



**Muchiri v Mburu & another (Environment and Land Appeal 48
'B' of 2022) [2024] KEELC 5003 (KLR) (24 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 5003 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 48 'B' OF 2022**

**JG KEMEI, J
JUNE 24, 2024**

BETWEEN

STEPHEN GICHARU MUCHIRI APPELLANT

AND

JOSEPH MAINA MBURU 1ST RESPONDENT

RUIRU LAND REGISTRAR 2ND RESPONDENT

JUDGMENT

Introduction

1. The Appellant herein was the 1st defendant in the trial Court suit filed by the 1st Respondent whereas the 2nd and 3rd Respondents were the 2nd and 3rd defendants respectively. Vide an amended plaint dated 1/8/2019 the 1st Respondent claimed that at all material times he was the bona fide owner of the parcel of land known as RUIRU KIU BLOCK 2/GITHUNGURI/3858 (hereinafter the suit) denoted by ballot No. 2313 issued by Githunguri Constituency Ranching Company Limited (hereinafter the Company). That the 1st Respondent bought the suit land from Peter Nyanjui Mbugua for valuable consideration and took possession thereof.
2. The 1st Respondent averred that he obtained all the requisite documents for purposes of processing his title deed but upon visiting the Thika Lands Registry, he was informed that the Appellant had fraudulently obtained registration and a title deed was issued to him in respect of the suit land. The 1st Respondent lodged his complaint at the then Thika Registry and his documents were processed leading to issuance of title deed in his name. The 1st Respondent later subdivided the suit land into other plots RUIRU KIU BLOCK 2/GITHUNGURI /21157-21168. To that end the 1st Respondent prayed for Judgment in terms; A declaration that the plaintiff is the legal and bonafide owner of the land parcel RUIRU KIU BLOCK 2/GITHUNGURI/3858 now subdivided to RUIRU KIU BLOCK 2/GITHUNGURI /21157-21168 by virtue of being a shareholder of Githunguri



- Constituency Ranching Company Limited vide ballot no 2313; That the Court be pleased to cancel/annul the defendant's title to the land parcel RUIRU KIU BLOCK 2/GITHUNGURI/3858; that the defendant does meet the costs of this suit.
3. Denying the claim, the Appellant filed his amended statement of defence dated 23/8/2019. He put the 1st Respondent to strict proof and stated that the 1st Respondent is not the registered owner of the suit land and any sale agreement purportedly entered into was null and void. He further contended that the 1st Respondent obtained a Clearance Certificate from the Company fraudulently as he lacked locus standi. He urged the Court to dismiss the suit with costs.
 4. The 2nd and 3rd Respondents filed their joint statement of defence dated 9/10/2019. They admitted that the 1st Respondent was the registered owner of the suit land. They stated that the Appellant caused himself to be registered as the owner of the suit land through misrepresentation as a shareholder of the Company. They urged that the amended plaint does not disclose any cause of action against them and asked the Court to dismiss the suit against them with costs.
 5. The suit was set down for hearing on 8/11/2019. The trial Court upon hearing the parties and considering the rival evidence placed before it rendered its Judgment on 30/9/2020. The Hon Court allowed the 1st Respondent's suit as follows; A declaration that the Plaintiff is the legal and bonafide owner of the land parcel RUIRU KIU BLOCK 2/GITHUNGURI/3858 now subdivided to RUIRU KIU BLOCK 2/GITHUNGURI/21157-21168 by virtue of being a shareholder of Githunguri constituency ranching co ltd vide ballot no 2313; That this honorable Court be pleased to cancel/annul the defendant's title to the land parcel RUIRU KIU BLOCK 2/GITHUNGURI/3858; That the defendant do meet the costs of this suit.

The appeal

6. Aggrieved with the above Judgment, the Appellant has preferred the instant Appeal vide the amended Memorandum of Appeal dated 6/10/2022 on grounds THAT;
 - a. THAT the Learned Magistrate erred in law and in fact when he disregarded the credible defence evidence when the same was raised serious issues.
 - b. THAT the Learned Magistrate misdirected herself in law when the issue of the Plaintiffs being a member of Githunguri Constituency Ranching Company Limited only caused to find the Plaintiff's title to be legitimately acquired hence Ruling in favour of him.
 - c. THAT the Learned Magistrate misdirected herself in law and in fact when she ignored the fact THAT the Appellant had a proper title which the same was reflecting on the records of the Land Registrar, Ruiru.
 - d. THAT the Learned Magistrate erred in law in insinuating that the Appellant had not acquired the suit land legally back in 1999.
 - e. THAT the Trial Magistrate clearly erred in law and facts expressed outright bias against the Appellant and wholly disregarded his arguments.
 - f. THAT the Trial Magistrate erred in law and fact by ordering the Land Registrar, Ruiru to cancel the Appellant's title.
 - g. THAT the Trial Magistrate erred in law and fact by rejecting the Appellant's evidence which was uncontroverted.



