



Guchu & 3 others v Kamau (Suing as the Personal Administrator of the Estate of Antony Kamau Njuguna – Deceased) (Environment and Land Appeal E010 of 2023) [2025] KEELC 939 (KLR) (20 February 2025) (Judgment)

Neutral citation: [2025] KEELC 939 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E010 OF 2023
LN GACHERU, J
FEBRUARY 20, 2025**

BETWEEN

**PETER GUCHU 1ST APPELLANT
KAGAA FARMERS COOPERATIVE SOCIETY LIMITED 2ND APPELLANT
THE LAND REGISTRAR THIKA 3RD APPELLANT
THE HON ATTORNEY-GENERAL 4TH APPELLANT**

AND

**SEBASTIAN CHEGE KAMAU RESPONDENT
SUING AS THE PERSONAL ADMINISTRATOR OF THE ESTATE OF ANTONY
KAMAU NJUGUNA – DECEASED**

*(Being an Appeal against the whole Judgment delivered by Hon. M. Sudi
P.M. in KANDARA PMELC NO. 15 OF 2019, on 15th March 2023)*

JUDGMENT

1. The Respondent herein Sebastian Chege Kamau(suing as the personal administrator of the estate of Antony Kamau Njuguna(deceased), filed Kandara SPMELC No. 15 of 2019, wherein vide an Amended Plaintiff dated 7th May, 2019, he sued the 1st Appellant herein Peter Guchu, and the other Appellants for Judgment against them jointly and severally for various prayers among them; an order of eviction and demolition of all illegal structures erected on land parcel No. Mitubiri/ Thuthua/Block 1/ Kagaa-Kabuku) 464, and for cancellation of the title deed held by the 1st Defendant(1st Appellant herein), and to declare entries thereon as null and void, and also declare the Plaintiff(Respondent herein), as the lawful and genuine owner of the suit land, among other prayers.



2. The Respondent claimed that at all material time, his deceased father, Antony Kamau Njuguna, was the registered owner of the suit land, Mitubiri/ Thuthua/ Block 1(Kagaa-Kabuku) 464, which measures approx. 0.2025ha. Further that it had come to his knowledge and attention that the 1st Defendant (1st Appellant herein) equally claimed to have a title to the suit land, which title must have been illegally and fraudulently acquired, and which title needed to be cancelled.
3. The 1st Appellant ,3rd and 4th Appellants opposed the said suit before the trial court by filing their respective Defences. The 1st Appellant as the 1st Defendant thereon, filed his Defence and Counter-claim, wherein he denied all the allegations made by the Plaintiff (Respondent herein), and alleged that he was genuinely in possession of the suit land and therefore, the Plaintiff (Respondent's) claim was unjustified.
4. The 1st Appellant also alleged that the suit land was allocated to his father Mungai Muigai (deceased), who was a member of Kagaa Farmers' Co-operative Society, and was allocated the suit land, then issued with the title deed, and that he has been in possession of the said land since 1990, and has been utilizing and has developed the said land.
5. He also claimed that the Plaintiff (Respondent herein) acquired the title to the suit land irregularly, unlawfully and or fraudulently. Therefore, in his Counter- Claim, the 1st Appellant sought for the Plaintiff's (Respondent) title to be cancelled, and for the court to declare that his father, Mungai Muigai (deceased) was the bona fide owner of the suit land, and for permanent injunction.
6. The 3rd and 4th Defendants (3rd & 4th Appellants herein) filed their Statement of Defence through the Office of Attorney General, and denied all the allegations made by the Plaintiff (Respondent herein), and did put him to strict proof thereof. They sought for dismissal of the Plaintiff's suit.
7. The matter proceeded for hearing through viva voce evidence, and on 15th March 2023, the trial court entered Judgement in favour of the Plaintiff thereon(Respondent herein),by declaring that Antony Kamau Njuguna(deceased), the father to the Plaintiff(Respondent), was the bona fide and absolute owner of the suit land; the 1st Defendant(1st Appellant herein) was ordered to vacate the suit land; he was permanently enjoined, and the Land Registrar, Muranga was directed to register the said suit land in name of Antony Kamau Njuguna.
8. The 1st Defendant, now 1st Appellant was aggrieved by the said decision of the trial court, and he filed the instant Appeal against that decision, wherein he joined the 2nd, 3rd and 4th Defendants thereon as Appellants in this Appeal. However, the said other Appellants did not participate in this Appeal, and therefore, this Appeal is basically by the 1st Appellant alone.
9. Vide his Memorandum of Appeal dated 13th April 2023, the 1st Appellant sought for the following Orders:
 - a. The Appeal be allowed.
 - b. The 2nd Respondent be summoned to give evidence before the superior court.
 - c. The 1st Appellant be awarded equitable interests and/or interests from the years 1989 to date.
 - d. Costs be awarded to the Appellant.
10. This Appeal is anchored on seven (7) grounds being:



- 1) That the trial Court erred in law and in fact in holding that the Respondent had proved to the required standard that there was fraud and that he is the owner of the suit property and in so doing:
 - (a) The trial Court erred in law and in fact in holding that the Appellant failed to sufficiently prove ownership of the suit property.
 - (b) The trial Court erred in law and in fact by failing to acknowledge that the Appellant has been enjoying peaceful possession of the suit property for a period of 32 years.
 - (c) The trial Court erred in law and in fact [by finding] that the 1st Appellant could not claim correctness of the title based solely on Registry Index Map (R.I.M.).
- (2) That the trial Court erred in law and in fact in favoring the Respondent's evidence and ignoring the 1st Appellant's evidence thus arriving at a lopsided Judgment.
 - (a) The trial Court ignored peaceful possession and enjoyment by the Appellant and faulted the failure of title to have Area Index Map even after he, the 1st Appellant produced share certificate, survey fees receipt and the process that authenticated the genesis of his possession.
 - (b) The trial Court erred in law and in fact by failing to make a ruling and/or award the Appellant on the equitable interest and developments since 1989 to date.
 - (c) The trial Court upheld the Respondent's claim solely on allegation that the Appellant's title deed lacked Registry Map Index.
 - (d) That the trial Court erred in law and in fact by failing to issue summons to 2nd Appellant-KAGAA FARMERS CO-OPERATIVE SOCIETY to corroborate concerning the process and possession of the suit property and instead shifted the blame entirely to the 1st Appellant and prevented him from producing the letter from the 2nd Appellant Society.
 - (e) That the trial Court erred in law and in fact by failing to uphold the sanctity of the share certificate and membership of the 2nd Appellant, (KAGAA FARMERS COOPERATIVE SOCIETY).
 - (f) That the trial Court erred in law and in fact by favoring the Respondent who has never been in control and/or occupation of the suit land from 1989 to date.
- (3) That the trial Court erred in law and in fact in ignoring the evidence pertaining to the process of acquiring the suit land.
- (4) That the trial Court ignored the date in relation to entries on a search certificate, unexplained entries on the Green-card and a title deed issued to the Respondent.
- (5) That the trial Court erred in law and in fact by shifting the Land Registrar's (the 3rd Appellant herein) mistakes as the maker of title deeds and the 2nd Appellant's mistakes being the originator of the share certificates, to the 1st Appellant.
- (6) That the trial Court erred in law and in fact on upholding the Respondent's claim and dismissing the 1st Appellant's Counterclaim.
- (7) That the decision of the trial Court is bad in law.



11. After filing of the Record of Appeal, the instant Appeal was admitted under the Section 79B of the Civil Procedure Act, and the court directed that the said Appeal be canvassed by way of written submissions. The parties complied with the said directives, and their respective rival written submissions are as follows;

THE 1ST APPELLANT'S SUBMISSIONS

12. The 1st Appellant filed his written submissions dated 28th May 2024, through the KCN ADVOCATES LLP, and submitted that there was a “double allocation” of the suit land to both his father and the Respondent’s father. Further, he submitted that his father became a member of KABUKU FARM, which was later renamed to KAGAA FARMERS CO-OPERATIVE SOCIETY LTD on 30th May 1971, and upon making payments to the 2nd Appellant as attested to by the receipts appearing on pages 46, 47 and 49 of the Record of Appeal, and upon payment of all necessary requisite fees, the 1st Appellant’s father was issued with a title deed to the suit land dated 10th May 1989.
13. He also submitted that the foregoing allocation was based upon the list of allottees of a Presidential Probe Committee on large scale Farms around Makuyu area, dated 8th June 1990, which document was produced as exhibit. He further submitted that the 1st Appellant’s father was issued with a Share Certificate dated 10th June 1992, during which time he was already in occupation of the suit property, and had carried out some developments thereon.
14. The 1st Appellant contrasted the above position to the situation obtaining with respect to the Respondent’s father, whose title to the suit property was also issued on 10th May 1989, but he never assumed possession of the suit property at any point in time. He argued that despite the Respondent’s father knowing full well that there was a double allocation of the suit land, and the 1st Appellant’s father was in occupation of the same, he never sought any remedy.
15. The 1st Appellant identified the following issues for determination by the Court:
 - (a) Whether the trial Court erred and gave a lopsided Judgment and failed to consider the 1st Appellant’s documentary evidence.
 - (b) Whether the 1st Appellant’s father Mungai Muigai trespassed onto the suit property for a period of 34 years.
 - (c) Whether there was a double allocation as opposed to trespass.
 - (d) Whether the Appeal should be allowed as prayed.
 - (e) Costs.
16. It was also submitted that the maxim of equity to the effect that where the two equities are equal, the first in time prevails is inapplicable to the suit herein as the titles held by both the 1st Appellant’s father and the Respondent’s father were issued on the same date being 10th May 1989. Further, there was no evidence of fraud or illegality on the part of the 1st Appellant’s father regarding the acquisition of the suit property.
17. The 1st Appellant further submitted that the mistakes of the Land Registrar not to include the Registry Index Number on the title deed issued to the 1st Appellant’s father cannot be attributed or shifted to the 1st Appellant herein because the report of the Presidential Probe Committee dated 8th June 1990, categorically stated that the list of allottees (who included the 1st Appellant’s father) was



