her case.
 - f. That the decision of the trial Magistrate should be upheld.
 - g. That this Appeal be dismissed with cost.
18. The Appeal was canvassed by way of written submissions. The Appellant's submissions were filed on 18th July 2023, through Karanja Kangiri & Co Advocates, whereas the Respondent's submissions were filed on 4th October 2023, by Kagwe Kithinji & Co Advocates.
19. The Appellant submitted that she has been residing on the suit property courtesy of an oral agreement executed between her and her son Michael Kinga Muchiri (deceased), who was married to the Respondent herein, which agreement provided that the Appellant would transfer her 2 Acres, of



land, being land parcel number Ithanga/ngelelia Block 1/381, to her aforesaid son and in exchange, the Appellant would occupy the suit land. The Appellant further submitted that her son (deceased), bought the suit properties and immediately began constructing a house on it which house, he intended to settle the Appellant for the rest of her advanced years.

20. The Appellant also submitted that land parcel number Ithanga/ngelelia Block 1/381, is currently registered in the name of the Respondent herein, pursuant to the foregoing oral agreement entered into with her son. According to the Appellant, the oral Agreement executed between the her and her deceased son is valid and enforceable. It was her further submissions that the Appellant's son started construction of a home for the Appellant on the suit land, but was unable to complete the construction project due to untimely death via a plane crash from Kinshasa in year 2011.
21. It was the Appellant's averment and submissions that the aforesaid oral Agreement was based on trust, as it was a domestic agreement between family members. She also submitted that the Respondent herein cannot claim to be unaware of the aforesaid Agreement as the Respondent has allowed the Appellant to reside on the suit land uninterrupted for 11 years, during which time she carried out some developments on the suit property.
22. The Appellant urged the Court to find that the transfer of land parcel Ithanga/ngelelia Block 1/381, from the Appellant to the Respondent had legal impact on the legal ownership of the suit property, as possession of the suit land by the Appellant was done only after the oral agreement was executed between the Appellant, her son and the Respondent herein.
23. The Appellant further submitted that the only reasonable inference to be drawn from the conduct of the Appellant, her deceased son and the Respondent herein, is that the Respondent and her husband (deceased) would hold the suit property in trust for the Appellant.
24. It was her further submission that a resulting trust, was created in favour of the Appellant, and that the purchase and subsequent developments effected on the suit land indicate that the suit property would be held in trust for the Appellant by the Respondent, and her husband (deceased).
25. Further, that the trial court failed to consider the oral Agreement by the parties herein, whereby, the Appellant transferred land parcel Ithanga/ngelelia Block 1/381, to the Respondent and in exchange, the Appellant would occupy the suit premises during her lifetime.
26. The Appellant faulted the trial court for the failure to consider all the issues raised during cross-examination, indicating the existence of the Agreement for the transfer of the Appellant's land to the Respondent, and subsequent occupation of the suit property by the Appellant.
27. In the end, the Appellant submitted that she currently has no land under her name having transferred her land parcel No. Ithanga/ngelelia Block 1/381, to the Respondent. Further, that the trial court failed to take into consideration that upon transfer of the Appellant's only piece of land to the Respondent, the Appellant was left without any land of her own.
28. The Appellant relied on the case of Joseph Gikonyo Kaguru v George Gikonyo Kamau & Another [2013] eKLR , wherein the court held:-

“In conclusion, it was clear that the Deceased had the intention to transfer the portion of land measuring 0.23 acres (now registered as LR NO. Dagoreti/Riruta/4472, in exchange for the Loitoktok Land. The agreement was frustrated by the death of the Deceased. however, before his death, the deceased in part performance of the agreement had given possession of the said portions of land to the Applicant. In this courts, considered opinion, it would be



inequitable to remove the Applicant from the said portion of land after being in occupation of the same for a period of more than 20 years ”.

