



**M’Nabea v Muthomi & another (Environment and Land Appeal
E042 of 2023) [2024] KEELC 5036 (KLR) (26 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 5036 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E042 OF 2023**

**CK NZILI, J
JUNE 26, 2024**

BETWEEN

M’INOTI M’NABEA APPELLANT

AND

HARUN MUTHOMI 1ST RESPONDENT

JERICA NKIROTE MUCHIRI 2ND RESPONDENT

*(Being an appeal from Meru CM ELC No. E13 of 2020
delivered on 19.10.2023 by Hon. T.M Mwangi – SPM)*

JUDGMENT

1. The appellant sued the respondents where the 2nd respondent is a cross-appellant at the lower court, through a plaint dated 14.10.2020. He sued the sister-in-law, the 1st respondent, and cross-appellant, as the legal administrator, claiming that land L.R No. Nyaki/Kithoka/125 was ancestral land initially belonging to their late father, M’Rintwara M’Nabea, registered in the name of his elder brother as the first son in trust for himself and the other siblings.
2. The appellant averred that he had been in peaceful use and occupation of L.R No. Nyaki/Kithoka/3249, 3250, and 3251, the resultant subdivisions of land LR No. Nyaki/Kithoka/135. The appellant averred that after his brother passed on on 24.5.2012, the 1st respondent secretly filed Meru Succession Cause No. 664 of 2012, of which he made a protest, and the court found that the suit property was held in trust for him and the other siblings by his late brother.
3. While aware of this, the appellant averred that the 1st respondent, without knowledge, sold and transferred L.R No. Nyaki/Kithoka/3249 and 3250 to the 2nd respondent on 13.4.2012. He termed the said sale and transfer as a breach of the trust, fraudulent, irregular, illegal, and subject to his accrued overriding rights.



4. The appellant prayed for a declaration that Land No. Nyaki/Kithoka/3249 and 3250 belong to him, cancellation of the titles to the parcels to revert to him and an order for the 1st respondent to transmit L.R No. Nyaki/Kithoka/3251 to him in default, the executive officer of the court, to sign the transfer forms.
5. The 1st respondent opposed the suit through a statement of defense dated 21.1.2021. The 1st respondent denied the contents of the plaint save to admit that there was a pending appeal at the Court of Appeal over the holding in the succession cause.
6. The 1st respondent denied the contents of paragraphs 16 and 17 of the plaint and averred that the 2nd respondent had been in occupation of LR No's. Nyaki/Kithoka/3249 and 3250 since 2009 and has developed the same. The 1st respondent denied any receipt of a demand letter as alleged or at all. Further, the 1st respondent denied that the suit disclosed any cause of action against him, terming the court as lacking jurisdiction on account of the determination of the land dispute in the High Court and the pending appeal at the Court of Appeal.
7. The 2nd respondent cross-appellant opposed the claim through a defense and cross-claim dated 3.11.2020. He denied the contents of the plaint and stated that he had been in complete occupation and use of 1 ¼ acres of L.R. Nos Nyaki/Kithoka/3249 and 3250, which he has extensively developed, after taking vacant possession with effect from 2005, which occupation had never been interrupted by either the appellant or the 1st respondent, having acquired it for value from the deceased in 2009, with no intended trust hence was a lawful owner.
8. By way of a cross-claim, the 2nd respondent as the plaintiff sued the 1st respondent as the defendant. He averred that on 19.2.2009, he purchased ¾ of an acre from the late M'MuchiriM'Nabea out of L.R No. Nyaki/Kithoka/1505 whose resultant subdivisions were L.R No's. Nyaki/Kithoka/3249 & 3250, which he took possession of after and commenced extensive developments thereon. He prayed that the court would declare him as an innocent purchaser for the value of the two parcels of land and, in the alternative a refund of the purchase price at market rates by the defendant in the cross-claim.
9. In a reply to the 1st respondent's statement of defence, the appellant, while admitting pending of the appeal at the Court of Appeal, denied that there was any stay of the suit. He insisted that the suit parcels were held in trust by his late brother, who had been in occupation of the suit parcels that he served a notice to use and that the court has the jurisdiction to hear and determine his claim.
10. Regarding the 2nd respondent's defense and cross-claim, the appellant denied the alleged developments on the suit land. As regards the cross-claim, he averred that he was not opposed to it, save that the 2nd respondent was not an innocent purchaser for value without notice, for he ought to have done due diligence in 2009; otherwise, he would have found out that a 3rd party occupied the land.
11. The court has been unable to trace any defense by the 2nd respondent to the cross-claim either in the original file or in the two records of appeal for both the main and the cross-appeals.
12. At the hearing, Stephen MureithiM'InotiM'Nabea testified as PW 1 and adopted his witness statements dated 14.10.2020 and 4.5.2021 as his evidence in chief. He told the court their late fatherM'RitaraM'Nabea owned L.R No. Nyaki/Kithoka/135, which he registered under the name of his elder brother, the husband to the 1st respondent, to hold in trust for him and the young siblings who reside on the land. PW 1 said that his late brother subdivided the land into several portions, including L.R No. Nyaki/Kithoka/3249, 3250, and 3251, which he was in use or occupation of going by the photographs and a surveyor report adduced as evidence in High Court Probate Cause No. 664 of 2012.



