



**Mbogo (Suing on Behalf of the Estate of the Late Stephen Karanja  
Mbogo - Deceased) v Thung'u & 2 others (Environment & Land Petition  
E001 of 2023) [2025] KEELC 268 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 268 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANGA**

**ENVIRONMENT & LAND PETITION E001 OF 2023**

**LN GACHERU, J**

**JANUARY 30, 2025**

**IN THE MATTER OF ARTICLES 2, 3(1), 10, 20, 21, 22, 40, 47, 48,  
50, 159(2) AND 162(2)(B) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL  
FREEDOMS UNDER ARTICLES 27, 40, 47, 60(1)(B) OF THE CONSTITUTION OF KENYA**

**BETWEEN**

**DAVID KAMAU MBOGO (SUING ON BEHALF OF THE ESTATE OF THE LATE  
STEPHEN KARANJA MBOGO - DECEASED) ..... PETITIONER**

**AND**

**GEORGE CHEGE THUNG'U ..... 1<sup>ST</sup> RESPONDENT**

**LAND REGISTRAR, MURANG'A ..... 2<sup>ND</sup> RESPONDENT**

**HON. ATTORNEY-GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The Petition herein dated September 22, 2023, was filed on September 27, 2023, wherein the Petitioner has sought the following Orders:
  - a. A Declaration Order be issued holding that the proprietary interest of the suit premises LOC.10/Gatheru/888, vests in the estate of Stephen Karanja Mbogo.
  - b. A Declaration Order be issued holding that the Title Document being held by the 1<sup>st</sup> Respondent and issued by the 2<sup>nd</sup> Respondent with respect to all that land known as LOC.10/Gatheru/888, is illegitimate, unlawful.



- c. An order be issued calling before the Court for quashing the Title Document held by the 1<sup>st</sup> Respondent and the Land Register held by the 2<sup>nd</sup> Respondents for all that land known as LOC.10/Gatheru/888.
  - d. An Order be issued allowing the Deputy Registrar Murang'a; Environment and Land Court to sign all documents to ensure transfer of LOC.10/Gatheru/888, from the 1<sup>st</sup> Respondent to the Petitioner.
  - e. That this Honourable Court do grant an Order for compensation for the infringement of the Petitioner's rights.
  - f. This Honourable Court do Order that costs of this Petition be borne by the Respondents.
2. This Petition is premised on the grounds set out on its face, as well as in the Supporting Affidavit sworn by Joseph Kamau Mbogo, in his capacity as the legally appointed Attorney of David Kamau Mbogo, the administrator of the Estate of the Late Stephen Karanja Mbogo, which is the Petitioner. The Deponent attached annexure marked "JKM1" which is a copy of a Power of Attorney together with a Certificate of Grant.
  3. The Petitioner's case is that land parcel No. LOC.10/Gatheru/888 (the suit property), belongs to the Estate of the Late Stephen Karanja Mbogo vide the Decree dated 18<sup>th</sup> November 1986, which was issued in Nairobi HC No. 147 of 1977; Stephen Karanja Vs Njoki Samuel and Charles Kamau Further, that the 1<sup>st</sup> Respondent herein acquired title to the suit land irregularly and unlawfully.
  4. That the in the Land Disputes Tribunal (LDT) Kahuro in Tribunal Case No.29 of 1999; George Chege Thung'u Vs David Kamau Mbogo, Daniel Irungu Mbogo and Charles Kamau Samue, the court ruled that the suit property did not belong to the 1<sup>st</sup> Respondent herein, but to the beneficiaries of the Late Stephen Karanja Mbogo, who have been residing on the said parcel for more than 40 years.
  5. That the decision of the Land Disputes Tribunal (LDT) Kahuro in Tribunal Case No.29 of 1999, was converted into an Order of the Court in Murang'a Magistrates' Case LDT No.5 of 2000: George Chege Thung'u Vs David Kamau Mbogo, Daniel Irungu Mbogo and Charles Kamau Samue.
  6. That the Petitioner being the administrator of the Estate of the Late Stephen Karanja Mbogo, is being prevented from fully administering the said estate because the title deed to the suit land is registered in the 1<sup>st</sup> Respondent's name.
  7. The Petitioner set out the history of the suit property as follows that: the suit land was originally registered in the name of Samuel Mukoma who died in year 1972, leaving behind two widows namely: Mary Kabura (1<sup>st</sup> wife) and Eunice Njoki (2<sup>nd</sup> wife). Further, Mary Kabura, and her children namely Charles Kamau and Jonah Machanga, resided on land parcel number LOC.10/Gatheru/823, while Eunice Njoki and her children being Stephen Karanja, David Kamau And Daniel Irungu resided on land parcel LOC.10/Gatheru/316.
  8. That upon the demise of Samuel Mukoma, the original registered proprietor of the suit land, succession proceedings were commenced in respect of the deceased's estate before the District Officer who upon hearing all the parties issued a decision whereby, the suit property being land parcel LOC.10/Gatheru/316, was subdivided into two parcels namely LOC.10/Gatheru/888 and LOC.10/Gatheru/889. Further, that upon the sub-division, two copies of the Green Cards for the two properties were issued.