29. In her submissions, the Respondent stated that she is the registered and absolute owner of the suit properties, having purchased the same from one James Kamau and Beatrice Waithera Nguya. Following her purchase of the suit properties, she started building thereon, with the aim of starting beef and fish farming. Further, that following the death of her husband Michael Kinga Muchiri, she erected to bury him on LOC.3/Githumu/1501, one of the suit properties.
30. The Respondent further submitted that the Appellant moved into the suit land after the burial of her husband on the pretext of lacking sufficient money for rent, but later on the Appellant took control of the suit property, and has now barred the Respondent from accessing the suit land on grounds that the suit premises was purchased by the Appellant’s son (deceased), for use by the Appellant.
31. The Respondent urged the Court to find that the Appellant has trespassed on the suit land and has denied the Respondent access to the suit property.
32. Further, that the Appellant interfered with the suit land in several ways including, by covering up a fish pond which had been dug out by the Respondent for income-generation purposes; renting out the suit land to third parties without the Respondent’s consent; selling the water installed on the suit land by the Respondent; placing a caveat on the suit land which was later vacated by the Land Registrar - Murang’a; cutting down trees and selling Napier grass located on the suit property; and, inviting the Appellant’s other sons to come onto and reside on the suit property without the Respondent’s approval.
33. The Respondent also submitted that the Appellant has disallowed her from picking tea leaves which are grown on the suit land, forcing the Respondent to uproot the aforesaid tea bushes, thus resulting in financial loss.
34. It was the Respondent further submissions that the Appellant has several other pieces of land on which she can choose to reside on, and she would therefore not be prejudiced if the court were to grant a permanent injunction barring the Appellant from accessing the suit property.
35. The Respondent also submitted that the trial Magistrate was correct in holding that the oral agreement between the Appellant, the Respondent and the late Michael Kinga Muchiri, had been revoked, and was devoid of evidence, since there was insufficient proof of the same.
36. For this, the Respondent relied on the case of Patrick Njuguna Kimondo vs Geoffrey Vamba Mbuti()eklr, where the court held that; an oral agreement supported by credible evidence can be and is enforceable. All that the Law requires is that certain contracts be in writing (section 3(3) of the [Law of Contract Act](#)), short of that, it would be travesty of justice as most people either knowingly or otherwise transact their business upon oral agreements”
37. Reliance was also placed in the cases of Dr. Joseph Arap Ngok Vs Justice Moiyo Ole Keiwua and Elijah Makeri Nyangwara Vs Stephen Mungai Njuguna & Another (2013) eKLR, where the court held: -

“section 23 of the Registration of Title Act, gives an absolute and indefeasible title to the owner of the property. The title of such ownership can only be subjected to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party; such is the sanctity of title, bestowed upon the title holder under the Act”



38. Further, that pursuant to Section 26 of the *Land Registration Act* No. 3 of 2012, a Certificate of title constitutes prima facie evidence of ownership of land. See section 26 which provides;

- “26. The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
- (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.”

39. Further that pursuant to the holding of the court in the case of Stephen Maina Kinyua Vs Rosemary Njoki Maina (Civil6 Appeal No. 32 of 2004), a licensee only stays and retains possession of the Land at the mercy of the owner and once the registered proprietor of the land claims it back, the licensee’s license stands terminated.

40. Further, the Respondent submitted that the trial Magistrate was correct in holding that the Respondent had proved her case on the required standard, since the title deeds showed that she was the bonafide owner of the land parcels No. Loc 3/Githumu/ 1501, 1502 & 1503. Reliance was placed in the ELC Appeal No.17 of 2021, where the Appellate court found it difficult to fault the decision of the trial court.