13. Similarly, PW 1 said that his sister-in-law colluded with the 2nd respondent around 2012, when she sold & transferred to him L.R No's. 3249 and 3250 without his knowledge, consent, or approval, yet occupation of his residence is on the suit parcels of land and has buried his wife and five children therein.
14. PW 1 said that at the time of the sale and transfer, his late brother was terminally ill with colon cancer and could not talk, walk, sell, or attend the land control board meeting for the land transfers; hence, the reason the respondents conducted a special land control board so as to conceal the process.
15. Again, PW 1 said that his brothers died on 24.5.2012, following which the 1st respondent applied for letters of administration, and he filed a protest, since the parcels of land were subject to his overriding interests, whose rights were upheld by the High Court. He denied that the 2nd respondent had taken any vacant possession of the land, though he was the registered owner.
16. In a further statement dated 4.5.2021, the appellant told the court that he was aged 87 years; his late father had only one parcel of land, though he died before the demarcation of land in the area started. PW 1 said that his late father had five children, namely the late M'Muchiri M'Nabea, Charity Kithao, himself, MwaririaR'imberia, and Isaac Kimene Nabea. He said all of the three sons were shown by their late father where to build on the mother's title, including charity Kithao, who was unmarried. PW 1 said that he has been occupying the land since 1959, when he constructed a permanent house therein got married in 1962, and has buried his late wife and four children on the land with cemented graves. PW 1 said that the suit land came under the name of the late brother in 1967, when already his permanent house was up.
17. Additionally, PW 1 said that the initial suit land was subdivided into L.R No. 787, 788, 801, 1263, 1264, 2490, 1491, 1503, 1504, 2528, 2529, 2530, 2531, 2532, 1505, 3248, 3249, 3251, 3252 and 3253, on knowledge until they realized that in 2009, after which he reported the matter to the area chief who gave him a letter dated 23.4.2009, addressed to the land registrar to place a caution on the title registered for the parcels of land.
18. Further, PW 1 said that he co-authored a joint letter with his brother Nabea Kimene, addressed to the chairman of the land control board alongside another one written by the area M.P. to stop the 1st respondent from selling the land. Additionally, PW 1 said that a letter was also written on 17.2.2011 by D.C. to the land registrar to stop the sale, followed by another one dated 14.1.2014.
19. PW 1 told the court that his late brother had cancer; hence, he was inactive on the last days of his life, and therefore, it was not possible for him to have been active in disposing of his parcels of land through a land control board consent dated 2.2.2012 and the title issued on 18.4.2012 to the 2nd respondent. He termed the events of 6.4.2012 and 18.4.2012 as suspect, fraudulent and irregular.
20. Subsequently, PW 1 said that his late brother had four wives and that the 1st respondent was the only one with him since 2011 and had allegedly enclosed her husband in a room till he passed on 24.5.2012.
21. Again, PW 1 said that despite the caution over L.R NO. 1505, someone moved to court ex parte to discharge the caution. Further, he said that at the succession cause the land surveyor was ordered to visit the land and prepare a report dated 16.10.2018. He said that they had peacefully lived on the suit land with the 1st respondent, with a road in between until 2021, when the 2nd respondent forcibly entered the land and started erecting a permanent house as per the photos produced and despite a court order, he came to the land on 23.4.2021 and demolished his properties valued at Kshs.250,000/= effectively pushing him out of the land.



22. PW 1 said that his brother Isaac Kimene grew cold toward him after the deceased's daughter took him to Sweden. Additionally, PW 1 told the court that this sister, Charity Kathio, and her brother live on a subdivision of land L.R No. 135, which is the ancestral land, namely L.R No. Nyaki/Kithoka/1963 and 1490. He said that his late father, mother, wife, and four children were all buried in the suit land.
23. PW 1 said that it was not true that the 2nd respondent took vacant possession in 2012. He also relied on a demand letter dated 17.2.2020, judgment in Meru H.C. Succession Cause No. 664 of 2012, a bundle of photographs, surveyor's report, death certificate, letters of grant obtained by the 1st respondent, 2nd respondent copy of title deed and agreement, a letter from the Ministry of lands, photographs, copies of green card for L.R No's. Nyaki/Kithoka 1351, 5005, 3249, 3250 and 3251, order and decree for the succession cause, statement of Isaac Kimeme in the succession cause, surveyors receipt dated 22.10.2018, area map, agreement dated 19.2.2009, chiefs letter dated 23.3.1990, MPS letter to the land control board, his letter to the land control board, D.C.'s letter dated 17.2.2011, letters dated 3.9.2019, 14.1.2014, 24.9.2020, extract of the 1st respondents statement and cross-examination in the succession cause as P. Exh No's. 1-23 respectively.
24. In cross-examination, PW 1 said that the succession court, as per P. Exh No. (2), found him as entitled to the land where he has had permanent building since 1979 on L.R No. 3251, a cow shed, children's house, water and calf house all built in 1979, 1980 and 1986, respectively as per the photographs produced as P. Exh No. (3).
25. PW 1 said that the land surveyor came to subdivide the mother title as per P. Exh No. (5), otherwise, if the 2nd respondent had done due diligence, he would have established that he was in occupation of the land before signing P. Exh No's. (7) (a) (b) & (c) for L.R No. 3249 & 3250 were next to each other.
26. Moreso, PW 1 said that between 2009 and 2012, the 2nd respondent did not take possession of the land. Regarding the 1st respondent's documents as per the list dated 13.4.2012, he termed the signature in the transfer as suspect and different from P. Exh No. 7 (a) & (c).
27. Similarly, he said that the application for the land control board and the alleged meeting on 4.4.2012 occurred when his brother was sick and during the pendency of the caution over the title for L.R No. 1505, which he had lodged on 21.2.2011 but was allegedly unilaterally removed on 2.2.2012 as per P. Exh No. 10 (c) PW 1 said the title register was closed on 2.2.102 as per P. Exh No. 19 (c) paving way for L.R No. 3248 – 3253, out of which L.R No. 3249 and 3250 were transferred to the 2nd respondent on 13.4.2012 while the deceased was terminally ill and was admitted at St. Theresa Hospital on 6.4.2012 was discharged from hospital on 17.4.2012 and died on 24.5.2012 and as per P. Exh No. (23).
28. PW 1 said that the transfer was made the same day the land control board consent was issued, while the title deed was collected on 13.4.2012 as per P. Exh No. 7 (a) & (b).
29. Additionally, PW 1 said that despite his objection letters and caution, the two parcels were still transferred to the new owners yet he was still in possession of the land going by P. Exh No. (15). Again, PW 1 said that the family of the 1st respondent occupied L.R No's. 1503 & 3253, his brother Isaac Karen occupied L.R No. 1263 Kitheu occupied L.R No. 1490 Sarah Karwitha Mkamba, L.R No. 1504, L.R No. 1352 and L.R No. 1348, belonged to Isaac Kimene all being subdivision of L.R No. 135.
30. Further, PW 1 said that he had planted yams on L.R No. 3249 and 3251, regarding the surveyor's report dated 18.5.2021, compared to the earlier one produced as P. Exh No. (4) PW 1 said the latter did not capture his buildings, unlike the former one.



