



**Njagi & another v Mwangi (Sued as Legal Representative of the Estate of George Muturi Mwangi) & another (Environment and Land Appeal E009 of 2021) [2025] KEELC 593 (KLR) (14 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 593 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**  
**ENVIRONMENT AND LAND APPEAL E009 OF 2021**  
**A OMBWAYO, J**  
**FEBRUARY 14, 2025**

**BETWEEN**

**DAVID KIMANI NJAGI ..... 1<sup>ST</sup> APPELLANT**

**TABITHA NYAMBURA WAITHANJI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**BETHEL MUTURI MWANGI (SUED AS LEGAL REPRESENTATIVE OF THE ESTATE OF GEORGE MUTURI MWANGI) ..... 1<sup>ST</sup> RESPONDENT**

**LAND REGISTRAR NAKURU ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. This is an appeal arising from the judgment of Honourable J.B Kalo Chief Magistrate, Nakuru delivered on 6th May, 2021 in Nakuru MCELC No. 1 of 2019. The Appellants filed an Amended Memorandum of Appeal dated 20th August, 2021 appealing against the said judgment on the following grounds: -
  1. The Learned Magistrate erred in fact and in law in disregarding documentary evidence in the form of a sale agreement PEXH 1 and allotment letter PEXH 4 adduced by the first appellant at the lower proving that he had purchased the suit land from its original allottee Joseph Rurigi in the year 1979.
  2. The Learned Magistrate erred in fact and in law in accepting unsubstantiated oral testimony by the deceased 1st Defendant that he had purchased the suit land from one Joseph Rurigi which impugned finding was contrary to the provisions of the *Law of Contract Act* that mandatorily require all contracts for the sale of land to be in writing.



3. The Learned Magistrate erred in fact and in law in failing to find that no evidence of an alleged verbal agreement of sale of the suit land between the deceased 1st Defendant and Joseph Rurigi Kamau was admissible and in the alternative the same was not corroborated by any evidence of possession of the vendor's allotment letter, payment of purchase price nor taking of possession of land allegedly purchased.
4. The Learned Magistrate erred in fact and in law in failing to find that the deceased 1st Defendant had not tendered any evidence at the lower court in proof of how he purchased the land and/or paid the alleged purchase to the suit land.
5. The Learned Magistrate erred in law and in fact in failing to properly analyze evidence adduced by the witnesses of the deceased 1st Defendant at the lower Court which not only failed to prove the said deceased 1st Defendant's case of an alleged oral sale agreement but in some instances materially contradicted his testimony.
6. The Learned Magistrate erred in law and in fact in finding that the documents adduced by the Plaintiffs at the Lower Court did not justify their claim to the suit land in the absence of a transfer executed in their favour by the seller while on the converse accepting abstract documents of transfer adduced by the deceased 1st Defendant that were not proven by the credible cogent evidence to have flowed from any legitimate contract of sale between the said deceased 1st Defendant and the seller.
7. The Learned Magistrate erred in law and in fact in making a finding that the process of transfer of the suit land from the seller to the deceased 1st Defendant was in accordance to the law which finding was unsupported by contrived documents and inconsistent evidence adduced in court by the said Defendant.
8. The Learned Magistrate erred in law and in fact in examining alleged evidence of transfer documents adduced by the deceased 1st Defendant in isolation without seeking to link it with the question as to whether the said deceased 1st Defendant had at the outset proved that he had in the first place ever purchased the suit land from Joseph Rurigi as alleged.
9. The Learned Magistrate erred in law and in fact in finding that the Plaintiffs at the lower court had not proven illegality, fraud and involvement in a corrupt scheme in procuring registration of the suit land in favour of the deceased 1st Defendant which finding was against the weight of evidence adduced.
10. The Learned Magistrate erred in law and in fact in disregarding evidence by the Plaintiffs at the lower court of their long standing occupation of the suit land from the year 1979 when they purchased the same from Joseph Rurigi that further buttressed their claim to the suit land and on the converse failed in arriving at his decision, to consider the established fact that the deceased 1st Defendant had never at any one time been in possession of the suit land.
11. The Learned Magistrate erred in law and in fact in failing to properly analyze testimony and evidence presented by the parties at the lower court thereby arriving at the wrong decision. The Appellants seek orders setting aside the judgment and an order allowing the Appellants suit in the trial court with costs together with costs of the present appeal.