41. The above is the evidence available before the trial court, the Memo of Appeal, as contained in the Record of Appeal, and the written submissions by the parties herein. This court has considered the instant Appeal together with the written submissions, and finds that this is a first Appeal. Therefore, the court is allowed to consider both the law and the facts. See section 65(1)(b) of the *Civil Procedure Act*, which provides;

- “(1) Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court—
- (b) from any original decree or part of a decree of a subordinate court, on a question of law or fact;”

42. Further, the duty of the Appellate court is set out in section 78 of the *Civil Procedure Act*, which duty is to re-consider, re-evaluate, re-analyze and re-assess the available evidence before the trial court, and then come up with its own independent decision, always bearing in mind that this court has not seen nor heard the witnesses, like the trial court, and therefore should give allowance to that.

43. In the case of Kurian Chacko Vs Varkey Ouseph AIH 1969 Kerala 16, which was cited with approval in Bwire Vs Wayo and Saloki (Civil Appeal 032 of 2021 [2022]), the court held that a first appellate court



is the final court of fact ordinarily and therefore, a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage, and that anything less than a full re-evaluation of the entire evidence by the appellate court would amount to visiting an injustice upon a litigant.

44. This Court will also consider that the trial court has discretion too, as set out by *the Constitution* and Statutes just like this court, and its decision cannot be interfered with simply because this is an Appeal. See the case of *Musa Cherutich Sirma v Independent Electoral and Boundaries Commission & 2 others* [2019] eKLR, had this to say about interfering with the appellate powers;

“In reiterating the above position, we affirm that we would only interfere with the Appellate Court’s exercise of discretion if we reach the conclusion that in exercise of such discretion, the Appellate Court acted arbitrary or capriciously or ignored relevant facts or completely disregarded the principles of the governing law leading to an unjust order. Conversely, if we find that the discretion has been exercised reasonably and judiciously, then the fact that we would have arrived at a different conclusion than the Court of Appeal is not a reason to interfere with the Court’s exercise of discretion.”

45. Further in the case of *Mbogo & Another vs Shah*, [1968] EA, p.15;, the Court held that;

“An appellate court will not interfere with the exercise of the trial court’s discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.”

46. Further, in the case of *Mwanasokoni Vs Kenya Bus Service Ltd.* (1982-88) 1 KAR 278 and in the case of *Kiruga Vs Kiruga & Another* (1988) KLR 348, the court held that the appellate Court will not ordinarily interfere with findings of fact by the trial Court, unless they were based on no evidence at all, or on a misapprehension of it, or the trial Court is shown demonstrably to have acted on wrong principles in reaching its findings.

47. Similarly, in the case of *Abok James Odera t/a A.J. Odera & Associates Vs John Patrick Machira- & Co. Advocates* [2013] eKLR, the duty of the first appellate Court was set out as follows:

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

48. This was also echoed by the court in the case of *Peter M. Kariuki v Attorney General* [2014] eKLR, where it was held that:

“We have also, as we are duty bound to do as a first appellate court, reconsider the evidence adduced before the trial court, and re-evaluate it to draw our own independent conclusions, and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence.

49. Being guided as above, the Court finds the single issue for determination is whether this appeal is merited and or whether the Appellant is entitled to the orders sought?