- h. THAT the Learned Magistrate erred in law in failing to address her mind to the law and facts before her but instead addressed extraneous matters.
 - i. THAT the issue before the Learned Magistrate involved land and the issue of validity of the two title deeds held by the Appellants and the Respondent, wherein the Trial Magistrate disregarded the succession law that state that before dealing with any property belonging to a deceased person one ought to get legal authority for the same by filing for Letters of Administration and being issued with a grant to that effect.
 - j. THAT the Learned Magistrate erred in law by finding the sale of suit land to the Respondent by someone who had no legal authority to transact in the land as proper and legal transaction.
7. The Appellant prays for Judgment that;
 - a. The Appeal be allowed.
 - b. The Judgment delivered on 30/9/2020 be set aside and be substituted by an order of this Honorable Court declaring the Appellant as the legal proprietor of the land parcel RUIRU KIU BLOCK 2/GITHUNGURI/3858.
8. Before the Appeal was prosecuted, the Appellant moved the Court vide a motion dated 17/11/2022 seeking leave to adduce additional evidence on appeal. The Court granted leave in a Ruling delivered on 9/11/2023 and consequently the Appellant filed his Further Supplementary Record of Appeal dated 24/1/2024.
9. On 15/2/2024 directions were taken for parties to prosecute the Appeal by way of written submissions.

The Written submissions

10. On behalf of the Appellant, the firm of Daniel Henry & Co. Advocates filed submissions dated 14/5/2024. Rehashing the evidence adduced in the trial Court, the Appellant submitted that it is commonly accepted that two parties lay claim over the suit land. That the Appellant's title was issued in 2003 with the Appellant having purchased the suit land from Waikonyo Mbugua and obtained all clearances from the Company. On the other hand, that the 1st Respondent's nexus to the suit land crystallized in 2010 after he purchased the suit land from Waikonyo Mbugua's son after Waikonyo passed away. That it is not disputed that there were two green cards and two title deeds for the suit land and the trial Court had a duty to analyze the roots of each title.
11. The Appellant posited that the Company issued the Appellant with a clearance certificate to process his title deed. That it is questionable why the Company issued two clearance certificates for the same parcel of land; why the Company accepted the documents presented by Peter Nyanjui Mbugua in the absence of a grant of the estate of his late mother, Waikonyo Mbugua. That the trial Court ought to have gone ahead and ask for production of a Grant of the estate of Waikonyo or even the Chief's letter listing her beneficiaries.
12. The Appellant further relied on the Doctrine of Torrens Systems that where there are two titles, the first one to be registered prevails as affirmed by the Court of Appeal in Benja Properties Limited v Syedna Mohammed Burhannudin Sahed & 4 others [2015] eKLR. In reference to the Further Supplementary Record of Appeal the Appellant submitted that he has gone into great lengths to show the Court that it is doubtful that Waikonyo passed on in 1994 as claimed by the 1st Respondent yet the Appellant's claim is that he bought the suit land from Waikonyo in 1999.