### **Brief Facts**

2. The Appellants filed a suit against the Respondents vide a plaint dated 7th May, 2018 seeking a permanent injunction against the 1st Respondent from the Appellants land RWANGONDU



SETTLEMENT SCHEME 45, an order of specific performance directing the 1st Respondent to transfer the land to the Appellants and costs of the suit.

3. The 1st Respondent's denied the allegations in that Plaintiff and averred that he was the registered owner of the suit property. The 2nd Respondent also denied the allegations in the Plaintiff and stated that in the event there was any fraud, the same was by the 1st Defendant to which they would seek indemnity against.
4. At the hearing, the Appellants and 1st Respondent testified and closed their cases. The trial magistrate found that the Plaintiffs did not prove their case on a balance of probabilities and proceeded to dismiss their case with costs to the 1st Respondent.
5. The Appellants being dissatisfied with the judgment lodged the instant appeal before this court. This court on 9th December, 2024 directed that the appeal be canvassed by way of written submissions.

### **Submissions**

6. Counsel for the Appellants filed her submissions dated 18th January, 2025 where she gave a background of the case and submitted on the grounds of appeal. On grounds 1,2,3 and 4, it was her submission that the trial court erred in disregarding documents showing how the 1st Appellant acquired the suit land from the original allottee Joseph Rugiri Wanjohi. He submits that the sale agreement was witnessed by the area chief and this fact was never contested by the 1st Respondent.
7. She further submits that the Appellant's possession of the allotment letter of Joseph Rugiri buttressed the fact that he purchased the suit land. She submits that the 1st Respondent claimed to have purchased the suit land from the original allottee Joseph Rugiri yet he did not have the allotment letter. She submits that the trial magistrate ought to have dismissed the 1st Defendant's evidence. It was also her submission that the court erred in accepting evidence of a claimed verbal sale agreement that the 1st Defendant was alleged to have had with the original allottee. Counsel argued that the same was inadmissible and relied on Section 3(3) of the *Law of Contract Act*. She further submits that the 1st Respondent despite claiming that he had purchased the suit land via banker's cheque, he failed to produce evidence of such payments. She also submits that the Appellants have been in possession of the land and thus no constructive trust could be imputed in the 1st Respondent's favour.
8. On ground 5, it was counsel's submission that the 1st Respondent's witness (DW2) contradicted the evidence by (DW1) on the issue of the form of agreement. He submits that DW2 stated that there was a written agreement yet DW1 claimed that the sale agreement was verbal. Counsel argued that DW2 stated that he did not know the land, its location, price or the person in possession of the same. She therefore submits that DW2's evidence was of no probative value on the 2nd Respondent's case. On grounds 6,7,8 and 9, she submits that the trial magistrate disregarded the sale agreement dated 4th December, 1979 and the allotment letter. She further submits that the 2nd Respondent failed to prove the root of his title. She added that the trial court put undue weight on the transfer documents by the 1st Respondent which were adduced in isolation of proof of how he bought the same from the original allottee. She submits that there was no evidence that the original allottee Joseph Rugiri signed the LCB consent and that the transfer forms were never submitted for registration. She submits that there was no legal paper trail leading to issuance of the title to the 1st Respondent. She submits that there was concrete evidence that the title was issued in a fraudulent and corrupt manner and thus it ought to be impeached.
9. Counsel relied on Section 43 of the *Land Registration Act* and Section 4 of the *Registration of Documents Act*. She submits that the alleged transfer failed to comply with the mandatory provisions of stamping and registration and thus could not create rights in favour of the 1st Respondent with