9. The Petitioner contended that the 1<sup>st</sup> Respondent is in unlawful possession of the title deed to the suit property in violation of the Decree of the Court issued in Nairobi HC No. 147 of 1977: Stephen Karanja Vs Njoki Samuel and Charles Kamau, which appears as his annexure JKM4.

### **The 1<sup>st</sup> Respondent's Response**

10. The Petition is opposed by the 1<sup>st</sup> Respondent vide the Replying Affidavit sworn by George Chege Thung'u (the 1<sup>st</sup> Respondent herein) on 31<sup>st</sup> October, 2023.
11. The 1<sup>st</sup> Respondent affirmed that he is the registered proprietor of land parcel No. LOC.10/Gatheru/888 (the suit property), measuring approximately 1.01 Hectares, and attached a copy of the title deed thereto which was marked as "GCT-1". He averred that he purchased the suit land for value from one Charles Kamau, and was issued with a title deed thereof on 31<sup>st</sup> March, 1977.
12. That the late Stephen Karanja Mbogo, filed suit number Nairobi High Court Misc. Application No. 147 of 1977, against Charles Kamau and Njoki Samuel, culminating in a decision dated 7<sup>th</sup> November 1986, which decision required Charles Kamau and Njoki Samuel to transfer the property in contention to Stephen Karanja Mbogo. However, the said Decree of the Court was not in respect of the suit property which was already registered in the 1<sup>st</sup> Respondent's name as at year 1977. Further, the 1<sup>st</sup> Respondent was not a party to the proceedings in Nairobi High Court Misc. Application No. 147 of 1977.
13. Further, that the 1<sup>st</sup> Respondent instituted case No. Nairobi HCC No. 4838 of 1986, against David Kamau Samuel (who is one and the same person as David Kamau Mbogo, the Petitioner herein) and Daniel Irungu Samuel, culminating in a Decree directing the said David Kamau Samuel and Daniel Irungu Samuel, to render Kshs.12,000/- to the 1<sup>st</sup> Respondent, being General Damages and to deliver vacant possession of the suit property to the 1<sup>st</sup> Respondent. He annexed the Decree of the Court dated 9<sup>th</sup> July 1987, as his annexure "GCT-2". Further, that the said Decree was not set aside, varied nor appealed against.
14. The 1<sup>st</sup> Respondent characterized the instant Petition as res judicata in light of the decision of the Court in Nairobi HCC No. 4838 of 1986, and urged the Court to resist the Petitioner's attempt to hoodwink the Court to sit in an Appeal against the decision issued in the foregoing cause. He also averred that a suit craving the same Orders sought in the instant Petition was moved by the Petitioner, which suit was dismissed by the Court (Hon. E. Muriuki Nyaga, P.M.) on grounds of being res judicata.
15. Further, that the Petitioner failed to plead particulars of fraud as against the 1<sup>st</sup> Respondent warranting the cancellation of the latter's title deed over the suit land.