authenticated and authorized by the Land Registrar. Further, that the said Report appearing on page 56 of the Record of Appeal stated that the list of allottees, was extracted as per the Green card.

18. The 1st Appellant further submitted that his father paid requisite survey fees, and other fees in respect of the suit property to the 2nd Appellant, and occupied the property whereupon he established his family home for more than 32 years, until when he encountered problems for the very first time in year 2019, when the Respondent laid claim to the suit land.
19. Further, the 1st Appellant also argued that the Respondent's father exhibited indolence by failing to assume occupation of the suit property, whereas the 1st Appellant's father took possession immediately upon completion of the registration, and transfer process and issuance of title in his name.
20. He also submitted that the 2nd Appellant engaged in double allocation of the suit land as reflected in the Presidential Probe Committee Report on page 50 of the Record; therefore, the 1st Appellant's father did not trespass on the suit property. It was his further submissions that the trial Court failed to analyze the evidence adduced before it, and draw the conclusion that there was a double allocation of the property in question.
21. Reliance was sought in the decision of the Court in the case of Nyambura Ndungu vs Ol-Kalau Farmers Cooperative Society [2018] eKLR, to anchor the proposition that in one instance where a double allocation was proven, the Court faulted the Settlement Fund Trustee. Further reliance was also placed in the reasoning of the Court in the case of M'Ikiara M'Rinkanya & Another vs Gilbert Kabeere M'Mbijiwe [1982-1988] 1 KAR 196, in support of the contention that where there exists a double allocation, the first in time shall prevail.
22. The 1st Appellant argued that during his father's lifetime, no claim was ever brought concerning the ownership of the suit property, thus, the Respondent and his father have exhibited indolence by not challenging his father occupation and/or developments carried out on the suit property for more than 30 years.
23. Further, that no evidence was placed before the trial court to demonstrate that the 1st Appellant's father acquired title over the suit land through fraud. It was also argued that the 1st Appellant's family have "allotment of interests on the suit land" as defined by the Court of Appeal in the case of Benja Properties Limited Vs Sydena Mohamed Burhannudin Sahed & 4 Others [2015] eKLR, wherein the Court held that that an allotment of interest in land was a transaction in rem attaching to and running with a specified parcel of land.
24. The 1st Appellant also faulted the Green card produced by the Respondent for containing errors, and which were never explained by the 3rd Appellant as the custodian of public records. It was also submitted that the cancellation error appearing on page 61 of the Record was rectified following the death of the Respondent's father, and the same was not sufficiently explained at the trial Court.
25. Further, that the 1st Appellant's father took possession of the suit property in year 1990, and the suit land was not available for allocation following his occupation. The 1st Appellant also argued that because neither himself nor the Respondent presented a consent from the Land Control Board, it was incumbent upon the 3rd Appellant being the custodian of public records on land transactions to furnish the same before the trial Court, going as far back as the records for the year 1988, in order to dispel all doubts as to the true ownership of the suit property. It was ultimately submitted that the 3rd Respondent was negligent, and its evidence contradicted the findings of the Presidential Probe Committee