13. That the 1st Respondent being also the chairperson of the Company had interest in the suit land and it is possible that having access to the documents, the record could be altered in his favor. That the 1st Respondent produced a sale agreement between him and Peter Nyanjui Mbugua and another agreement between Peter Nyanjui Mbugua and Daniel Kamotho noting the discrepancies in the use of a thumb print and signature by Peter Nyanjui Mbugua in the former and latter agreements.
14. The Appellant faulted the trial Court for disregarding the Appellant's evidence that his documents had been stolen and disregarded the OB abstract as undated yet at page 57 Record of Appeal it shows the date of 7/7/2009. That its illogical why the lands office would yield a search if there were no supporting documents as testified by the Land Registrar. That having paid for stamp duty, it shows that all other documents were surrendered and the relevant clearances and consents obtained. The Appellant pointed that despite the 1st Respondent alleging fraud, no cogent evidence was led to proof the same.
15. The Appellant also faulted the Land Registrar for failing to exercise his powers under Section 79(2) of the Land Registration Act having learnt that the suit land had two green cards and two title deeds. That the Appellant's title deed remains conclusive evidence of ownership as per the provisions of the Land Registration Act. In the end the Appellant beseeched the Court to allow the appeal in its entirety and set aside the impugned Judgment.
16. In rebuttal the 1st Respondent through the firm of Kanyi Kiruchi & Co. Advocates filed submissions dated 27/5/2024. The 1st Respondent summarized the parties' cases before the trial Court and drew two issues for determination; who between the Appellant and 1st Respondent is the owner of Ballot 2313 giving rise to the suit land and who should pay costs.
17. In addressing the first issue, the 1st Respondent submitted that it is imperative to interrogate the documents relied on by the parties. That his title traces its roots to Waikonyo Mbugua. That after her demise, her family transferred her shares to Peter who in turn sold the suit land to the 1st Respondent. That Peter Nyanjui Mbugua's registration was hampered by the Appellant's registration leading to the sale agreement dated 7/1/2010 between Peter Nyanjui Mbugua and the 1st Respondent.
18. On the other , it was submitted that the Appellant's title was assailed for not being supported by documentation because the Appellant cannot produce Waikonyo who sold him the land; Waikonyo died on 12/4/1994 as shown by copy of the Death Certificate produced in Court; there is no sale agreement between the Appellant and Waikonyo, no evidence of the documentation by way of Share Certificate number or entry in the company register; no document from the company to show any payment thereof; the Appellant's claim of selling the suit land to Josephat Mwangi Waweru on 9/4/2009 and reporting the loss of ballot paper and Share Certificate is doubtful; that the police abstract has no OB number; the discrepancies in the alleged purchase price and mode of payment of the purchase price. That failure to avail any documentation to back his title imputes fraud on his part as provided under Section 26 of the Land Registration Act and the case Hubert L. Martin & 2 Others Vs. Margaret J. Kamar & 5 Others [2016] eKLR.
19. Lastly on the issue of costs, the 1st Respondent posited that having proved the root of his title to the suit land, he is the successful party and deserves costs of the appeal. He urged this Court to affirm the trial Court Judgment dated 30/9/2020.

Analysis & determination

20. As a first appellate Court, this Court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing a conclusion from that



analysis. The Court has however to bear in mind the fact that it did not have an opportunity to see and hear the witnesses first hand. This duty is enunciated by Section 78 of the *Civil Procedure Act* which espouses the role of a first appellate Court which is to: ‘... re-evaluate, reassess and re-analyze the extracts of the record and draw its own conclusions.’

21. Besides, that duty has been affirmed in numerous decisions of the superior Courts. Notably in the case of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was pronounced thus:

“...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...”

22. To that end the germane issues for determination are;

- a. Who is the owner of the suit land?
- b. Whether the appeal is merited?
- c. Who bears costs?

23. It is trite that he who alleges must prove. The burden of proof in civil cases is on a balance of probabilities. The burden of proof is anchored in statute. Sections 107 – 109 of the *Evidence Act* provide;

“

“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.

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.”

24. The facts of this case refer to a case of double registration of land. The 1st Respondent claimed legal ownership of the suit land vide his amended plaint dated 1/8/2019. In the main he sought an order for a declaration that he is the bonafide owner of the suit land now subdivided into RUIRU KIU BLOCK 2/GITHUNGURI /21157-21168 and cancellation of the Appellant’s title in respect of the suit land.