### **The 2<sup>nd</sup> Respondent's Response**

16. The 2<sup>nd</sup> Respondent also opposed the Petition vide the Replying Affidavit sworn by E.M. Mputhia on 13<sup>th</sup> December 2023, in her capacity as the Land Registrar, Murang'a. That according to the records available to the 2<sup>nd</sup> Respondent, the Register for land parcel number LOC.10/Gatheru/888 (the suit property), was opened on 4<sup>th</sup> March, 1977, and the said parcel of land is a subdivision of land parcel No. LOC.10/Gatheru/ 316. Further, that the suit property was registered in the name of Charles Kamau on 4<sup>th</sup> March 1977, and a land certificate issued in his name on the same date as attested to by the attached copy of the Green card thereto marked as the 2<sup>nd</sup> Respondent's exhibit "EM1".
17. Thereafter, on 31<sup>st</sup> March 1977, the suit property was transferred to and registered in the name of George Chege Thung'u (the 1<sup>st</sup> Respondent herein) and a land certificate issued in his name on the



said date as verified by the following annexures: “EMP 2(a)” being a copy of the said transfer; a copy of the application for the Land Control Board’s consent marked as “EMP 2(b)”; and, letter of consent marked as “EMP2(c)”.

18. She further averred that a restriction was registered in respect of the suit land on 10<sup>th</sup> December 1993, resulting from the Order of the District Magistrate’s Court in Civil Suit No. 94 of 1992, as verified by the 2<sup>nd</sup> Respondent’s annexure “EMP 3”.
19. That a further caution was lodged in respect of the suit property on 22<sup>nd</sup> April, 2002, in favour of Daniel Irungu Samuel of P.O. BOX 385 Murang’a, claiming beneficial interest therein as evidenced by the attached annexure “EMP 4”.
20. That on the encumbrances section in respect of the title deed to the suit land indicates a notification of charge by the Agricultural Finance Corporation (AFC) dated 22<sup>nd</sup> July 1983, which charge was used to secure a loan of Kshs.38,000/=, as attested to by annexure “EMP 5”.
21. It was the 2<sup>nd</sup> Respondent’s averment that neither the award of the LDT referred to by the Petitioner nor the decision of the Court adopting the same as its Judgment were ever presented to the 2<sup>nd</sup> Respondent for registration. The Court was urged to dismiss the instant Petition due to lack of merit.

### **The Petitioner’s Further Affidavit In Response To The 1<sup>st</sup> Respondent’s Rreplying Affidavit**

22. The Petitioner filed a Further Affidavit on 3<sup>rd</sup> April 2024, and dated 20<sup>th</sup> November 2023, in Response to the 1<sup>st</sup> Respondent’s Replying Affidavit dated 31<sup>st</sup> October, 2023. He stated that the suit property had not been subdivided and was registered as land parcel LOC.10/Gatheru/316, as at the initiation of case No. Nairobi HCC NO. 147 OF 1977 Stephen Karanja Vs Njoki Samuel and Charles Kamau
23. Further, land parcel LOC.10/Gatheru/316, was subdivided into two thereby, forming the suit property, during the pendency of succession proceedings in respect of the estate of the deceased registered proprietor. That Stephen Karanja Mbogo, became the lawful owner of the suit property following the issuance of the Decree in NAIROBI HCC NO. 147 OF 1977 Stephen Karanja Vs Njoki Samuel and Charles Kamau, and the beneficiaries of the Estate of the late Stephen Karanja Mbogo, took possession of the suit land and have been in occupation of the same to date.
24. He reiterated that the proceedings in Nairobi HCC No. 4838 of 1986, were not served on the Petitioner herein nor on the beneficiaries of the Estate of the late Stephen Karanja Mbogo.
25. That David Kamau Samuel and Daniel Irungu Samuel were not the owners of the suit property in year 1986.
26. This Petition was canvassed by way of written submissions, which the court summarizes as below;-

### **The Petitioner’s Submissions**

27. The Petitioner filed his written submissions dated 16<sup>th</sup> May, 2024, and identified three (3) issues for determination being:-
  - a. Whether the instant Petition is res judicata.
  - b. Whether the Respondents have violated the Petitioner’s constitutional rights;
  - c. Whether the Petitioner is entitled to the reliefs sought in the Petition.