50. In answering the above issue, this court will also consider the grounds of Appeal as out in the Memo of Appeal herein. From the available evidence, it is not in doubt that the suit properties are all in the name of the Respondent herein – Esther Njeri Gachagwa. There are three title deeds that were produced as exhibits, which were issued on 5th October 2010, under the Registered Land Act, Cap 300(repealed).
51. Under section 27(a) of the said Cap 300(repealed), it is clear that the registration of a person as the proprietor of land shall vest in that person the absolute rights and privileges belonging or appurtenant thereto. Therefore, on the face of it, the Respondent herein Esther Njeri Gachagwa, is the absolute owner of the named parcels of land.
52. Further, section 28 of the said Act, provides that the rights of a proprietor shall not be liable to be defeated except as provided by the said Act. From this provision of law, the right of the Respondent, as a proprietor are protected and can only be defeated as provided by the law. Such factors that can defeat the rights of a proprietor are overriding interests; trust being one them.
53. The Appellant had alleged that the Respondent herein, though registered as a proprietor, was holding the suit land in trust for her, since the suit land was purchased by her late son, Michael Kinga Muchiri, with intention to settle the Appellant on the suit land for the remainder of her lifetime. She also claimed that she had transferred land parcel No. Ithanga/ Ngelelia Block 1/381, to her late son as an exchange for the instant suit land.
54. The Appellant had alleged existence of resulting trust, which the trial court held and found did not exist. It is trite that trust is proved by calling of evidence, and courts do not imply existence of trust. The intention of the parties to create trust must be clear. See the case of Peter Ndungu Njenga vs. Sophia Watiri Ndungu [2000] eKLR, where this Court held,
- “The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the court may presume a trust. But such presumption is not to be arrived at easily. The courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied.” Emphasis added.
55. On ground No1, the Appellant alleged that the trial court misdirected itself when it held that the Appellant had a lessor right to the suit land, than the Respondent. In its holding, the trial court held; it appears the defendant after being given the licensee rights as a mother in law to occupy the suit premises, she converted to the exclusion of the registered owner as she imagined that her son was the purchaser. Being a licensee does not give her exclusive rights to use and abuse the property as she wished to the exclusion of the registered owner.
56. In her evidence, the Appellant had admitted that she entered into the suit land after the death of her son. She confirmed that she was allowed by the Respondent who was the registered owner to occupy the unfinished house and thus she was a licensee.
57. If the Appellant was a licensee, then her stay and possession of the suit land was at the mercy of the owner, and once the registered proprietor claims back the land, her licence is terminated. See the case of Stephen Maina Kinyua vs Rosemary Njoki Maina(supra).
58. Given that the Respondent is the registered owner of the suit properties and the Appellant entered into the suit properties after the death of her son, and with the permission of the Respondent, then this court finds and holds that the trial court did not err in law and fact in holding that the Appellant had lessor’s right.



59. In ground No 2, the Appellant had alleged that the trial Magistrate erred in law and fact in holding that the transfer of land parcel No Ithanga/ Ngelelia Block 1/381, from the Appellant to the Respondent had no legal impact on the ownership of the suit properties. The Appellant had alleged that she exchanged her parcel of land in Makuyu, with the suit properties. The Respondent denied that.
60. In her determination, the trial court had held; the issue of Ithanga land being in exchange to the land in issue is neither here nor there, as there was no agreement in writing nor was the timing of the plots in exchange the same. The Ithanga land was transferred 7 years prior to the son's death
61. This court did not have the benefit of perusing the Ithanga title. However, the Respondent admitted that the same is in her name, but through transmission. It is evident that the said transfer of ithanga land to the husband of the Respondent was done in 2004/2005. The suit land was purchased in 2010, and was not registered in the name of the Appellant's son nor the Appellant, but in the name of Respondent, whom the court finds is deemed by section 27 of Cap 300(repealed), to the absolute owner.
62. Since the issue of land exchange was denied, and the Appellant had alleged that the said transfer was an exchange of land, then the onus of adducing evidence in support of that claim or allegation squarely fell on the Appellant herein. In the case of *Hellen Wangari Wangechi Vs Carumera Muthini Gathua* [2005] eKLR, the Court held as follows:
- “It is a well-established fact that whoever asserts a fact is under an obligation to prove it in order to succeed.”
63. Further Section 107 of the *Evidence Act*, provides as follows:
- “(1) 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.
- (2) When a person is bound to prove the existence of any facts it is said that the burden of proof lies on that person.”
64. Again, Sections 109 and 112 of the *Evidence Act* (CAP. 80) state as follows:
- S.109. “The burden of proof as to any particular fact lies on the person who wishes the court to believe in the existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”
- S.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”.
65. It is trite that the standard of proof in civil cases is on a balance of probabilities. The Court in *Miller Vs Minister of Pensions* [1942] 2 ALL ER 372, defined the standard of proof on a balance of probabilities as follows:
- “It must carry a reasonable degree of probability... If the evidence is such that the tribunal can say ‘we think it is more probable than not’ the burden is discharged., but if the probabilities are equal, it is not”.
65. The Appellant submitted that she has lived on the suit premises since 2009, pursuant to the agreement between herself and her deceased son. However, it is clear that she entered into the suit land in 2011,