25. Supporting his case, he took the stand as PW1. Adopting his witness statement as his evidence in Chief, he informed the Court that he bought the suit land on 7/1/2010 and paid Kshs. 500,000/- in cash and Kshs 100,000/- via banker's cheque. That Daniel Kamotho Mboro witnessed the sale agreement. That Nyanjui had a certificate No. 0024 dated 25/7/2008 in his name alongside membership receipts of his late mother, Waikonyo. That he had Waikonyo's Share Certificate No. 1144 dated 19/10/1972 and a copy of Waikonyo's Death Certificate. That upon checking the company register, the 1st Respondent decided to buy the suit land. It was his testimony that upon the demise of a member, the company requires a Chief's letter to identify the family members and a resolution by the family members on who the transfer is to be made to. That there was no need for succession since the lands were untitled. He produced the following documents as PEX 1 -9; Waikonyo's Death Certificate; land agreement dated 22/7/2008; bankers cheque No. 003798; Share Certificate No. B1375; copy of mutation form for the suit land; resultant title deed for RUIRU KIU BLOCK2/21157-21168; correspondence dated 12/7/2019; correspondence from the company dated 30/8/2019 and copy of extract of the Company register.
26. In cross, the 1st Respondent maintained that the Appellant could not have sold the suit land to Josphat Mwangi Waweru on 3/4/2009. This is because that the Appellant claimed loss of documents in July 2009. That the Appellant's title is not supported by relevant documents namely clearance certificate, transfer forms duly signed by the company. The 1st Respondent added that his title was issued on 22/1/2018 and he has since subdivided the suit land into 12 portions nos. 21157 to 21168.
27. The 1st Respondent's second witness was Peter Nyanjui Mbugua, Waikonyo's son. He testified that after his mother's demise, he and his brother Ngugi divided their mother's properties. Ngugi took the Gilgil property while PW2 retained the suit land which he sold for Kshs. 500,000/-. He denied knowing the Appellant and stated that in 1999, his mother had already passed on.
28. In cross, PW2 confirmed transferring the suit land to the 1st Respondent. That he did not have the Chief's letter because there was no dispute among the siblings and therefore succession proceedings were not done.
29. On behalf of the 2nd Respondent, Robert Mugendi Mbugua, Land Registrar no.327 attached to Ruiru land registry testified as DW1. He adopted his statement dated 18/10/2019 as his evidence in Chief. He also produced the documents in the List of Documents dated 9/10/2019 as exhibits.
30. In cross, DW1 informed the Court that the suit land has two green cards. He explained that before opening a green card in relation to the company lands, the registry requires a transfer form duly signed by the directors of the Company as the transferors and transferees as the beneficiaries of the land. That before 2012 the transfer was signed by the Commissioner of Lands (CoL) on behalf of the allocating Company upon obtaining the Company's authority. That the accompanying documents namely the clearance certificate, copy of transferee's ID card and the transfer would be submitted to the Lands Registry for the Registrar to prepare a green card and issue a title deed. That in the instant case the Appellant's title deed was not supported by any documentation whereas the 1st Respondent's title was duly transferred by the Company in his favor with all the necessary accompanying documents..
31. On his part, the Appellant Joseph Gichau Muchiri testified as DW2. He adopted his statement dated 17/6/2019 as evidence. It was his testimony that he bought the suit land in August 1999 from WAIKONYO who used to work with his father in Waira Kamau's farm. That he bought the suit land for Kshs. 38,000/- which he paid in installments. That Waikonyo took him to the Company where they met the Chairman of Githunguri Constituency Ranching Co. Ltd (GRCL) namely Wa Githuku and the suit land was confirmed as Waikonyo's. That Waikonyo gave him the certificate and ballot



which unfortunately got lost in 2009. That he reported the loss of documents and was issue with police abstract, Dex.1 dated 7/7/2009. The Appellant also produced a search (Dex. 2) confirming that he owned the suit land and obtained a title issued (Dex.3) on 27/2/2003. DW2 produced copy of green card as Dex. 3 dated 27/2/2003 and a sale agreement dated 3/4/2009 selling the suit land to Waweru Mwangi. That the intended transfer to Waweru Mwangi was hampered by a caution on the suit land placed by the 1st Respondent. Notably DW2 was emphatic that Waikonyo sold him the land in 1999 and that the Death Certificate produced by the 1st Respondent was fake.

32. In cross the Appellant was adamant that he bought the suit land from Waikonyo but there was no sale agreement between them. That he did not have any evidence for the payments he made to Waikonyo. He did not have proof of payment of clearance fee to the Company and neither could he recall the Share Certificate number. The Appellant added that his original title deed was with Waweru and denied that Waikonyo is dead.
33. The next witness was DW3, Josphat Mwangi Waweru. He told the Court that he bought the suit land on 3/4/2019 from the Appellant. That he duly paid for it and obtained LCB consent and submitted the following documents at Thika Registry; sale agreement, consent, ID card and KRA pin, valuation, stamp duty receipts and Application for Registration.
34. DW3 said despite submitting those documents, the transfer was unsuccessful reason being the Appellant's title had a caution. That notwithstanding, DW3 said he put a concrete wall on the suit land and was therefore in possession.
35. In cross, DW3 said the purchase price was Kshs. 185,000/- which he paid in cash; Kshs. 170,000/- paid at the bank and Kshs. 15,000/- was paid after obtaining the Land Control Board consent.
36. Having outlined the rival evidence adduced in Court by the parties, the first issue in this appeal is addressed as follows.
37. Section 3(3) of the [Law of contract Act](#) states as follows;

“(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—

- (a) the contract upon which the suit is founded—
 - (i) is in writing;
 - (ii) is signed by all the parties thereto; and
- (b) the signature of each party signing has been attested by a witness

who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the [Auctioneers Act](#) (Cap.526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.”