28. It was submitted that the Kahuro LDT in Case number 29 of 1999 directed Charles Kamau to reimburse the amount paid by the 1<sup>st</sup> Respondent being the purchase price in respect of the suit property.
29. Reliance was placed in the holding of the Court in the case of Kangaru Vs Wachira & 4 Others (ELC Petition 001 of 2020) [2023] KEELC 18977 (KLR), in support of the argument that establishing the root of a title is essential to demonstrate ownership. Furthermore, both the decision of the Court in Nairobi HCCC Misc. 147 of 1977, and the award issued by the Kahuro LDT in Case number 29 of 1999, found the title held by the 1<sup>st</sup> Respondent in respect of the suit property to be faulty.
30. Reliance was placed on the provisions of Article 60 of *the Constitution* of Kenya, as read together with Sections 2 and 4 of the Fair Administrative Actions Act and the decision of the Court in Del Monte Kenya Ltd; National Land Commission & Another Vs Kandara Residents' Association & 3 Others (Interested Parties) (Petition 3 of 2020) [2022] KEELC 2234 (KLR).

### **The 1<sup>st</sup> Respondent's Submissions**

31. The 1<sup>st</sup> Respondent filed written submissions dated 17<sup>th</sup> May, 2024 through TLO Advocates LLP, and after setting out the history of the suit property, three (3) issues for determination by the Court were identified:
  - a. Whether the Petition is res judicata?
  - b. Whether the Petitioners have established a violation of their constitutional rights, specifically Articles 40, 47, 50 and 60 of *the Constitution* of Kenya 2010?
  - c. Whether the Petitioner is entitled to the Reliefs sought.
32. Reliance was sought in the decision of the Court in the cases of Kennedy Mokuia Ongari Vs John Nyasenda Mosioma & Florence Nyamoita Nyasende [2022] eKLR; and, Njangu Vs Wambugu & Another Nairobi HCCC No.2340 of 1991 to anchor the argument that the present suit is res judicata.
33. On the matter of the alleged violation of the Petitioner's constitutional rights, it was submitted that the Petitioner deliberately failed to disclose to the Court the existence of Nairobi HCC No. 4838 of 1986, which suit involved both the Petitioner and the 1<sup>st</sup> Respondent herein, and where the object of contestation was the suit property culminating in a Decree issued by the Court requiring the Petitioner and one Daniel Irungu Samuel to deliver vacant possession of the suit property to the 1<sup>st</sup> Respondent, and to pay the sum of Kshs.12,000/=, being general damages. Reliance was sought in the decision of the Court in the cases of Mumo Matemu V Trusted Society for Human Rights Alliance [2013] eKLR;
34. It was reiterated that the 1<sup>st</sup> Respondent was not party to the proceedings in Nairobi HCCC Misc. 147 of 1977; therefore, the Decree issued in the foregoing suit was incapable of affecting the entry of registration of title in respect of the 1<sup>st</sup> Respondent.
35. Further, that pursuant to the doctrine of stare decisis, the decision by the Kahuro LDT in Case number 29 of 1999, which was confirmed as an Order of the Court in Murang'a Magistrate's LDT No. 5 of 2000, must pave way for the holding of the Court in Nairobi HCC No. 4838 of 1986, the latter being a decision of a Superior Court. Reliance was sought in the case of Camps Bay Ratepayers and Residents Association & Another Vs Harrison & Another [2010] ZACC 19; 2011 (2) BCLR 121 (cc) 2011 (4) SA 42 (CC).



36. The 2<sup>nd</sup> Respondent did not file written submissions; accordingly, the Court will rely on the Replying Affidavit sworn on its behalf by E.M Mputhia, the land Registrar(Muranga), dated 13<sup>th</sup> December, 2023 on record.
37. Having considered the pleadings herein, the written submissions, the cited authorities and the relevant provisions of law, the court finds the issues for determination as follows;-
- I. Whether the current suit is res judicata
  - II. Whether the 1<sup>st</sup> Respondent's title over the suit property has been impeached and, thus, ought to be cancellation by the Court.
  - III. Whether the Petitioner's constitution rights were violated by the 2<sup>nd</sup> Respondent as claimed.
  - IV. Who shall bear the costs of the suit.