- after the death of her son. The transfer of the Ithanga land was done long before the suit properties had been purchased. There was no evidence to connect the transfer of Ithanga land to the deceased son, with the purchase of the suit property. The trial court did not misdirect herself when she held that the said exchange was neither here nor there, as the transfer was done 7 years prior to her son's death.
66. On ground No 3, the Appellant alleged that the trial court misdirected itself when it held that the oral agreement between the Appellant, Respondent and the late Michael Kinga Muchiri had been revoked and was devoid of evidence. The Appellant contended that the oral agreement executed between herself and her son (deceased) was disregarded by the lower Court, which ruled the aforesaid oral agreement was devoid of evidence. This is one of her bone of contention and a ground of Appeal.
 67. It is evident that the trial Court in its Judgment dated 28th September 2022, noted that the Appellant transferred to her son (deceased) land parcel number Ithanga/ngelelia Block 1/381, about seven (7) years prior to his death. The suit land was purchased by the Respondent approximately six months prior to the death of her husband in April 2011. At the time of transfer of land by the Appellant to her deceased son in/or around year 2006, the suit property was not owned by the Appellant's deceased son.
 68. The Court finds and holds that the burden of proof was upon the Appellant herein to demonstrate to the trial Court the existence of an oral agreement to exchange the suit property for the Appellant's land parcel number Ithanga/ngelelia Block 1/381, in view of the timing of the aforesaid transfer and the purchase of the suit land.
 69. The Appellant failed to demonstrate before the trial Court the nexus between the transfer of land to her son (deceased) in 2006, and the purchase of the suit land by the Respondent in 2010. The Court finds and holds that before the trial Court, the Appellant did not discharge the burden of proof to the required standard, which is on a balance of probabilities.
 70. This court finds and holds that the alleged transfer of Ithanga land was done in or around 2006, and the suit land was purchased by the Respondent in 2010. Therefore, if there was any oral agreement, which has not been proved, then the same was revoked, and there was no evidence of existence of the said oral agreement. The trial court did not err or misdirect itself in holding as such.
 71. The Court further finds and holds that the trial Court was not mistaken in terms of fact or law in its holding that the claim advanced by the Appellant to the effect that there was an oral agreement and that the suit land was purchased by her son was not supported by evidence. Consequently, the Court declines to find that there was an error on the trial court's findings on non-existence of oral evidence.
 72. On ground No 4, the Appellant alleged that the trial Court misdirected itself when it failed to hold that there was a clear trust held by the Respondent in favour of the Appellant. For this argument, the Appellant submitted that from the conduct of the deceased, the Respondent and the Appellant transferring her Ithanga land to her deceased Son, there was inference that the deceased would hold the purchased land in trust for the Appellant. Trust is proved by calling of evidence, and no such evidence was availed by the Appellant herein before the trial court. Therefore, this court declines to find that a resulting trust in favour of the Appellant was created, and thus the trial court did not err or misdirect itself.
 73. On ground No 6, the Appellant alleged that the trial court erred in failing to find and hold that the suit properties were purchased by Michael Kinga Muchiri. It was the Appellant's contention that her son Michale Kinga Muchiri (deceased), purchased the suit land for use by the Appellant during her lifetime, until her demise. This was vehemently denied by the Respondent, who averred that she purchased the suit property solely, and she owns it absolutely.