38. The above Section is also replicated in Section 38 of the [Land Act](#) as well.
39. Both parties are unanimous in tracing the original owner of the suit as Waikonyo. The Appellant claimed that he bought the suit land from Waikonyo's son, Peter. Peter testified that his mother passed on in 1994 and that there was no succession proceeding in respect of her estate. According to the 1st Respondent who also in his capacity as the Chair of the Company, upon demise of their member, all that the Company does is to transfer the shares to the beneficiaries of the deceased member. That



under the Memorandum and Articles of the Company members register show the land was registered in the name of Waikonyo, then transferred to Peter Nyanjui Mbugua then to the 1st Respondent. There is no evidence tendered by the Appellant to show that he was ever registered as a member of the Company. There is no requirement for grant of letters of administration as envisioned in law. In this case, Peter Nyanjui Mbugua testified that he and his siblings agreed on the mode of sharing their mother's estate. See Pex 2 Land agreement dated 22/7/2008. In particular Peter Nyanjui Mbugua inherited Waikonyo's shares in the Company and the suit land was transferred to him. A clearance certificate dated 25/7/2008 from GCRCL was produced as Pex.1 See also Pex. 9 copy of the Company register extract entry no. 2313 showing transfer to Peter on 25/7/2008 and subsequent transfer to the 1st Respondent on 8/1/2010. The next transfer to Progressive Women group was on 26/2/2010 but was withdrawn on 12/5/2017.

40. The 1st Respondent also produced a sale agreement between him and Peter Nyanjui Mbugua dated 7/1/2010. According to the agreement the purchase price was Kshs. 100,000/- which was paid via cheque for Ksh. 100,000/- drawn in Peter's name on the same date.
41. Dw1 the Land registrar testified that the suit land has two green cards. In respect of the 1st Respondent, the green card was opened on 22/1/2018 and suit land was transferred to the 1st Respondent and a title deed issued. The title deed was subsequently closed on sub division into land parcels 21157-211168.
42. On the other hand, the Appellant claimed that he purchased the suit land from Waikonyo in August 1999. He did not produce any sale agreement between him and Waikonyo neither proof of payment of the purchase price, if at all. By his concession he said that Waikonyo gave him the suit land documents but they got lost in July 2009, around ten years after the alleged purchase. That he paid clearance fee of Kshs. 2,000/- to the Company but no proof was tendered. That he obtained a title deed on 27/2/2003 confirming his ownership over the suit land. DW2 also testified that he could not recall the Share Certificate number. That the ballot was no 2313 and his Share Certificate similarly got lost. A glean of the police abstract indicates report of loss of Share Certificate and ballot paper. There is no specific reference of the property in whose respect the lost documents relate to. The official search produced dated 25/8/2004 indicate that the Appellant was the owner of the suit land. The sale agreement dated 3/4/2009 between the Appellant and Josphat Mwangi describes the Appellant as the registered owner of the suit land.
43. It is noteworthy to consider the contents of the Supplementary Record of Appeal filed by the Appellant challenging the authenticity of Waikonyo's Death Certificate. The 1st Respondent and Peter posited that Waikonyo died in 1994 and produced a Death Certificate. In denying the Death Certificate the Appellant produced a letter dated 16/12/2019 from the Director Civil Registration services stating that the death register (of Waikonyo) cannot be traced in their record.
44. It is trite that the legal burden of proof, unlike the evidentiary burden of proof does not shift. The majority decision of the Supreme Court in Presidential Election Petition No. 1 of 2017 between Raila Amolo Odinga & Another Vs. IEBC & 2 Others (2017) eKLR had the following to say on the evidential burden of proof in paragraphs 132 and 133 thereof: - a

“(132) Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and “remains constant through a trial with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.



(133) It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the Respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce ‘factual’ evidence to prove his/her allegations of breach, then the burden shifts and it behooves the Respondent to adduce evidence to prove compliance with the law....”