### **Whether the current suit is res judicata?**

38. It was the 1<sup>st</sup> Respondent's contention and submissions that the substratum of this Petition concerns the ownership of the suit land, which issue was conclusively determined by the Court in Nairobi HCC No. 4838 of 1986, thereby, rendering the instant Petition res judicata.
39. The Petitioner, in his written submissions, admitted that the 1<sup>st</sup> Respondent herein was the Plaintiff in Nairobi HCC No. 4838 of 1986, while the Petitioner herein and Daniel Irungu Samuel, were the co-Defendants. However, the Petitioner argued that he initiated the present Petition in a representative capacity, being the administrator of the Estate of Stephen Karanja Mbogo, who was not a party to the preceding suit.
40. Further, that the subject matter in Nairobi HCC No. 4838 of 1986, and the subject matter in this Petition are different for the reason that the former was concerned with trespass while the Petition herein is in respect of the violation of the Petitioner's constitutional rights. It was submitted that the cause of action in the present Petition has not been determined by any Court of law, therefore, the matter is not res judicata as argued by the 1<sup>st</sup> Respondent.
41. Black's Law Dictionary 10<sup>th</sup> Edition defines res judicata as follows:
- “An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties...”
42. The substantive law on Res Judicata is found in Section 7 of the [Civil Procedure Act](#) Cap 21 which stipulates as follows:
- “No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”.
43. In the case of Christopher Kenyariri vs Salama Beach (2017) eKLR, the Court enumerated the elements to be satisfied when determining whether a matter is rendered res judicata as follows:
- a. The suit or issue was directly and substantially in issue in the former suit.



- b. Former suit between same parties or parties under whom they or any of them claim.
  - c. Those parties are litigating under the same title.
  - d. The issue was heard and finally determined.
  - e. The court was competent to try the subsequent suit in which the suit is raised.”
44. Similarly, in the case of *E.T vs Attorney General & Another* (2012) eKLR, it was held that:
- “The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction.”
45. Further, in the case of *Independent Electoral and Boundaries Commission –v- Maina Kiai & 5 Others* (2017) eKLR, the Court set out the rationale for the rule of res judicata in these terms:
- “Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in distinctive but conjunctive terms:
- a) The suit or issue was directly and subsequently in issue in the former suit.
  - b) The former suit was between the same parties or parties under whom they or any of them claim.
  - c) Those parties were litigating under the same title.
  - d) The issue was heard and finally determined in the former suit.
  - e) The Court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”
46. The dispute between the parties herein is long-running, and was the subject of resolution by the Kahuro LDT in Tribunal Case No. 29 of 1999 whereby, the 1<sup>st</sup> Respondent herein was the Plaintiff, and the Defendants were as follows: 1. David Kamau Samuel’ 2. Daniel Irungu Samuel; and, 3. Charles Kamau Samue, in that order. The above mentioned proceedings before the LDT resulted in the award dated 28<sup>th</sup> October 1999, which award was filed before the Court on 18<sup>th</sup> January 2000, and adopted as a Judgment of the Court on 14<sup>th</sup> April, 2000.
47. The Court has further perused the Decree dated 8<sup>th</sup> November 1986, issued by the High Court of Kenya at Nairobi in Misc. 147 of 1977, whereby, Stephen Karanja being the Plaintiff/Appellant was represented by Daniel Irungu Samuel as his Legal Representative, while the Defendants/Respondents were Njoki Samuel and Charles Kamau In the said Decree, the Respondents were directed to transfer land parcel No. LOC.10/Gatheru/888, being the suit land, to the Plaintiff/Appellant.
48. The Court has carefully considered the said Decree of the Court dated 21<sup>st</sup> October 1987, issued in HCCC No. 4838 of 1986, whereby, the 1<sup>st</sup> Respondent herein was the Plaintiff and the Defendants listed thereunder are: David Kamau Samuel And Daniel Irungu Samuel. The foregoing cause proceeded as a formal proof following non-appearance by the Defendants in the said suit. The estate of the late Stephen Karanja was not party to the preceding suit.