31. PW 1 said that L.R No. 3251 had two graves while L.R No. 3250 had three graves all captured in the surveyors' report. PW 1 said that he started a dairy farm on L.R No. 3251, in 1979. He said that he did not report the alleged fraud to the police after he discovered the subdivision and the alleged forced transfers of 2012 over the suit land.
32. Similarly, PW 1 admitted that he never reported the alleged forgeries or fraud regarding P. Exh No. 7 (c) 10 (c) & (d) consent to transfer, registration of L.R No. 3249 & 3250, and payment of stamp duty as per DMF (1), (2), (3), (4), (8) and (9).
33. PW 1 said that L.R No. 298, going by a green card marked DMF 1 (4), belonged to him as the first registered owner since 2.5.1967, the same day as P. Exh No. 10 (a).
34. Moreso, P.W. said that he bought L.R No. 298, bordering L.R.No 135, at the age of 30 years, while he was then working as a public health officer. PW 1 denied that L.R No. 298 was ancestral given to him by his late father the same way the deceased acquired L.R No. 135 as an inheritance. Regarding L.R No. 334, PW 1 said it was co-owned with Isaac Kimene, which was five kilometers from the suit land.
35. PW 1 reiterated that his residence was on parcel L.R No. 3251 while he was tilling on L.R No. 3244. PW 1 confirmed that all the beneficiaries were given land as per P. Exh No. (2) at the High Court going by DMF I No. (7), there was a pending appeal at the Court of Appeal.
36. PW 1 admitted that P. Exh No. 18, 20 & 21 had no receipt stamp or signature and that between 1967 and 2009, he demanded a share of the land from his late brother until he started subdividing it with a view of disposing of some portions in 2009. Similarly, he said that they did not sue him before he died in 2012 for his share and that Harun Muthomi came to the land for the first time in May 2021.
37. In re-examination, PW 1 said that the decree of the succession court said that the land was held by the deceased in trust for him. PW 1 further said that going by P. Exh No. 10 (a) & (b) and P. Exh No. (24) The deceased could not effect the transfers while he was admitted a the hospital. He said that the 2nd respondent's building was hurriedly erected at the corner of the suit land on a Good Friday of 2021.
38. Charles K Muchiri testified as D.W. 1. He adopted his witness statement dated 28.4.2021 as his evidence in chief. As a son of the late Muchiri M'Nabea, he adopted the evidence of his stepmother contained in her witness statement dated 28.4.2021 as part of his evidence that on 19.2.2009, his late father sold the L.R No's. 3249 and 3250 to the 2nd respondent, after which they attended a land control board meeting and the buyer took vacant possession and started tilling the land. He termed the evidence of PW 1 as full of lies. He said that his mother lodged Meru H.C Succession Cause No. 664 of 2012, and the estate was distributed accordingly in a judgment dated 19.9.2019, to which the appellant was allocated L.R No. Nyaki/Kithoka 3251, to which his mother preferred Nyeri Court of Appeal No. 12 of 2019, still pending determination. He said that the probate court decided to distribute L.R No's 3249 and 3250 for lack of jurisdiction and advised parties to move to this court.
39. D.W. 1 said that as per the sale agreement dated 19.2.2009, his late father legally and procedurally sold and transferred a portion measuring $\frac{3}{4}$ acres excised from L.R No's. Nyaki/Kithoka/1503, whose resultant titles were L.R No's. 3249 & 3250 and erected a house. He said that he was the caretaker of the land on behalf of the 2nd respondent.
40. Additionally, D.W. 1 said there was no dispute over the ownership of the land during the lifetime of his late father. He also said that his grandfather had distributed his estate to the three sons, namely L.R No's. 135, 298, and 334, in favor of his late father, uncles M'Inoti M'Nabea and Isaac Kimene Nabea respectively.



41. Further, DW 1 said his uncle merely started claiming the land after the death of his father out of greed, yet he did not object to the sale in 2009. He said that he was not a party to P. Exh No. (7). DW 1 also said that this father transferred L.R No.1260 to his brother Isaac Kimene. However, DW 1 disputed the contents of P. Exh No. (4) for it was not clear who was soon which parcel of land. Regarding the land control board meeting of 4.4.2012, DW 1 told the court that his late parents attended the same. He denied there was any alleged houses belonging to the appellant on the disputed land save for a cowshed erected therein despite warning to cease zero grazing his cattle on his father's land unfortunately D.W. 1 could not tell when the said cowshed was erected on his father's land.
42. Jerica Nkirote Muchiri testified as D.W. 2 and adopted her witness statement dated 28.4.2021 as her evidence in chief. She equally produced a transfer form for an application for a land control board consent from the Land Control Board copies of I.D. cards, stamp assessment and pay slip payment receipts, green card for L.R No's 135, 298, 3249, 3250 and 1505, judgment in the succession cause and a memorandum of appeal as D. Exh No's. 1-16 respectively.
43. D.W. 2 confirmed that it was her late husband who lawfully sold and transferred the two parcels of land to the 2nd respondent as per the exhibits produced, showing that all the requisite procedures were followed up only for the appellant to start staking a claim over the land after the death of her late husband. Further, DW 2 confirmed that the 2nd respondent entered the suit land during the lifetime of her late husband. She denied the alleged admission to the hospital between 6.4.2012 and 17.4.2012 as per P. Exh No. (24) (d) in the absence of any valid medical record to that effect.
44. In cross-examination, D.W. 2 admitted that her late husband had two other wives. She said that she was not a party to the land sale agreement and that there had been no dispute over the land ownership with the appellant, until the deceased passed on.
45. Similarly, D.W. 2 confirmed that it was her late husband who applied for the removal of the caution registered against his land title register by the appellant in 2012. She admitted that the appellant had built a stone house on one of the parcels of land belonging to her late husband but she could not identify the same. Regarding the 2nd respondent's land, D.W. 2 said that the appellant had kept some cattle on zero grazing on the land.
46. Harun Muthomi testified as D.W. 3. Relying on his witness statements dated 3.11.2010 and 24.6.2011, he told the court that he conducted an official search before buying the land from the late M'Muchiri M'Nabea and lawfully bought land he was subsequently registered as the owner of L.R No's. 3249 and 3250 as per a sale agreement and two title deeds that he produced as D. Exh no's (1) (2) & (3).
47. D.W. 3 said that when he caused a search and bought the two parcels, there was no caution in existence since it had been removed in CC No. 162 of 2011.
48. Further, DW 3 said that he bought $\frac{3}{4}$ of an acre at Kshs.1,000,000/= as subdivisions of L.R no.1 505, paid the purchase price in full on 19.2.2009, and took vacant possession. Again, DW 3 admitted that the deceased passed on on 25.4.2012, the date that they allegedly signed the transfer form. D.W. 3 further said that he bought the two parcels unaware of any conflict or dispute over the ownership and that between 2009, when he took vacant possession, and 25.4.2013, no one had an objection to the sale, transfer, or occupation of the suit land. He said that his land has been under active cultivation throughout, as per the land surveyor report dated 18.5.2021, with no alleged graveyard developments or structures belonging to the appellant.