The Respondent's Submissions

26. The Respondent filed his written submissions dated 20th June 2024, through Kanyi Kiruchi & Co Advocates. After setting out the background of the dispute between the parties, he identified the following issues for resolution by the Court:
- a. Which between the Appellant's title and the Respondent's title deed is legitimate, lawfully-obtained and above board?
 - b. Who between the Appellant and the Respondent is the owner of Mitubiri/ Thuthua / Block 1 (Kagaa-Kabuku)464.
 - c. Whether the appeal is merited.
 - d. Who should pay the costs of the suit.
27. Relying on the decision of the Court in the case of Munyu Maina Vs Hiram Gathiha Maina (2013) eKLR, the Respondent submitted that where a party's title is under challenge, he must prove its acquisition was legal and free from any encumbrances. Further, that the Green card marked as PExhibits 3 & 4 in the suit before the trial Court clearly indicated the history of the suit land. Further, that the Green card appearing on pages 60 and 61 of the Record does not contain the name of the 1st Appellant's father.
28. It was argued that it is inexplicable for the 1st Appellant's father to be issued with a Share Certificate by the 2nd Appellant on 16th June 1992, yet his title deed to the suit land is dated 10th May 1989, rather than the inverse. Doubt was cast on the authenticity of the title held by the 1st Appellant's father on grounds that it was issued while he was a non-member of the 2nd Appellant. Reliance was sought in the holding of the Court in the case of Esther Ndegi Njiru vs Leonard Gatei [2014] eKLR, to undergird the proposition that the 1st Appellant's father being an outsider in relation to the 2nd Appellant could not become a beneficiary of the suit property as at the date claimed 10th May 1989.
29. The Respondent further submitted that there was no evidence produced to show that the title deed by the 1st Appellant's father is recognized by the 3rd Appellant, or by any official authority. Reliance was placed on the provisions of Section 26 (1) of the *Land Registration Act* to buttress the argument that Certificate of title is held as conclusive proof of ownership over the subject parcel. It was the Respondent's further submission that the evidence adduced by the 1st Appellant did not aid him, and the instant Appeal is without merit.
30. On the issue of costs, it was the Respondent's submissions that he is entitled to the costs of this Appeal, being the successful litigant. Reliance was sought in the decision of the Court in the cases of DGM Vs EWG [2021] eKLR and Party of Independent candidates of Kenya & Another Vs Mutula Kilonzo & 2 Others (2013) eKLR.
31. This court has carefully considered the available evidence before the trial court as contained in the Record of Appeal, the Memo of Appeal as filed by the 1st Appellant, the rival written submissions, the cited authorities and the relevant provisions of law, and finds the issues for determination are as follows; -
- i). Whether the Appeal herein is merited.
 - ii). Who is entitled to the costs of this Appeal?



32. Before delving into the merit and demerit of this Appeal, the court finds and holds that since this is a first Appeal, the court has an obligation to re-consider, re-analyze, re-evaluate and re-assess the evidence adduced before the trial court, and then come up with its own independent evidence. See the case of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, where the Court held;
- “...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses, and should make due allowance in this respect...”
33. Further, this court as an Appellate court cannot just upset/ and or set aside the trial court’s decision just because it has been moved in an Appeal. This court takes note of the fact that the trial court has discretion conferred upon it by both statutes and *the Constitution*. See the case of *Mbogo & Another vs Shah*, [1968] EA, p.15; where 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 miscarriage of justice.”
34. The Court in the above case of *Mbogo vs Shah*(supra) at page 93, also observed as follows;
- “I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It would be wrong for this Court to interfere with the exercise of the trial Judge’s discretion merely because this Court’s decision would have been different.” (emphasized added)
35. Being guided as above, the court will now consider the issues identified for determination, the available evidence exhibits produced before the trial court, and then come to its own independent evidence.
36. Though the Appeal herein is indicated as having been filed by the four Appellants herein who were the Defendants before the trial court, the Appeal herein has been prosecuted by the 1st Appellant, who was the 1st Defendant before the trial. The 2nd Appellant, as a 2nd Defendant did not participate in the trial before the trial court, and the 3rd and 4th Appellants did not confirm whether they were aggrieved by the Judgement of the trial court, and did not express any intention of appealing against the said Judgement of the trial court. The 1st Appellant therefore could not prosecute an Appeal against unwilling parties. Therefore, the Appeal herein is basically by the 1st Appellant only.
37. In determining whether the Appeal is merited or not, this court will consider the issues set out by the parties herein in their rival submissions being; whether there was a double allocation as opposed to trespass; which between the 1st Appellant and the Respondent’s title is legitimate, and obtained lawfully; who between the 1st Appellant and the Respondent is the lawful owner of the suit land;



whether the trial court erred and gave a lopsided judgement by failing to consider the 1st Appellant documentary evidence.

i) Whether the Appeal herein is merited?