49. The Court has further perused the Ruling of the Court issued on 7<sup>th</sup> May, 2019, by the Chief Magistrate’s Court at Murang’a in LDT Case No. 5 of 2000, in which the 1<sup>st</sup> Respondent herein was the Plaintiff/Respondent, and the Defendant/Applicants were David Kamau Samuel and 2 others. The trial Court dismissed the Applicants prayer for the District Land Registrar Murang’a to dispense with the production of the original title deed to the suit property which is held by the 1<sup>st</sup> Respondent herein and to issue a new title as per the Judgment of the Court in HCCC No. 4838 of 1986, on grounds of res judicata.
50. The Court has carefully considered the pleadings, evidence and rival submissions of the parties and is persuaded that the question of violation of the Petitioner’s constitutional rights arising from the failure by the 2<sup>nd</sup> Respondent to register the estate of the Late Stephen Karanja Mbogo, as the proprietor of the suit land pursuant to the decision of the Court in Nairobi HCCC Misc. 147 of 1977, has never been the subject of adjudication by a competent Court.
51. Further, in HCCC No. 4838 of 1986, the estate of the late Stephen Karanja, the Petitioner herein was not a party to that cause and which fact, therefore, cannot anchor 1<sup>st</sup> Respondent’s claim of res judicata.
52. Consequently, this court holds and finds that the 1<sup>st</sup> Respondent’s claim that this Petition is res judicata cannot hold water and is not merited, and is thus dismissed.

**Whether the 1<sup>st</sup> Respondent’s title over the suit property has been impeached and, thus, ought to be cancellation by the Court.**

53. The 1<sup>st</sup> Respondent is the registered owner of the suit property as per the copy of the Certificate of title thereto dated 30<sup>th</sup> March 1977, on record and marked as his exhibit “GCT-1”. The said Certificate of title was issued under the regime of “ The Registered Land Act, Cap 300(repealed)” under Section 27 of the said Cap 300(repealed) and now mirrored in Section 24(a) of the Land Registration Act, 2012, it provides;

“(a) (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”

54. Further, Section 26 (1) of the Land Registration Act, 2012 provides as follows;

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

55. The essence of the Petitioner’s claim is that the 1<sup>st</sup> Respondent became the registered proprietor of the suit property illegally and unlawfully on grounds that one Charles Kamau, who conveyed the said land, lacked good title over the suit land to pass to the 1<sup>st</sup> Respondent.



56. The Petitioner submitted and argued that his constitutional rights were infringed by the Respondents for failure to actualize the decision of the Kahuro LDT in Case No. 29 of 1999, as adopted as a decision of the Court on 14<sup>th</sup> April, 2000 in LDT No. 5 of 2000 (The Principal Magistrate’s Court at Murang’a), which ruled that the suit land belongs to the Petitioner herein and Daniel Irungu Samuel, meaning that Charles Kamau was incapable of passing a good title over the suit property to the 1<sup>st</sup> Respondent.
57. The Petitioner argued and submitted that the 1<sup>st</sup> Respondent refused to surrender the title deed in respect of the suit property thereby, frustrating the decision issued by the Kahuro LDT in Case No. 29 of 1999 For the avoidance of doubt, the Court in the aforementioned Decree directed the Defendant to refund Kshs.50,000/- to the Plaintiff (now 1<sup>st</sup> Respondent), together with half of the costs of the suit and further directed that the suit property be registered in the names of the Petitioner herein and Daniel Irungu Samuel jointly.
58. In the case of Kangaru vs Wachira & 4 others (Environment & Land Petition 001 of 2020) [2023] KEELC 18977 (KLR) (13 July 2023) (Judgment), the Court observed as follows:
- “ Thus, for this Court to effectively determine who is the bonafide owner of the suit property, the Court will first determine which party has been able to show the root of his/her title.”
59. In the case of Munyu Maina..Vs..Hiram Gathiha Maina, Civil Appeal No.239 of 2009, the Appeal Court held that:-
- “ We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”
60. The 1<sup>st</sup> Respondent’s claim of ownership over the suit property is founded on the conveyance executed with the said Charles Kamau, culminating in the issuance of a title deed in the 1<sup>st</sup> Respondent’s name on entry on the Green card thereto dated 31<sup>st</sup> March 1977. The copy of title issued by the 1<sup>st</sup> Respondent indicates that he was issued with the title deed on 30<sup>th</sup> March 1977. The 1<sup>st</sup> Respondent’s case is further premised on the decision of the Court in HCCC No. 4838 of 1986.
61. Therefore, this court finds and holds that the Petitioner possesses the necessary locus standi to bring the instant Petition, him being a beneficiary of the Estate of the deceased Stephen Karanja Mbogo, pursuant to the Certificate of Confirmation of Grant dated 29<sup>th</sup> July, 2022 on file.
62. The history of the suit property is set out in the Relying Affidavit of the 2<sup>nd</sup> Respondent dated 13<sup>th</sup> December 2023, on record. The suit property was registered in the name of Charles Kamau on 4<sup>th</sup> March 1977, being a sub-division of land parcel number LOC.10/Gatheru/316, and a land Certificate was issued in his name on the same date.
63. Further, the said Charles Kamau Samue conveyed the suit land to the 1<sup>st</sup> Respondent herein who obtained a title deed thereof in his name on 31<sup>st</sup> March, 1977. The sum of Kshs.8,000/=, being the purchase price in respect of the property is indicated against the 1<sup>st</sup> Respondent’s name in the extract from the Green card to the suit land dated 27<sup>th</sup> January 2003, and filed by the Petitioner as part of his List of Documents.
64. The 1<sup>st</sup> Respondent had testified before the LDT in Kahuro LDT in Case No. 29 of 1999, that he purchased the suit land for the sum of Kshs.35,000/=, on 31<sup>st</sup> March 1977. Interestingly, the copy of