- regard to the suit property. She relied on a number of cases including the case of Alice Chemutai Too V Nickson Kipkurui Korir & 2 Others [2015] eKLR
10. On ground 10, she submits that failure by the Appellant to obtain consent to transfer did not invalidate the sale agreement. She cited the case of William Kitilit V Michael Kibe Eldirect Civil Appeal 51 of 2015
  11. Counsel for the 1st Respondent filed his submissions dated 1st February, 2025. On grounds 1,2,3 and 6 he submits that the Appellants failed to adduce evidence to prove their ownership. He further submits that the handwritten agreement contained contradictory identification number of the original allottee Joseph Rugiri. He submits that the Appellant had not established that there was vendor-purchaser relationship between them and the 1st Respondent to warrant orders of specific performance. He cited the case of Kimani V Njeri & 3 Others (2023) KEELC 17771 (KLR). It was his submission that the Appellants failed to prove ownership of the suit land.
  12. On grounds 4,5,7,8 and 9 he submits that the Appellants did not adduce evidence to impeach the 1st Respondent's title. He relied on the case of John Kamunya & Another V John Nginyi Muchiri & 3 Others [2015] eKLR and submits that the Appellants did not plead with specificity particulars of fraud for the 1st Respondent to rebut since they were general allegations. He further relied on Section 24 and 26 of the [Land Registration Act](#) and submits that the 1st Respondent was the registered owner of the suit property. He submits that the 1st Respondent went beyond to prove that he legally acquired the suit property. He further submits that the Appellants did not adduce evidence to prove fraud or that the 1st Respondent illegally or unprocedurally acquired the suit property. He added that prior to 20th January, 2015, the suit property was vested in the Settlement Trustee. He relied on the case of [Munyu Maina V Hiram Gathiba Maina, Civil Appeal 239 of 2009](#). On grounds 10 and 11, it was counsel's submission that the Appellants did not prove their alleged long occupation of the suit land since 1979. He added that the claim was not that of adverse possession to warrant the stay. He relied on the case of Raila Amollo Odinga & Another V IEBC & 2 Others [2017] eKLR and submits that it is trite law that parties are bound by their pleadings. He urged the court to dismiss the appeal with costs.

### **Analysis and Determination**

16. Upon consideration of the materials presented in respect to the Appeal herein including the Amended Memorandum of Appeal and Record of Appeal, the following issues for determination:
  1. Whether the trial magistrate erred in law and fact in dismissing the Appellants suit.
  2. Who should bear the cost of the appeal.
17. Being a first appeal, the court relies on a number of principles as set out in *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123:

“...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. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ...”
18. Further as was held in the case of *Mwangi V Wambugu* [1984] KLR 453 that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence



or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence.

19. This court has keenly perused the record of appeal and it is not in dispute that the Appellants case was based on the sale agreement between the 1st Appellant and Joseph Rugiri Wanjohi. The sale agreement was produced as PEX1 and the same is dated 4th December, 1979. It was the Appellants case that the fact that the 1st Appellant had the allotment letter, the same was sufficient proof that he had rightfully purchased the land from the original allottee. I am of the view that the said argument is rather misconceived since anyone can have a copy of the allotment but the issue of proving ownership is a whole different ball game. The legal principle is that he who alleges must prove and Sections 107, 108 and 109 of the Evidence Act provides that:

“107.

- (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. 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. 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.”

20. It is not in dispute that from the sale agreement, the seller’s identification number was 4627392 while this was a fact confirmed by PW1 and PW2 during trial, the Respondent disputed that the said number was different from that in his transfer forms which was 0361168/63. DW3 the allottee’s son confirmed that his father’s ID number was 0361168/63 and not 4627392. It is also not in dispute that the said ID was never produced as evidence and therefore there were glaring discrepancies which puts into serious doubt the authenticity of the sale agreement. It is not in dispute that the 1st Appellant confirmed that the seller did not execute the transfer forms in his favour a fact that the trial court noted in his judgment. It is my view that the Appellants failed to prove that the sale agreement was proper and this court’s is unable to hold that the agreement was authentic. It is my view that the trial court did not err in finding that the Appellants did not produce anything other than the sale agreement and the allotment letter that would entitle him to claim ownership of the suit land. It is my finding that a claim of ownership of land goes beyond just the sale agreement. There are steps of transfer and registration that ought to be finalized so that one can claim ownership. In addition, even with the allotment letter adduced, the same was not in the 1st Appellant’s name so as to confer ownership.

21. It is this court’s view that in as much as the trial court interrogated the 1st Respondent’s evidence, it was solely the Appellants duty to prove to the required standard that they purchased the suit property thus obtained ownership. I do find that the Appellants failed to convince the court and in light of the same, I find that the trial court did not err in its finding that the Appellants’ failed to prove their case on a balance of probability against the Respondents. In the upshot, the appeal lacks merit and the same is hereby dismissed with costs to the Respondents. It is so ordered.

**SIGNED BY: HON. JUSTICE ANTONY O. OMBWAYO**

**THE JUDICIARY OF KENYA.**

**NAKURU ENVIRONMENT AND LAND COURT**