49. D.W. 3 said that even though D. Exh No. (1) stated that he would take possession upon transfer. He said he later agreed with the seller to take possession before the transfer could be effected since he had cleared the purchase price while awaiting the subdivisions.
50. Elijah K. Ogoti advocate testified as D.W. 4. He confirmed to the trial court that both the late M'Muchiri M'Nabea and the 2nd respondent came to his office on 3.1.2012 in person and appended their signatures onto D. Exh no. (1) & (2), a transfer form for L.R No's. 3249 and 3250 all being of sound mind which from he duly witnessed by appending his signature, stamped the form following which they paid him Kshs. 2,500/=
51. After the closure of the respondent case, the trial court rendered its judgment on 19.10.2023, which attracted both an appeal and a cross-appeal dated 10.11.2022 and 17.11.2023.
52. The appellant faults the trial court for:
- i. Failing to appreciate his evidence.
 - ii. For failing to appreciate the 2nd respondent's defense and counterclaim
 - iii. For declaring that the 2nd respondent as the legal owner of L.R No. Nyaki/Kithoka/3249.
 - iv. For dismissing his claim against the 1st respondent
53. On the other hand, the 2nd respondent, as the cross-appellant, faults the judgment for:
- i. Failing to dismiss the claim against him
 - ii. For not finding his title for L.R No. Nyaki/Kithoka/3250 was legally, regularly, and procedurally acquired without any corrupt scheme.
 - iii. For failing to consider the evidence on record that the appellant was not a beneficiary to the estate of the deceased and, therefore, could not claim trust on the suit land.
 - iv. For proceeding to cancel his title.
 - v. For finding that the appellant was in possession of L.R No. Nyaki/Kithoka/3250, yet no evidence was available to support such findings.
 - vi. For failing to find that he was an innocent purchaser for value without notice.
 - vii. For not addressing or resolving all the issues raised by the parties.
 - viii. For striking out the cross-claim against the 1st respondent even though it was clear that it was her deceased husband who received the entire purchase price and caused the transfers for the two parcels of land to him.
 - ix. For issuing an order for transfer and registration of L.R No. Nyaki/Kithoka/3250 to the appellant and by dismissing the cross-claim, leaving the cross-appellant without land or restitution by way of a refund hence making the 1st respondent to unjustly enrich herself.
 - x. For condemning him to pay costs to the appellant.



54. With leave of court, parties were directed to file written submissions by 15.6.2024. The appellant relied on written submissions dated 12.6.2024, stating that the trial court failed to appreciate his oral and documentary evidence that the land was ancestral and had been in occupation as per the land surveyor's report, that all other family members own land arising out of the parent title except him, he had lodged complaints during the lifetime of his late brother the cross-appellant was never in possession until 2021 when he forcefully entered the land and hurriedly started developments therein, for not appreciating that the transfers were fraudulent, especially since there was a caution and sickness, his occupation had been admitted in the previous proceedings by the 1st respondent and before the trial court.
55. The cross-appellant, on the other hand, relied on written submissions dated 13.6.2024. It was submitted that the appellant was using his claim inter-alia, on the finding of the High Court Succession Cause No. 312 of 2019 which has been determined by the Court of Appeal and remitted for redistribution of the estate afresh before the High Court.
56. In any event, the cross-appellant submitted that there was no evidence tendered to sustain the appellant's claim based on the occupation of the suit land, given his evidence was shaky, inconsistent, misleading, and appeared a character who was untrustworthy, as pointed at paragraphs 9 of the judgment.
57. The cross-appellant submitted that his documents were clear, that he took vacant possession as per his two witnesses, unlike the appellant. He further submitted that the judgment was unfair by unjustly allowing the respondent to enrich herself, yet equity seeks to do justice. In this case, the cross-appellant submitted that he had prayed for an alternative remedy of restitution in the cross-claim. Reliance was placed on *Chase International Investment Corporation and another v. Laxman Kesbra & others* (1978) KLR 143.
58. The cross-appellant submitted that there was no single proof that the sale agreement was tainted with fraud forgeries or that he was party or privy to any fraud in effecting the sale and the transfers. Reliance was placed on *Republic v Land Registrar Taita Taveta District & another* (2015) eKLR.
59. An appellate court of the 1st instance has the mandate to weigh, evaluate, assess, and analyze the lower court record and come up with independent findings as to facts and the law while giving credit to the lower court that had the opportunity to see and hear the witnesses first hand. See *Selle v Automatic Motor Boat Company Ltd* (1968) E.A 123.
60. The issues calling for my determination are:
- i. Whether the appellant pleaded and proved ancestral trust and its breach over L.R No. Nyaki/Kithoka/135 and its resultant subdivisions.
 - ii. Whether the appellant pleaded and proved ancestral trust and its breach by the 1st respondent in selling and transferring L.R No. 3249, 3250, and 3251 to the cross-appellant.
 - iii. Whether the appellant pleaded and proved any fraud, illegality, and irregularity in the manner, L.R No's. 3249 and 3250 were sold and transferred to the cross-appellant.
 - iv. Whether the sale and transfer of L.R No. 3249 and 3250 to the cross-appellant was subject to any overriding rights, interests, possession, or occupation rights held by the appellant