title deed to the suit land annexed to the 1<sup>st</sup> Respondent's Replying Affidavit and bearing his name is dated 30<sup>th</sup> March 1977.

65. On the issue of the holding of the Court in HCCC No. 4838 of 1986, the court finds as follows;- Having stated hereinabove that the estate of the late Stephen Karanja Mbogo was not a party to the proceedings in HCCC No. 4838 of 1986, whose final orders were relied upon to underpin the 1<sup>st</sup> Respondent's claim over the instant property, it is the finding and holding of the Court that the Decree dated 21<sup>st</sup> October 1987, that was issued in that cause is incapable of extinguishing the proprietary rights held by Stephen Karanja Mbogo over the suit property.

66. Section 80 (1) of the *Land Registration Act* No. 3 of 2012 provides as follows;

“Subject to subsection (2), the court may Order rectification of the registrar by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”

67. In the case of Mary Ruguru Njoroge –Vs- Samuel Gachumu Mbugua & Others [2014] eKLR, the court held as follows:

“The court too has powers to order the rectification of the title or register in appropriate circumstances. The court will under Section 80(1) of the *Land Registration Act* order the cancellation or amendment of an entry or any registration when it is satisfied that the registration was obtained made or omitted by fraud or mistake. Registration under the said Section, in my view, refer to and includes a title or entry in the register or on the title itself. It is however upto the party seeking rectification to prove to the court's satisfaction that there has been fraud or a mistake in the registration. In my view, the mistake referred to under section 80(1) includes both a slip like a typographical error and a substantive mistake like the registration of a wrong or erroneous name. in equity, the court also has powers to rectify in suitable circumstances any written instrument to conform with the agreement between the parties, where the instrument, by mistake, does not express the agreement and the mistake justifies the intervention of the court.”

68. Further, in the case of Alice Chemutai Too ...Vs... Nickson Kipkurui Korir & 2 Others [2015] eKLR, the Court held that:

“It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme

I do not see how a person with a perfectly good title should be deprived of his title by activities of fraudsters. It is in fact time to put down our feet and affirm that no fraudster, nor any beneficiary of fraudulent activities, stands to gain for his fraud, and no title holder will ever be deprived of his good title by the tricks of con artists.”

69. From the totality of the evidence placed before the Court, it is evident that the root of the title deed held by the 1st Respondent over the suit property stands impeached. Further, the Court is alive to the Certificate of Confirmation of Grant dated 29<sup>th</sup> July 2022, issued by Chief Magistrate's Court at Murang'a in Succession Cause No. 217 of 1991, in respect of the Estate of the Late Stephen Karanja Mbogo wherein, the ownership over land parcel no. LOC.10/Gatheru/888, being the suit property, was vested to David Kamau Mbogo as the sole proprietor thereof.