74. As part of her evidence tendered before the trial Court, the Respondent annexed documents showing the transfer of funds from her bank account to the vendors of the suit land. The evidence therein is clear that the Respondent made three payments to the vendors of the suit land from her account at the Middle Eastern Bank Kenya Ltd as follows: a single cheque for the amount of Ksh.350,000/= dated 29th September 2010, drawn in favour of Beatrice Waitheha Nguya; and, two cheques of Ksh.400,000/= each, drawn in favour of James Kamau; one is dated 29th September 2010, the other cheque is dated 8th October 2010.
75. The Respondent alleged that the aforesaid monies were not sent from the Democratic Republic of Congo, where her late husband (the Appellant's son) worked, but it was her money. The Appellant alleged that the money used to buy these parcels of land were sent by her son from DRC. However, she did not avail any evidence to that effect, given that he who alleges must prove.
76. Without any evidence to support the allegations that money for purchase of the suit lands were remitted by the Appellant's son, this Court's finds and holds that the funds used to purchase the suit land were not transmitted to the vendors from the bank account of the Appellant's son or from a joint account held by the Respondent and her husband (deceased).
77. Consequently, this court finds and holds that the Appellant failed to present sufficient evidence before the trial Court to support her contention that her son (deceased,) purchased the suit property for her, and thereafter, she was allowed to use the suit land, in exchange of her land in Makuyu.
78. In ordinary circumstances, it would not be possible for two parties to exchange two items between themselves where one of the items to be exchanged did not exist. It suffices to note that the Appellant's son (deceased) never assumed ownership of the suit property. The principle of 'nemo dat non-quod habet' was enunciated by the Court in the case of Daniel Kiprugut Maiywa Vs Rebecca Chepkurgat Maim [2019] eKLR as follows:
- “The nemo dat principle means one cannot give what one does not have. This principle is intended to protect the title of the true owner. The rationale behind this principle is that whoever owns the legal title to property holds the title thereto until he or she decides to transfer it to someone else.”
79. For the avoidance of doubt, the suit property was never placed under the ownership of the Appellant's son during his lifetime, and therefore, it follows that the Appellant's son could not pass title of the suit property to the Appellant, for the reason that the Appellant's son was never the owner thereof.
- From the above analysis of the grounds set out in the Memo of Appeal, none of them have been proved, and thus they are all dismissed.
80. The trial court relied on the case of Abdulatif Esmail & Others Vs Ali Ashur & Others (1993) KLR, wherein the court held as follows:
- “That taking possession of the premises is not acceptance of the owner's title or waiver of the owner's right to make requisitions or objections to the title. The licensee had no right to impede the owner from exercising possession over the suit premises”.
81. It is evident that the Respondent is the registered owner of the suit properties and has protested the Appellant's occupation of the suit land. The Respondent's rights are protected by Section 24 and 25 of the [Land Registration Act](#), 2012. Her rights cannot simply be defeated, with an allegation, which allegation has not been proved.



82. Therefore, it is the holding and finding of this Court that the trial Court did not misdirect itself on both facts and law, in its holding that a licensee does not possess exclusive rights to use and abuse immovable property to the exclusion of the registered owner. It is the further holding of this Court that the trial Court was correct in arriving at the decision that Respondent is the registered owner of the suit land and, thus, enjoys the rights of a proprietor as provided by Sections 24 and 25 of the [Land Registration Act](#).
83. Having considered the available evidence, and having re-evaluated, re-analyzed and re-assessed the said evidence, this court finds and holds that the trial court did not misdirect itself or arrive at a wrong conclusion. This court, as an Appellate one, finds no reasons to interfere with the trial court's Judgement of 28th September 2022.
84. Consequently, this court upholds the trial court's findings of 28th September 2022, and further finds this Appeal as contained in the Memo of Appeal dated 25th October 2022, is not merited. The instant Appeal is thus dismissed entirely with costs to the Respondent.

It is so ordered

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 7TH DAY OF MARCH, 2024.

L. GACHERU

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

Delivered online in the presence of:

Joel Njonjo – Court Assistant

M/S Mugo H/B for Karanja Kangiri for the Appellant.

M/S Susan Kagwe for the Respondent.