- v. Whether the cross-appellant was an innocent purchaser for value without notice of any overriding interests possessory and occupation rights over L.R No's. Nyaki/Kithoka/3249 and 3250, belonging to the appellant.
 - vi. If the cross-appellant had a competent cross-claim which he proved it to be entitled to any reliefs against the 1st respondent.
 - vii. Whether the appeal and cross-appeal have merits.
61. The nature, scope, and complexity of the concept of ancestral trust were discussed in the case of *Isaiiah Kiebia v M'Lintari & another* Civil Case No. 10 of 2015) (2018) KESC 22 KLR 5th October 2018 Judgment). The court said that land in an African setting is always a subject of many interests and derivative rights that belong to individuals or group units and frequently co-exist with each other. The court said customary rights on land do not appear on the title deed. The court said that such rights of a person that subsisted at the time of first registration as evidenced in being in possession or actual occupation were rooted or derived authority from customary law with no equivalent, either at common law or in equity. The court set out the following elements:
- a. The land in question before registration belonged to a family, clan, or group.
 - b. The claimant belongs to such family, clan, or group.
 - c. The relationship of the claimant to such family clan or group is not so remote or tenuous as to make the claim adventurous.
 - d. The claimant could have been entitled to be registered as an owner or beneficiary of the land, but for some intervening circumstances.
 - e. The claim is directed against the registered proprietor who is a member of the family, clan, or group.
62. Customary trust is proved through evidence. See *Muthuita v Mathuita* (1982 – 1988) 1 KLR 42. In this appeal, the appellant had averred that the mother's title to the land belonged to their late father and that the circumstances of the first registration in the name of the elder brother and the husband to the 1st respondent were to hold it in trust for himself and the other siblings. In *Henry Mwangi v Charles Mwangi* C.A No. 248 of 2004, the court took judicial notice of Kikuyu customary law; the eldest son inherits land as a Muramati to hold in trust for himself and the other heirs.
63. The appellant had invoked the Ameru customary law that the deceased, as the eldest son of his late father, was registered and was holding the land in trust for himself and the two brothers. A court of law never implies or presumes trust unless in a case of absolute necessity. See *Mbothu & others v Wairimu & others* (1980) KLR 171. The intention of the parties to create a trust must be clearly determined before a trust can be imposed.
64. In this appeal, the onus was on the appellant to lead evidence on the circumstances before and after the first registration, as pointing out an intention for creating a trust. One of the main grounds the appellant had relied upon to sustain his claim was the finding in the probate case. Unfortunately, the said decision was made on 7th June 2024, set aside by the Court of Appeal, and remitted to the High Court for redistribution of the deceased estate. The court, however, reaffirmed the position that the court clothed with jurisdiction to determine the existence of a trust is the Environment and Land Court under Article 162 2 (b) of the *Constitution* and Section 13 of the ELC Act. See Mathuita case.



65. The appellant failed to call and or provide evidence on the history of the suit land before the title register was opened on 2.5.1967 in the name of the late brother, Muchiri Nabea, was ancestral or family land. DW 1 and DW 2 led evidence and produced copies of title deeds for L.R No's. Nyaki/Kithoka/135, 298 and 334 showing that the late M'Muchiri M'Nabea M'Riumwara had three sons, namely, M'Muchiri M'nabea, M'Inoti M'Nabea, and Isaac Kimene Nabea, whom he gave out L.R No. 135, 298 and 334, respectively, before he passed on and where each settled on his parcel of land.
66. PW 1, when cross-examined on this evidence, alleged that he bought his portion from some people who were already dead. Regarding why he did not call his surviving brother Isaac Kimene to sustain his evidence that his elder brother held the land in trust, PW 1 said that his brother grew cold feet after he allegedly left him on his tour to Sweden. The green card for L.R No. Nyaki/Kithoka/298 shows that the title register was opened on 2.5.1967, the same day as the one for L.R No. Nyaki/Kithoka/135. The former portion is 7.4 ha, while the latter is 2.8 ha. If then the appellant is saying that his late father was the one who registered the former in the name of the elder brother to hold in trust, one expects the appellant to explain why he would be solely entitled to his brother's land and not his other brother Isaac Kimene.
67. L.R. No's. 298 and 135 are situated next to each other. The green card for L.R No. 135 shows that the title register was closed for subdivisions on 15.8.2005. Between 1967 and 2005, the appellant was unable to explain why he did not assert his overriding interest over the title held by his brother. Between 2005 and 2012, there was no evidence that the appellant demanded a share of the suit land from his late brother. Further, if the appellant asserted that he had been in possession or occupation of his share to L.R No. 135, he failed to produce evidence that when the title was closed for subdivisions in 2005, and land surveyors came to effect the mutation form on the ground, he demanded his share under his occupation be picked out and plotted on the mutation forms. There was no evidence produced that the appellant took that opportunity during the subdivisions to assert his overriding interest.
68. Evidence shows the title register for L.R No. Nyaki/Kithoka/1505, arose from L. No. Nyaki/Kithoka/3250, a subdivision of L.R No. 1491, a title register opened on 7.10.1987 in the name of the late M'Muchiri M'Nabea. There is no evidence that the appellant, as of 1987, had confronted his late brother, asserting that his occupation and possessory rights be factored in. Evidence shows that the title register for L.R No. Nyaki/Kithoka/1505 was cautioned by the appellant on 4.2.2011. It was the first time since 1967 that the appellant was claiming a licensee's interest.
69. In *Omar Bin Mohamed Al Hatim v Mohsin Bin Saleh Alkblagy* (1957) E.A 486, the court cited *Errington v Errington & Wood* (1952) 1 AllER 149 the court observed that words alone may not suffice and parties would not turn a tenancy into a license merely by calling it one. The court said that if circumstances or the conduct of the parties show that all that was intended was that the occupier should be granted a personal privilege with no interest in the land, he would be held only to be a licensee.
70. It was the appellant who personally registered a caution over the title register based on a licensee's interest and not on account of trust. PW1 had alleged that the removal of the caution was illegal. DW 2 was evident in her evidence that it was her late husband who went to court and caused the caution to be removed. Apart from a plethora of letters produced at the trial court, the appellant was unable to explain why he did not move the court for review of the orders lifting the caution or seek inhibition orders when the title register was closed for subdivisions on 2.2.2012.
71. Evidence produced shows that after the title register for L.R No. Nyaki/Kithoka/1505 was closed, the resultant subdivisions, among them L.R No's. Nyaki/Kithoka/3249, 3250 & 3251 which are the subject matter of this appeal, which was during the lifetime of the late M'Muchiri M'Nabea.



72. There was no evidence tendered that the appellant inhibited or placed a caution against them on account of customary trust before his brother passed on or transferred the two titles to the co-appellant on 16.4.2012. The appellant later placed a caution on 5.6.2015, going by the copy of the register for L.R No. Nyaki/Kithoka/3249. So, at the death of the late M'Muchiri M'Nabea, L.R No's Nyaki/Kithoka/3249 and 3250 were not in the names of the deceased. They did not, therefore, form part of his estate.
73. More evidence from the copy of the register also shows that the late M'Muchiri had subdivided the mother title and transferred some portions among them L.R No. Nyaki/Kithoka/263, 2528 & 3248, to Isaac Kimene, his brother. Curiously, the appellant did not object to those subdivisions and transfers if at all the entire land was held in trust. Trust is a matter of fact proved through evidence. It is trite law that a brother of a deceased is not a beneficiary of his estate unless he can show that he was a dependant of the deceased. See *Re-estate of Njuguna Igwima* (2017) eKLR. In *Muthuita v Muthuita* (supra), customary trust was said to be established by leading evidence on the history of the suit property and the relevant customary law on which it is founded.
74. The appellant relied solely on his evidence. He did not call any of his brothers, uncles, or neighbors to corroborate his evidence on the existence of a trust. He did not call any land surveyor to substantiate his evidence on the extent of the land under his use, occupation, or possession, the nature and status of his developments there on it. PW 1 relied on photographic evidence and has urged this court to find that the trial court disregarded that evidence or the surveyor's report, yet it was corroborating facts on possession and occupation, unlike the cross-appellant who only came in on Good Friday of 2021 and illegally destroyed his structure and purported to erect a house on the land hurriedly.
75. It is one thing to produce photographs and land survey reports. The appellant did not call the makers of the reports to testify and clarify the contents of the reports. The photographs were not produced by the makers and or accompanied by a certificate of electronic evidence under Section 107 of the *Evidence Act*.
76. The burden of proof was on the appellant to prove the existence of the facts, leading the court to conclude that there was trust. He who alleges must prove a trust as a powerful institution and a substantial question of law as held in *Susan Gacheri Mugambi v Maureen Florence Kagwiria and others* (2016) eKLR. In *Patricia Mathenge Gacheri v Karumi Wambugu & another* (2010) eKLR, the court observed that the mere fact that one was in occupation of land belonging to another was proof of trust. The intention must be evident. That intention is lacking in this suit. That intention was not followed up with an assertion of the title between 1967 to 1982 and 2005 if the appellant n was evident in his mind that his deceased brother held the land in trust when subdivisions ..
77. To discharge that burden, the appellant had to lay bare the root of the title to create the nexus or link of the trust to the title holder and himself, as held in *Alice Wairimu Machaira v Kirigo Philip Macharia* (2019) eKLR.
78. In *Kiebia M'Inanga v M'Lintari & another* (supra), the court observed that each case has to be determined on its own merits and the quality of evidence for not every claim of a right to land qualifies as a customary trust. In my considered view therefore, the appellant failed to establish every element as per the Kiebia case to found a trust and its breach by the late brother.
79. Coming to the question of fraud, illegality, and irregularity in the subdivisions and registration of the resultant titles from L.R No. 135 and, in particular L.R No 3249, 3250, and 3251. Fraud must be specifically pleaded and proven to a degree higher than in ordinary suits. See *Ardhi Developers Limited v West End Butchery* (2015) eKLR and *Virjay Morjaria v Nansigh Madhusingh Darbar* (2000) eKLR.



80. The appellant had pleaded in paragraph 15 of the plaint dated 14.10.2020 that the two parcels of land were sold secretly, and without notifying him, that the cross-appellant did not do due diligence to establish who was on the land, that there was collusion and misrepresentation.
81. As indicated above, the changes to the initial land register for L.R No. Nyaki/Kithoka/135 commenced on 7.10.1987 and came to the knowledge of the appellant as early as 21.2.2011 when he placed a caution. A claim based on fraud should the law require that it be lodged before the expiry of three years from the date of discovery of the fraud by the claimant. The appellant lodged the suit in 2020. By 2012, when the appellant was protesting the filing of the succession cause, he already knew that there were changes to the register. I find the claim based on fraud as time-barred.
82. As to proof of illegality, collusion, misrepresentation, and irregularity, the appellant, other than alleging sickness, incapacity, and inability by his late brother to transact before he passed on, brought no tangible or authentic medical reports to sustain such allegations. The appellant failed to call evidence on the mental status of his late brother when he appended signatures to the land control board application form, a mutation form, a land transfer form and the sale agreement, regarding the two parcels of land. The onus was on the appellant to prove that DW 2 used undue influence over the deceased and improperly misused that power to effect the changes to the title register when the deceased had no mental capacity to do it.
83. In *Patel & another v MJC & another* (KECA) 364 (KLR) (4th February 2022) (Judgment), the court said that evidence of undue influence or unsound mind, could not be inferred from facts nor adduced by way of written submissions. The appellant relied on uncertified hospital documents, without calling their makers to establish the date of admission and discharge of the deceased from the hospital, including his mental status.
84. The appellant went on to suggest that the transfer documents were signed on behalf of the deceased by the wife, the 1st respondent, yet no evidence was produced to show that the signatures appearing therein did not belong to the deceased. The evidence of DW 3 was not challenged that he witnessed the deceased and the co-appellant sign the transfer form. In the absence of medical evidence of severe sickness likely to have impeded the deceased from freely exercising his proprietary rights to dispose of the land.
85. On the root of the cross-appellant's title, it is trite law that when a title deed is on attack, every paper trail towards its acquisition becomes material. In this appeal, the onus was on the appellant to demonstrate that the co-appellant title was unsafe on account of fraud, illegality and irregularity, procedural impropriety, and was obtained through a corrupt scheme. See *Dr. Ngok v Ole Keiwua & 4 others* (1997) eKLR. The appellant brought no forensic report to show that the deceased did not sign the paper trail to transfer his interest over the land.
86. It was upon the appellant to show that he had a discernible or apparent overriding right, which the co-appellant and his late brother ignored. There was no evidence that the appellant had encumbered the title register so much so that the co-appellant was aware of his claim. The caution was regularly removed. The appellant did not lodge or make a complaint if the thought it was irregularly removed. It was not enough to write letters to the land registrar without filing a suit and or having his alleged customary rights declared as valid by a court of law.
87. There was no declaratory order registered against the title in favor of the appellant, which the co-appellant ignored. The appellant failed to call the chairman of the land control board committee to show that there was no such special board meeting in which the late brother consented to the transfer of the two parcels of land. No evidence was held that the transfers over a few months before the late