38. There is no doubt that the 1st Appellant's father, Mungai Muigai and the Respondent's father Antony Kamau Njuguna, both deceased, each had a Certificate of title for the suit land; Mitubiri/ Thuthua/ Block 1/ Kagua/Kabuku) 464. Interesting, their Certificates of titles were issued the same day on 10th May 1989. These two title deeds were issued under "The Registered Land Act" Cap 300 LOK, (now repealed), and under Section 27 of the said Act, as the registered owners, they were deemed to be the absolute and indefeasible proprietors of the said parcel of land, with all rights and privileges appurtenant thereto.
39. However, it is very clear that a parcel of land cannot have two titles owned by two or several different persons. A parcel of land can either be owned singularly by an individual with his own title, or jointly or owned in common by different persons, but bearing one Certificate of title. The scenario herein is that both Mungai Muigai and Antony Kamau Njuguna, bear Certificates of titles for this parcel of land, Mitubiri/ Thuthua/ Block1/464, which certificates of titles were issued on the same day, and bearing the same acreage of 0.2025 Ha.
40. From the Record of Appeal, it is clear that each of the rival party herein produced documents to support their allegations and claims that their respective fathers owned the suit property. The 1st Appellant, Peter Guchu produced various documents and receipts to support his claim that his father Mungai Muigai, was a member of Kagua Farmers Co-op Society. The receipts of payment to the said Society were reflected on pages 47 and 48 of the Record of Appeal. Further, it is evident that the said Mungai Muigai, also paid some money to the Presidential Probe Commission on Large Scale Farms in Makuyu- Muranga.
41. Further, the Mungai Muigai was issued with a Share Certificate for Kagua Farmers' Co-op Society Ltd on 16th June 1992. This share certificate was issued after the title deed for the suit land had been issued and though it bore No. 1114, it was not indicated whether it corresponded with the land parcel No. Mitubiri/ Thuthua/ Block1/ 464. The 1st Appellant also produced a Roll of Allottees contained in a document referred to as the Presidential Probe Committee of Large Scale Farms in Makuyu- Muranga.
42. In the above referred document, on page 59 of the Record of Appeal, the said allottees are indicated as being allottees for Makuyu/ Kimorori/ Block 3/ Kagua F.C.S Ltd- Kabuku. The suit land herein is Mitubiri/ Thuthua/ Block1/464. These two seems to be different blocks of land, and maybe different schemes. In this Roll of allottees, Mungai Muigai is indicated as No. 464, though his Identity Numbers are not indicated.
43. On his part, the Respondent too produced documents being receipts from Kagua Farmers Co-op Society Ltd, to confirm that his late father Antony Kamau Njuguna paid some money to the said Society for Membership, Survey fees and registration in 1980s. Later he paid other monies to the Presidential Probe Commission on Large Scale Farms in Makuyu- Muranga. However, the said receipts do not indicate the land parcel number, that was been paid for. Was it this suit property or a different one?
44. What is also evident is that both Mungai Muigai and Antony Kamau Njuguna, who had paid some monies to Kagua F.C.S Ltd, and later to Presidential Commission of Large Scale Farms in Makuyu- Muranga, were later issued with title deeds for the same parcel of land. This therefore seems to be a case of double allocation rather than trespass.



45. The law is very clear that there can be only one title to land, and a parcel of land cannot be held by two or more persons with different individual titles, unless they own the said land jointly or commonly, but bearing one title. Section 30(1) & (2)(a) of the [Land Registration Act](#), provides: -

“(1) The Registrar may, if requested by a proprietor of land whose name appears in the register or a lease where no certificate of title or certificate of lease has been issued, issue to him or her a certificate of title or a certificate of lease, as the case may be, in the prescribed form showing, if so required by the proprietor, all subsisting entries in the register affecting that land or lease.

(2) Notwithstanding subsection (1)—

(a) only one certificate of title or certificate of lease shall be issued in respect of each parcel or lease”

46. Courts have severally held that where there are disputes over double allocation, the root of the title must be traced, this is because acquisition of the title is an end product, and the process of acquisition is important, and must be traced and must be procedural. See the case of *Kobilo Kandie vs James Ondiek* (2019) eKLR, where the court held: -

“Acquisition of a title to land is the end product and the process of acquisition is very important and must be procedural.”

47. Further, in the case of *Hubert L. Martin & 2 Others vs Margaret J. Kamar & 5 Others* (2016) eKLR, the Court while faced with an issued of double allocation had this to say; “A court face with a case of two or more titles over the same land has to make investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all the process and procedure that brought forth the two titles at hand. It must follow that the title that is upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their titles starting with its roots. No party should take it for granted that simply because they have a title deed or certificate of lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one’s case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder”

48. Before the trial court, the parties herein had challenged each other titles; therefore, each one of them had an obligation to call sufficient evidence to prove their claims/case on the required standard of balance of probabilities. This is a legal duty, and the burden of proof was upon the person who had alleged; since both of them had alleged, they were required to prove their case on the required standard. See section 109 of the [Evidence Act](#);

“109. Proof of particular fact.

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.



49. In arriving at its decision, the trial court relied on various decided cases among them the case of *Munyuu Maina vs Hiram Gathiba Maina Civil Appeal No 239 of 2009*, where the Court of Appeal held: -

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”

50. The trial court too relied on the case of *Peter Kaguny Kiragu vs Anne H. G. Muchunku (2021) eKLR*, where the court held: -

“.....DW2 testified that in their parcel file, a green card which is essential does not exist. That in the said file there is an earlier title that was issued on 15th August 1994, and that there is a caution in favour of Esther. For the Defendant to have a good title, it follows that she ought to prove that she got the title from a person who had good title. As per the green card produced in evidence by the Defendant, the initial owner of the suit property was one Emily Mbaire. No evidence has been produced as to how the said Emily Mbaire acquired the suit property. The Court therefore can not ascertain if she acquired through allocation directly from the government or from Nyakinyua Investment Company Limited. Further, it is not in doubt that while the said Emily Mbaire allegedly acquired the suit property in 1988, Waithira Kageni had already acquired the same as early as 1976, and sold the said suit property to Esther Wairiara in 1987. Therefore, as the suit property had already been located, it could not then be allocated again to the said Emily Mbaire.”

51. So, did the trial court consider all the relevant factors, evidence before it, relevant provisions of law and precedents in arriving at its decision of 15th March 2023?

52. As stated earlier, this court had a duty to re- evaluate the evidence adduced before the trial court, re-consider it, re-analyze the same, and then come to its own independent conclusion. This court as an appellate court does not need to overturn/ and or upset the trial court’s decision, just because it has been moved on an appeal, or could have decided differently. It must be evident that the trial court misapprehended the facts and law, and consequently misdirected itself and arrived at a wrong decision. See the case of *Mbogo & Another vs Shah (1968) EA pg15*: -

“an appellate Court will not interfere with the exercise of the trial Courts 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”

53. This court has observed as above that this is a case of double allocation; therefore, the court will re-consider the evidence adduced before the trial court and investigate which of the party herein was able to avail sufficient evidence, which evidence would trace the root of his title; bearing in mind that both of the original title holders are now deceased.

54. As the court held in the case of *Hubert L. Martins & Others (supra)*, the root of the title must be traced without a break in the chain, and that every party must show that his title has a good foundation, and that the said title passed properly to the said title holder. Bearing these principles in mind, this court will



now sieve through the available evidence before the trial court to unravel this mystery of who between the 1st Appellant and Respondent's father held a good title.

55. This court too will take into account the holding by the court in the case of *R vs Land Registrar Kilifi & Another Ex-parte Daniel Ricci* 2013)eKLR, where it was observed as follows: - “ A title deed is an end product of a process and that for a title deed to be protected by Article 40(1) of *the Constitution*, the holder of the said title has to establish that he followed the laid down procedure in acquiring it”
56. It is evident that the fathers of the 1st Appellant and the Respondent had some association with Kagaa Farmers Co-operative Society Ltd. They paid some monies to the said Society, were issued with receipts and the Presidential Probe Committee on Large Scale farms also interacted with both of them, and they paid some monies too to the said Probe Committee.
57. It is also very clear that two titles deeds were issued on the same date-on 10th May 1989. This court cannot hold that one of the title was first in time, and thus employ the maxim of equity which states, “ when two equities are equal, the first in time prevails.” None of the title herein is earlier than the other. See also the case of *Gitwany Investment Limited Vs Tajmal Limited & 3 Others* [2006] eKLR, where the Court held: -

“ My understanding is therefore that the title given to Gitwany in the first instance and which I have held to be absolute and indefeasible as regards the suit land is the earlier grant and in the words of the Court of Appeal in *Wreck Motors Enterprises vs Commissioner of Lands, C.A. No. 71/1997*(unreported): - is the “grant [that] takes priority. The land is alienated already.” This decision was again upheld in *Faraj Maharus vs J.B. Martin Glass Industries and 3 others C.A. 130/2003* (unreported). Like equity keeps teaching us, the first in time prevails so that in the event such as this one where, by a mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel of land, then if both are apparently and on the face of them, issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail. It must prevail because without cancellation of the original title, it retains its sanctity.”

58. The suit land in dispute is Mitubiri/ Thuthua/ Block1/ 464. While investigating the available evidence, the said evidence should lead to the tracing of the above property. This is because the 2nd Defendant (*Kagaa Farmers Co-operative Society Ltd*, did not appear before the trial court to avail evidence on whom between *Mungai Muigai* (deceased) and *Antony Kamau Njuguna* (deceased), did it allocate the suit land.
59. Further, the receipts produced before the trial court and now availed in the Record of Appeal do not indicate the payments were made for which parcel of land could the said receipts be connected to the suit land? Certainly not! The Share certificates too do not indicate they relate to which parcel of land.
60. The 1st Appellant faulted the trial court for holding that the Respondent had availed sufficient evidence to prove his case on the required standard of balance of probabilities. It was evident that the 1st Appellant produced his title deed, but he did not produce the area index Map.
61. The 1st Appellant based his case on the fact the Presidential Probe Committee on Large Scale Farms, which had prepared a Report on 8th June 1990, had found that indeed, *Mungai Muigai* held land parcel No 464. However, the document relied on, on Page 59 of the Record of Appeal shows the probe was for Land Parcel *Makuyu/ Kimorori/ Block 3/ Kagaa F.C.S Ltd*. The suit land is *Mitubiri/Thuthua/ Block 1*. These are two different blocks of land, and there was no evidence to link these two blocks as one.



62. Further, the 1st Appellant had produced a Share Certificate as exhibit before the trial court to prove that Mungai Muigai was a shareholder of Kagaa F.C.S Ltd. This Share Certificate was issued on 16th June 1992, whereas the title deed in issue was issued on 10th May 1989. Could the title deed have been issued before the holder of the said title deed was a member of the Society? It is evident that shareholders are always the ones eligible to be issued with parcels of land in a given Society and thereafter issued with Certificate of titles. See the case of Esther Ndegi Njiru & another v Leornard Gatei [2014] eKLR.
63. Although the 1st Appellant had produced a letter dated 22nd January 2019, signed by Monica Florence V. (Ass. County Commissioner, Makuyu Division), indicating that the land parcel in dispute appears in the Presidential Probe Register as belonging to Mungai Muigai, it is clear in the said Report, the Land parcel is Makuyu/ Kimorori/ Block 3, and not Mitubiri/ Thuthua/ Block1.
64. Further, the Land Registrar, R.M Mbuba, had on 1st August 2016, written a letter to the C.I.D Kigumo Division to confirm that land parcel No Mitubiri/ Thuthua/ Block1/ 464, belonged to Antony Kamau Njuguna, the father to the Respondent herein. This is the suit property, and the Land Registrar is the custodian of the land documents and / or public documents, which documents confirm that the suit property was owned by Antony Kamau Njuguna. This letter by the Land Registrar was written earlier than the one written by the Assistant County Commissioner.
65. The Respondent had also produced a Certificate of Official search dated 7th December 2018, which document confirmed that the suit land belonged to Antony Kamau Njuguna, as the absolute proprietor. The 1st Appellant had not produced any Certificate of Official Search, to confirm that indeed Mungai Muigai was the absolute owner of the suit land.
66. The 1st Appellant had also produced an extract of title, contained on page 61 of the Record of Appeal, which extract had the name of Antony Kamau Njuguna, cancelled, and later indicated not cancelled. The 1st Appellant made heavy weather out of this cancellation, but he did not call any witness from the Lands office to confirm that indeed the Antony Kamau Njuguna Certificate of title had been cancelled and/ or was not lawfully registered.
67. However, the Land Registrar who is the custodian of land documents had in his letter of 1st August 2016, indicated that the suit land was in the name of Antony Kamau Njuguna, but he did not indicate that the said parcel of land belongs to Mungai Muigai.
68. Therefore, from the available evidence, the suit land is traced as having been registered in favour of Antony Kamau Njuguna, and thus the root of Antony Kamau Njuguna's title is traceable, but not that of Mungai Muigai.
69. The 1st Appellate had alleged that his late father and himself have been in possession of the suit land since 1990, when the Presidential Probe Committee finished its investigations. However, the claim herein is not for adverse possession, or ownership of the land through prescriptive rights, but it was a claim of declaration that the 1st Appellant had wrongfully entered unto the Respondent's father parcel of land.
70. Even if the 1st Appellant claim was for ownership of the suit land through long period of occupation and possession, thus adverse possession, he did not call any evidence to support that allegation. Without calling of evidence to support a claim of long occupation and possession, then his claim remained mere allegations, which allegation is not sufficient to prove a case on the required standard of balance of



probabilities. See the case of CMC Aviation Ltd Vs. Crusair Ltd (No.1) (1987) KLR 103 where the court held: -

“The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents.”

71. The 1st Appellant had alleged in his Counter-claim that he had been in possession of the suit land since 1990, and that the Respondent’s father obtained the title deed to the said land irregularly, unlawfully, and the said title ought to be cancelled. However, this court has found that the Respondent’s father root of his title was traceable.

72. The 1st Appellant had alleged fraud, and the burden of proof was upon him as provided by sections 107 and 108 of the *Evidence Act*, which provides: -

“107. Burden of proof.

(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 fact it is said that the burden of proof lies on that person.

108. Incidence of burden.

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

73. It is trite that the onus of adducing evidence in support of any claim alleged in a suit falls squarely on the party making such a claim. In the case of Hellen Wangari Wangeshi vs Carumera Muthoni Gathua (2005) eKLR, the court held;

“it is well established fact that whoever asserts a fact is under an obligation to prove it in order to succeed”

74. Having re-considered, re-analyzed and re-evaluated the available evidence before the trial court, this court in its Appellate jurisdiction comes to its own independent conclusion that the root of Certificate of title held by Antony Kamau Njuguna, the father to the Respondent herein as was traceable, and thus he was the rightful holder of the said parcel of land.