45. The 1st Respondent bore the legal burden to prove the death of Waikonyo. He produced her Death Certificate to that end. By challenging the Death Certificate, the Appellant bore the evidentiary burden to prove his doubts. Did the Appellant discharge the evidentiary burden? Am afraid not. In my view, the Death Certificate was a late registration of 13/11/2000, almost 6 years after Waikonyo’s death and the intervening period of the said letter (2019) and the year 2000, the number of death registrations recorded must be numerous. While the objection is sound, it is not lost to this Court that the Appellant himself stated that he did not know the whereabouts of Waikonyo. He did not have any documents least of all a sale agreement from Waikonyo to support his alleged purchase of the suit land. Additionally, the purported witnesses to his agreement were said to be all deceased. The totality of the absence of these evidence in my view militate against the root of the Appellant’s title.

46. Moreover, in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 Others* (2014) eKLR the Supreme Court held inter alia:

“The person who makes such allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue.”

47. I have also appraised myself with the provisions of the relevant statute governing inter alia the issuance of Death Certificates namely the [Births and Deaths Registration Act](#). Relevantly Section 17 thereto provides;

“17. Duty to notify deaths where registration compulsory

Upon the death of any person the registration of whose death is compulsory, it shall be the duty of the nearest relatives of the deceased present at the death or in attendance during the last illness of the deceased, and, in default of such relatives, of every other relative of the deceased dwelling or being in the same registration area as the deceased, and, in default of such other relatives, of each person present at the death and of the occupier of the house in which to his knowledge the death took place, and, in default of the persons hereinbefore in this section mentioned, of each inmate of such house, or of any person finding or taking charge of the body of such person or causing the body of such person to be buried or otherwise disposed of, to give notice within such time as may be prescribed to the registrar of the registration area in which the death took place.



48. In this case the nearest relative of Waikonyo is her son, Peter and I have no basis to doubt the Death Certificate in absence of contrary cogent evidence proving otherwise.
49. In the Court of Appeal case of Munyu Maina Vs. Hiram Gathiha Maina Nyeri Civil Appeal No. 239 of 2009 [2013] eKLR the Learned Judges stated 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. Additionally the same Court in the case of Mwangi James Njehia Vs. Janetta Wanjiku Mwangi & Another [2021] eKLR in dismissing an appeal challenging the trial Court's Judgement that found the Appellants' title to be invalid and ordered its cancelation stated;

“We say so because in the recent past and even presently, fraudsters have upped their game and we have come across several cases where Title deeds manufactured in the backstreets have, with collusion of officers in land registries, been transplanted at the Lands Office and intending buyers have been duped to believe that such documents are genuine and on that basis they have “purchased’ properties which later turn out to belong to other people when the correct documents mysteriously reappear on the register or the genuine owner show up after seeing strangers on their properties waving other instruments of title. It is the prevalence of these incidents that have necessitated the current overhaul and computerization of the registration systems at the Land Registry in

Nairobi.”

51. The upshot and totality of my analysis above is that the appeal is bereft of merit on the following grounds; the trial Court soundly analyzed the rival evidence as presented and there is no basis to depart from its findings; the root of the 1st Respondent's title was proven on a balance of probabilities and found more credence from DW1, the Land Registrar; the root of the Appellant's title was not supported by proper documentation; acquisition of a title is a wholistic process, not just the end product, the process is as important as the title; no allegation of bias against the trial Magistrate was proved by the Appellant, thus remains an allegation; In any event the trial Court declined the adduction of evidence long after close of pleadings but this Court granted leave for the same to be adduced and has now been duly considered; the Court's power to order cancelation of title is well entrenched in law by dint of Section 80 of the *Land Registration Act*; the Appellant has not established which evidence was rejected; the allegation that the Court addressed extraneous matters is unfounded; the land registrar outlined the documentation the office requires from land held by the Company. Even if this ground was to stand, the Appellant himself did not have any evidence of his purchase from Waikonyo (no sale agreement, proof of payment nor any supporting documentation).
52. The last issue for determination is who bears costs? Section 26 of the *Civil Procedure Act* provides that costs generally follows the event. The SC in the case of Jasbir Singh Rai & 3 Others Vs. Tarlochan Singh Rai & 4 Others [2014] eKLR affirmed that costs must always follow the event unless the Court has a good reason to order otherwise.
53. Ultimately the appeal is found to be without merit. It is dismissed with costs to the 1st Respondent.
54. Orders accordingly

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 24TH DAY OF JUNE 2024 VIA MICROSOFT TEAMS.



J G KEMEI

JUDGE

Delivered online in the presence of
Ms. Nyamu HB Gitau for Appellant
Kanyi for 1st Respondent
Attorney General - Absent
Court Assistants – Phyllis/Oliver