- brother passed on were irregular or illegal. Being aged or sick is not tantamount to mental incapacity. Evidence of loss of memory, mental debility, senility, decay, and incapacity to understand the meaning and effect of the agreement transfer form and registration by the deceased was not produced by the appellant.
88. In *Grace Wanjiru Munyinyi & another v Gedion Waweru Githunguri & others* (2011) eKLR, the court said that a presumption exists until proven, otherwise every person is of sound mind. It was the appellant, who was asserting mental incapacity and or sickness. A medical specialist was not called to prove the said allegations that the deceased was delusional, confused, incoherent, and incapable, between 2.2.2012 and 25.5.2012 when he passed on.
89. Undue influence or collusion is a matter of fact, and whoever asserts the wrong bears the burden of proving the same as held in *Mombasa Bricks and Tiles Ltd & others v Arvind Shah & others* (2019) eKLR. The particulars of misrepresentation were not pleaded as required under Order 2 Rule 10 (1) of the *Civil Procedure Rules*. The condition of mind of the deceased was also not specifically pleaded. How the 1st respondent unduly influenced the deceased to sign and transfer the titles during the period he was reportedly sick was not pleaded with precise particulars. In the absence of such pleadings or evidence, I find written submissions, however powerful by the appellant, could not replace pleadings and or evidence; otherwise, fraud illegality, or forgery are serious charges requiring cogent and tangible evidence.
90. The last issue is whether the co-appellant proved his cross-claim and defense that he was an innocent purchaser for value without notice. In *Diasoperty Ltd & others v. Gitbae & others* (Civil Appeal E155 & E157 of 2023 consolidated (2024) KECA 318 (KLR) 22nd March 2024 (Judgment), the trial court had held that the appellant knew that the respondent was in possession had been cautioned against it and therefore they were not innocent purchasers for value without notice, for there was a constructive trust in his favor. The court cited *Dina Management Ltd v County Government of Mombasa* (2023) KESC 30 (KLR) that for one to succeed as a bonafide purchaser, he has to prove that:
- i. He holds a certificate of title.
 - ii. He purchased the property in good faith.
 - iii. He did not know about the fraud
 - iv. He purchased it for valuable consideration.
 - v. The vendor had an apparent valid title.
 - vi. He purchased without notice of any fraud.
 - vii. He was not party to the fraud.
91. In this appeal, the cross-appellant had pleaded the doctrines of due diligence, regularity, legality, procedural compliance, and good titles to the suit land free of any prior notice of the alleged customary trust. The appellant, in reply to the defense and cross-claim dated 10.2.2021, averred that he had no objection to the cross-claim except that the co-appellant was not an innocent or bonafide purchaser, since had he conducted due diligence, he would have established the land was occupied by a third party.
92. The starting point is paragraphs 5 and 6 of the co-appellant's statement of defense. The cross-appellant had averred that he took possession with effect from 2005, and had been in continuous occupation, without interruption by either the appellant or the 1st respondent of 1 ¼ acres of L.R No. Nyaki/Kithoka/3249 and 3250, which he had extensively developed. In paragraph 8 thereof, the co-appellant



- averred that he bought the land from the deceased in 2009 which was not under any trust in favour of the cross-appellant.
93. The cross-appellant relied on a sale agreement dated 19.2.2009. The portion to be sold was indicated as $\frac{3}{4}$ of an acre out of L.R No. Nyaki/Kithoka/1505. Possession, as per clause 4, was to take place after transfer. The purchaser was the one to pay the transfer fee. Timelines for completion of the sale agreement terms and conditions were missing. Execution of the transfer took place on 2.1.2012. That was close to three and a half years after the sale agreement was signed.
94. The cross-appellant told the trial court that even though clause 4 stated that the taking of possession would be after the transfers, he had made a request and was allowed by the deceased to take up early vacant possession for he had already paid out the entire purchase price. DW 1 and 2 corroborated that piece of evidence. Further, DW 3 said that there was no caution since it had been removed through Civil Suit No. 162 of 2011. Additionally, the cross-appellant produced alongside the 1st respondent, D. Exh No. 1-16 shows that all the processes of an application for a land control board consent, consent to transfer, transfer form, stamp duty payment, and registration fees were paid before issuance of the two title deeds.
95. D. Exh No. (1) shows that the transfer form was lodged on 13.4.2012. The considerations for the suit parcels of land are missing both in the transfer form, and the application for a land control board consent. What is disclosed in the valuation is Kshs.50,000/= . Curiously, the cross-appellant pleaded that he acquired the land for valuable consideration, yet the figure of Kshs.1,000,000/= is missing in the official documents used for the transfer and registration.
96. The sale agreement referred to $\frac{3}{4}$ of an acre as the subject land, whereas paragraph 5 of the statement of defense and cross-claim referred to the use and occupation of $1\frac{1}{4}$ of an acre. In his evidence, DW 3 said that he bought $\frac{3}{4}$ of an acre. A court of law cannot enforce an illegal contract or be used as an instrument of enforcing the obligation alleged to arise out of a contract or transaction, that is illegal or if an illegality has been brought to the attention of the court.
97. A court of law cannot protect a title obtained illegally, fraudulently, or unprocedurally. See *Wambui v Mwangi & others* (KECAA) 144 9KLR) (Civil) 19th November 2021). Concealment or misrepresentation of material facts to induce another to act is wrong. The innocence of the cross-appellant is suspect or unsafe in view of the discrepancies in his documents, leading to the issuance of the title. The documents are inconsistent as to acreage and the consideration paid. The consideration paid was also not indicated in the statement of defense and cross-claim.
98. The cross-petitioner dwelt with the late M'Muchiri M'Nabea as the seller and not the 1st respondent. At the time the cross-claim was filed, the estate of the seller was still paid litigation at the Court of Appeal. The 1st respondent has not produced before this court any grant issued that she represents the estate of her deceased husband, for any declaratory orders to issue against her as a legal representative, to be liable for.
99. Order 42 Rule 32 Civil Procedure Rules grants this court powers to pass or make such further or other decree or order as the case may require. The court has already made a finding that there was no intended trust in the registration of L.R No. Nyaki/Kithoka/135 and its resultant subdivisions in 1987 in favor of the appellant. The cross-appellant is not a member of the family, clan, or group that was entitled to the suit land in the event there was a trust over the suit land. I find the claim against him remote or tenuous.



100. Additionally, as regards the alleged fraud, there is evidence that the appellant was aware of the changes to the register in favor of his late brother and later the cross-appellant by 2012, yet he filed the suit after three years expired. The claim is time-barred as regards fraud or illegality.
101. Coming to the claim against the 1st respondent, there is no evidence that the two titles of land were part of the estate of the deceased by 25.5.2012 when he passed on. So, the 1st respondent could not be answerable for acts made by her late husband in his capacity. Her powers and duties as a legal representative arise out of a grant issued under Section 80 – 82 of the *Law of Succession Act*. There was no cause of action against the deceased husband that would subsist upon his death on 25.5.2012, for the appellant to sue the 1st respondent. As rightly stated by the 1st respondent, she was not privy to the sale agreement and transfer between the deceased and the cross-appellant.
102. On the same token, the cross-appellant should have laid the basis for why the 1st respondent was liable in the cross-claim. He did not provide any evidence on why the 1st respondent was liable for his claim and an innocent purchaser for value without notice. There was no evidence tendered that she held a letter of grant under Section 80 of the *Law of Succession Act* (Cap 160) for the parcel of land. The two parcels of land did not form part of the estate of the deceased by 25.5.2012, so even if the 1st respondent were to be said to hold letters of administration, evidence should have been led as to why she should be liable for acts or omissions committed by her late husband in selling and transferring the two parcels of land. A grant of letters of administration does not relate back to the date of death, so as to authenticate any of the acts of the administrator done between the death and the date of the appointment.
103. The transaction relating to the sale of land occurred in 2009, while the transfer occurred on 13.4.2012. How then was the 1st respondent liable for it as a legal representative of the estate of the deceased when the appellant's claim relates to acts committed during the lifetime of the deceased brother? My finding is that the cross-appellant had no cause of action in law against the 1st respondent to justify the filing of the cross-claim.
104. Coming back to the issue of an innocent purchaser for value without notice of the appellant's use and occupation rights or interests, the cross petitioner merely pleaded in paragraphs 8 that he bought the land in 2009 from the deceased, took occupation, and had exclusively used the land as a lawful owner. There was no specific purchaser for value without notice. Parties are bound by their pleadings and issues flow from the pleadings. The cross-appellant did not jointly sue the appellant in the cross-claim, yet he was alleging overriding rights, namely constructive trust on account of occupation and use interests. His licensee's interest was already in the caution that an order of court had lifted.
105. The concept of buyer-beware applies under Section 80 of the *Land Registration Rights Act*. Due diligence as held in *Torino Enterprises Ltd v Attorney General* (2023) KESC 79 KLR (22nd September 2023) (Judgment). It involves going beyond the title register by visiting the ground to establish who is in occupation use and possession of the suit land before one can move in. Evidence tendered in the succession cause as early as 2012 shows that the appellant was in occupation of L.R No. Nyaki/Kithoka/3250.
106. Taking possession includes ascertaining the beacon's neighborhood and whoever else has licensees to the land. DW 1 and 2 were clear that the appellant's cowshed and zero grazing activities had been on the suit land for some time, though the appellant had severally been told to remove them. The cross-appellant was unable to discount the evidence of PW 1 that he had been utilizing L.R No. 3250 until 2021, when the cross-appellant forcefully made an entry and destroyed his cowshed. The court found the evidence of PW 1 more reliable than that of the cross petitioner, who was unable to justify how



it was possible to take vacant possession in 2009, yet clause 4 of the sale agreement talked of taking vacant possession after the transfer.

107. The cross-appellant has submitted that the trial court was unfair by allowing the 1st respondent to enrich herself unduly yet equity seeks to do justice. The court has made a finding that the cross-appellant was unable to prove or justify the taking of vacant possession in 2005 or 2009, given that he was only entitled to vacant possession after the transfer. The earliest the cross-appellant would have been on the land was after 13.4.2012. Evidence by way of use, possession, and occupation was lacking.
108. D.W. 1 claimed to have been a caretaker of DW 3. Parole evidence may not be brought into contract clear terms reduced by parties to a contract. See *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* (2011) eKLR. The terms and conditions of a contract bind parties. The court found no basis to disregard without the cross-appellant, and the deceased agreed on over vacant possession. DW 1 and DW 2 were not privy to the sale agreement or the transfer forms. So, they cannot contract an explicit clause in the sale agreement.
109. The cross-appellant, as indicated above, led no evidence on the basis of why the 1st respondent should be liable in the alternative, to reconstitute the purchase price to him. The cross-appellant did not specify any figure in the cross-claim. Filing fees for the cross-claim did not include any figure as special damages prayed for by the cross-appellant for this court to invoke the doctrine of restitution. Further to this, the cross-appellant did not provide any evidence on how much investment they had made on the suit land and, in particular, L.R No. Nyaki/Kithoka/3250 since the alleged take over of vacant possession in 2005 or 2009.
110. The upshot is that I find both the main appeal and the cross-appeal lacking merits. The same are dismissed with no order as to costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU

ON THIS 26TH DAY OF JUNE, 2024

In presence of

C.A Kananu/Mukami

Mutungu for appellant

Mwirigi for Karanja for respondents

HON. C K NZILI

JUDGE