75. The 1st Appellant’s father root of his title had a broken chain, in that the Share Certificate was issued after the title deed; there was no Certificate of Official Search; the Land Registrar confirmed that the suit land belonged to Antony Kamau Njuguna, and there was no record in the lands office to support the Certificate of title held by Mungai Muigai, the father to the 1st Appellant herein.

76. The two title deeds were issued on 10th May 1989, which titles were issued under the Registered *Land Act* (repealed), regime. This court observed earlier that under section 27 of the said repealed Act, now reiterated in Section 24 of the *Land Registration Act*, the registration of such persons shall vest in them absolute ownership of the said land together with all rights and privileges appurtenant thereto.



77. Therefore, each of the proprietors herein and/or their successors are supposed to enjoy the rights prescribed above. However, the said right cannot be conferred to two separate persons, unless they own the title jointly, which is not the case herein. See Section 30(2)(a) of the [Land Registration Act](#).
78. Further, Section 26 of the [Land Registration Act](#), provides that Certificate of title issued by the Land Registrar is prima facie evidence that the person named is the absolute and indefeasible owner of the suit land. Being in possession of the said title deeds, each of the proprietor is supposed to be the absolute and indefeasible owner, enjoying the rights prescribed above; that is Antony Kamau Njuguna and Mungai Muigai.
79. However, in this case, there is an issue of double allocation, and only one of the proprietors should be declared as the owner of the suit land, and the one to be declared so is the proprietor whose root of the title is traceable. The trial court held and declared Antony Kamau Njuguna, as the lawful proprietor, which decision aggrieved the 1st Appellant herein.
80. Further, it is evident that Section 26 of the [Land Registration Act](#) provides that Certificate of title issued by the land Registrar is not subject to challenge except on the grounds that it was issued through fraud, misrepresentation, illegally, unprocedurally or through corrupt scheme. This court had found that the two titles were issued through double allocation, to two different proprietors. Therefore, the said allocation was unprocedural, and thus illegal.
81. Having found that the double allocation was unprocedural, and could have occurred through mistake and/ or omission, and having found that the title held by Antony Kamau Njuguna, was traceable, then this court finds that the trial court was correct in invoking the provisions of section 80(1)&(2) of the [Land Registration Act](#), wherein it directed the land registrar to rectify the Register by cancelling the title held by Mungai Muigai(deceased), which could have been issued by mistake, and retain Antony Kamau Njuguna (deceased), as the proprietor of the suit land.
82. Antony Kamau Njuguna(deceased) having been declared as the lawful owner of the suit land, then his successors, the Respondent herein being one of them, have the right to enjoy the rights and privileges as provided by Section 24 of the [Land Registration Act](#).
83. How could such proprietor enjoy these rights and privileges? By being granted vacant possession of the suit land. It is evident that the 1st Appellant did admit that he was in possession and occupation of the suit land. Though he alleged he has been in such possession for a long time, there was no evidence of such long time occupation, and also his Counter-claim was not hinged on ownership through prescriptive right or adverse possession.
84. For the above reasons, this court finds and holds that the trial court did not err both in law and fact when it held that the 1st Appellant ought to give vacant possession to the Respondent herein, and he could only do so either voluntarily or through eviction. This court in its appellate jurisdiction finds no reasons to fault the trial court's holding and findings.
85. Consequently, this court having found that the root of Antony Kamau Njuguna (deceased) was traceable, and having considered the impugned decision of the trial court dated 15th March 2023, finds no reasons to upset and/or set side the said findings and determination. For the above reasons, this court upholds the findings and judgement of the trial court as contained in the said Judgement of 15th March 2023. Therefore, the court finds the instant Appeal not Merited.
86. The ultimate finding and holding of this court is that having found the instant Appeal not merited, the said Appeal be and is hereby dismissed entirely as prayed by the Respondent.



ii) who should bear costs of this Appeal?

87. The court herein will be guided by the provisions of Section 27 of the Civil Procedure Act, which provides that costs are awarded at the discretion of the court. However, costs follow the event, and are awarded to the successful litigant. The Respondent herein is the successful litigant, and thus is awarded costs of this Appeal, and costs of the suit before the trial court.

Appeal is dismissed accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 20TH DAY OF FEBRUARY 2025.

L. Gacheru

Judge.

20/02/2025

Delivered online in the presence of

Joel Njonjo- Court Assistant

N/A for the 1st Appellant

N/A for 2nd Appellant

N/A for 3RD Appellant

N/A for 4th Appellant

Mr. Wachira H/B for Kanyi Kiruchi for the Respondent.

20th February 2025.

L. Gacheru

Judge.

20/02/2025