70. From the proceedings and testimony which resulted in the tribunal award in Kahuro LDT in LDT Case No. 29 of 1999, which was later adopted as a Judgment of the Court in LDT Case No.5 of 2000 (The Principal Magistrate’s Court at Muranga) as well as the Decree issued in HCCC No. 147 of 1977, dated 18<sup>th</sup> November 1986, the Court is persuaded that Charles Kamau Alias Charles Kamau Samue lacked the necessary legal capacity to dispose the suit property to the 1<sup>st</sup> Respondent herein.
71. This court will rely in the case of Ngugi vs Kimunio (Environment & Land Case E006 of 2023) [2024] KEELC 1518 (KLR) (20 March 2024) (Judgment), wherein the Court reasoned as follows:
- “The suit land is not in the name of the Defendant, and he could not give what he does not have. This position is emphasized by the principle of ‘nemo dat non-quod habet’, which was enunciated by the Court in the case of Daniel Kiprugut Maiywa v Rebecca Chepkurgat Maim [2019] eKLR as follows: “The nemo dat principle means one cannot give what one does not have. This principle is intended to protect the title of the true owner. The rationale behind this principle is that whoever owns the legal title to property holds the title thereto until he or she decides to transfer it to someone else.”
72. The Court is satisfied that title held by the 1<sup>st</sup> Respondent is unlawful on account of the lack of legal capacity of the vendor, or the person who sold to him, being Charles Kamau Alias Charles Kamau Samue. Pursuant to the doctrine of nemo dat non-quod habet, the Court holds and finds that the title held by the 1<sup>st</sup> Respondent in respect of the suit property was defective ab initio and cannot stand. The same is hereby cancelled by the Court.
73. Accordingly, having carefully considered the pleadings herein, the relevant exhibits, the written submissions, and the relevant provisions of law, this court finds the Petition herein is merited and the same is allowed in terms of prayers No. (a) (b) (c) and (d) of the instant Petition dated 23<sup>rd</sup> September 2023.

**Whether the Petitioner’s constitution rights were violated by the 2<sup>nd</sup> Respondent as claimed.**

74. The Petitioner argued and submitted that its right to Fair Administrative Action pursuant to Article 47 as read together with Article 50 of *the Constitution* of Kenya was violated by the 2<sup>nd</sup> Respondent herein by neglecting to cancel the title deed held by the 1<sup>st</sup> Respondent in respect of the suit land, despite presentation of the Decree issued in Nairobi HCCC Misc. 147 of 1977 and the award issued by the Kahuro LDT in Case number 29 of 1999.
75. However, the Petitioner did not adduce any evidence to demonstrate that the 2<sup>nd</sup> Respondent was served with the Decree dated 18<sup>th</sup> November 1987, issued in Nairobi HCCC Misc. 147 of 1977, or with the Order of the Court dated 14<sup>th</sup> April 2000, adopting the award of the Kahuro LDT in Case number 29 of 1999, as a Judgment of the Court in LDT No. 5 of 2000 (The Principal Magistrate’s Court at Murang’a), and failed to effectuate the same.
76. Consequently, the Court is persuaded that the claim of violation of the Petitioner’s constitutional rights by the 2<sup>nd</sup> Respondent has not been substantiated by means of evidence as required by Sections 107, 109 and 112 of the *Evidence Act*, accordingly the prayer No (e) of the instant Petition fails.
77. In a nutshell, the Court finds and holds that the Petition herein is merited and the same is allowed entirely in terms of prayers No. a, b, c, d & d together with costs.



78. On the issue of costs, the Court is guided by the provisions of Section 27 of the *Civil Procedure Act*. The Petitioner being the successful litigant in the suit is entitled to the costs of the suit which shall be borne by the 1<sup>st</sup> Respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 30<sup>TH</sup> DAY OF JANUARY 2025.**

**L. GACHERU**

**JUDGE.**

**30/1/2025**

Delivered online in the presence of:

Joel Njonjo - Court Assistant

David Kamau Mbogo – Petitioner in person

M/s Maina for 1<sup>st</sup> Respondent

N/A for the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents

