



**Gachiri & another v Muchai (Suing as attorney for Lucy Nyambura Muchai) & another (Environment and Land Appeal 103 of 2023)
[2024] KEELC 13768 (KLR) (5 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13768 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 103 OF 2023**

JG KEMEL, J

DECEMBER 5, 2024

BETWEEN

JOHN KAHIU KINIYA GACHIRI 1ST APPELLANT

SAMUEL KAMORI KAMAU 2ND APPELLANT

AND

**VERONICA WARUBURI MUCHAI (SUING AS ATTORNEY FOR LUCY
NYAMBURA MUCHAI) 1ST RESPONDENT**

LAND REGISTRAR, THIKA 2ND RESPONDENT

(Arising from the Judgement and the Decree of Hon Oscar Wanyaga delivered on the October 19, 2022 in Thika MCECL No 183 of 2019.)

JUDGMENT

1. This Appeal arises from the Judgement and the Decree of Hon Oscar Wanyaga delivered on the October 19, 2022 in Thika MCECL No 183 of 2019.
2. In the trial Court, the Plaintiff (now the 1st Respondent in this appeal) filed suit against the Appellants and the 2nd Respondent seeking in the main declaratory orders as to ownership of THIKA /MUN/ BLOCK24/1098 (hereinafter called the “suit land”), cancellation of the title in the names of the 1st and 2nd Defendants , a permanent injunction against the Defendants from interfering with the suit land; special damages in the sum of Kshs 300,000/-, general damages for loss and costs of the suit.
3. The Plaintiff averred that she acquired the suit land through her membership (No 887) of Thika Landless Cooperative Society which has since been wound up. That on 4/9/94 she was issued with a ballot No 12910 through her sister Pauline Wanjiru Muchai. She paid for land rates, title deed processing and other related fees and was issued with a receipt No 1075 leading to the issuance of a



title on 20/6/95. She settled in Switzerland and left the suit land under the watch of her sister Pauline Muchai and on her demise in 2017 another sister namely Veronica Waruburi Muchai who held her power of Attorney for the purpose. In 2019 Lucy Nyambura Muchai visited the land and to her surprise found a permanent development under construction on the suit land. On carrying out a search she found that her title had been unlawfully and fraudulently registered in the name of the 1st Defendant who had allegedly acquired it from the 2nd Defendant. She then filed a complaint with the Directorate of Criminal Investigations (DCI) where the 2nd Defendant was arrested but later released in unclear circumstances. The 1st Defendant offered to purchase the suit land from the Plaintiff an offer she rebuffed. Particulars of fraud against the Defendants were impleaded under para 16 of the Plaintiff. As a result of which the Plaintiff suffered loss of user and damage of Kshs. 300,000/- from a lease with a company that had planned to erect an internet mast. She averred that she has never sold the land to anybody least of all the 1st and 2nd Defendants.

4. The 1st Defendant (now 1st Appellant) denied the claim of the Plaintiff and contended that he lawfully acquired the land from the 2nd Defendant (the 2nd Appellant) herein and therefore is a bonafide purchaser for value without notice. He denied offering to purchase the land from the Plaintiff and sought to put her in strict proof.
5. In his Amended Defence dated the 11/5/2022 he averred that he carried out due diligence prior to purchasing the suit land which diligence showed that the land belonged to the 2nd Defendant; the suit land was vacant and under the control of the 2nd Defendant; the transaction complied fully with the law with respect to land control board consent, payment of stamp duty. Upon completion of purchase he took possession of the same, charged the same to Equity Bank Limited for a development facility of Kshs 5 Million which he used to develop a maisonette which is nearing completion. By way of counterclaim the 2nd Defendant stated that in the alternative if the 1st Defendant is found not to be the owner of the suit land, the agreement between him and the 2nd Defendant be deemed to be void for fraudulent misrepresentation. Particulars of fraud negligence and misrepresentation were pleaded under para 12 of the Counterclaim as a result of which the 1st Defendant suffered special damages in the sum of Kshs 6,200,540/-. Lastly the 1st Defendant sought orders against the Defendants for compensation by the 2nd Defendant in the event that his title is canceled by the Court; the 1st and 3rd Defendants be compelled to compensate him with the current value of the suit land and developments thereon
6. The 2nd Defendant denied the Plaintiff's claim and contended that he was the first allottee of the land from the Government of Kenya. Though he admits having been recording a statement he denied ever having been arrested on account of any complaint concerning the suit land.
7. The 3rd Defendant failed to enter appearance nor file Statement of Defence in the suit.
8. Upon hearing the suit the Learned trial Magistrate entered Judgement in favour of the Plaintiff as follows;
 - a. A declaration is hereby issued that the suit property herein, THIKA/MUNICIPALITY/BLOCK 24/1098 measuring 0.0800 Hectares belongs to the Plaintiff.
 - b. An order is hereby issued directing the 3rd Defendant herein to cancel the title deed for THIKA/MUNICIPALITY/BLOCK 24/1098 issued to the 2nd Defendant and thereafter transferred to the 1st Defendant herein and in place indicate Lucy Nyambura Muchai as the registered owner of the same.



- c. An order is hereby issued directing the Court's Executive Officer to execute any transfer document (if so needed) on behalf of the 1st Defendant to facilitate the transfer of the suit property to Lucy Nyambura Muchai.
 - d. 1st Defendant is granted 45 days from the date herein to remove all structures developments on the suit property failing which the Plaintiff shall be at liberty to remove such structures/developments without further reference to him (1st Defendant) whatsoever.
 - e. The Officer Commanding Station under whose jurisdiction is directed to provide security during the execution of order (d) above. The role of the Police shall be to maintain law and order.
 - f. 2nd Defendant is directed to refund the full purchase price (Kshs. 2,800,000/-) as well as the expulses (rates and stamp duty) of Kshs. 143,850/-.
 - g. 1st and 2nd Defendant are to conduct a joint valuation of the development on the suit property within 30 days i.e before close of business 19/11/2022. 2nd Defendant shall refund the assessed amount within 30 days of the said assessment.
 - h. The amount in (f) shall attract interest at Court rates from date of filing this suit (28/11/2019). The amount in (g) shall attract interest at Court rates upon expiry of 30 days from the date an valuation report is given by the assessor.
 - i. 2nd Defendant will pay costs of the suit to both the Plaintiff and the 1st Defendant.
9. Aggrieved by the Judgment above the Appellants proffered this appeal on the following grounds;
- a. That the Learned Magistrate erred in law and fact and misdirected himself when he admitted into evidence the purported title deed issued in the 1st Respondent's name on 20th June 1995; when it had been disowned by the Land Registrar (3rd Respondent), when the maker had not been called to testify, and when it was admitted in violation of rules on admissibility of public documents.
 - b. That the Learned Magistrate erred in law and fact and misdirected himself when he admitted into evidence the purported transfer instrument dated 19th June 1995 when the maker was not called to testify and identify it, when the document was itself incomplete without the signature of the transferor, or the being attested as require
 - c. That the Learned Magistrate erred in law and fact and misdirected himself when he failed to interrogate the regularity of the 1st Respondent's title in terms of the capacity of the Commissioner of Lands to transfer land to the 1st Respondent, when the said land was already alienated to Thika Landless Cooperative Society Limited and the obvious deformities of the purported transfer instrument which lacked signature of the transferor and which was not attested.
 - d. That the Learned Magistrate erred in law and in fact and misdirected himself when he found that the 1st Respondent's title deed was issued under Kiambu Land Registry when no evidence was tendered to that effect and further when he ignored the fact that the 1st Respondent's title deed was not supported by any government records.
 - e. That the Learned Magistrate erred in law and fact and misdirected himself and acted without any evidence when he found that the records pertaining to the 1st Respondent must have been



lost/removed during the transition from Kiambu Land Registry to Thika Land Registry when no evidence was tendered to that effect.

- f. That the Learned Magistrate erred in law and fact and misdirected himself when he found that the 1st Respondent's title deed was not obtained fraudulently.
 - g. That the Learned Magistrate erred in law and fact and misdirected himself when he applied the doctrine of priority when the same was clearly inapplicable based on the facts of the case.
 - h. That the Learned Magistrate in law and fact and misdirected himself when he concluded that the number "1172" appearing on the ballot produced by the 2nd Respondent was written over some other number when it was not the case and when he ignored other identifiers such as the serial number and signatures.
 - i. That the Learned Magistrate erred in fact and law when he paid more weight to the ballot filed by the 1st Respondent more than that filed by the 2nd Respondent despite striking similarity.
 - j. That the Learned Magistrate erred in law and fact when he totally ignored the letter from the liquidator dated 8th March 2001 transferring ownership of the plot to the 2nd Respondent and further requesting the Land Registrar to issue a title deed to him.
 - k. That the Learned Magistrate erred in law and fact and misdirected himself when he totally ignored the Appellant's submissions and the issues raised thereunder.
 - l. That the Learned Magistrate erred when he found that the 1st Respondent had proved her case on a balance of probabilities.
 - m. That the Learned Magistrate erred in law and fact when he made orders which were not pleaded.
 - n. That the Learned Magistrate erred when he made the orders that he did.
10. Consequently, the Appellants sought the following orders;
- a. That the appeal be allowed and Judgment and the decree delivered on the 19/10/22 be set aside and substituted with an order dismissing the suit with costs to the Appellants.
 - b. Costs of the appeal be in favour of the Appellants.
11. With leave of the Court on the 29/5/24 ELCA No 100 of 2022 filed by the 2nd Appellant was consolidated with this appeal with ELCA 103 of 2022 being the lead file. The parties adopted the Record of Appeal dated 17/11/2022 as the joint grounds of Appeal.
12. Upon admission of the Appeal, the parties agreed to canvass the Appeal by way of written submissions.

The written submissions

13. On 29/5/2024 directions were taken and parties agreed to canvass the appeal by way of written submissions. At the time of this Judgment only the 1st Appellant had filed submissions dated 7/8/2024 through the firm of Gikenye Mugo Rienye & Co. Advocates.
14. Reciting the trial Court case and ensuing Judgment, the 1st Appellant framed five issues for determination; whether the Hon Magistrate erred by admitting into evidence the title deed issued on 20/6/1995 yet the transfer instrument was dated the same day; whether the Hon Magistrate erred by finding that the said title deed was issued by Kiambu Lands Registry; whether the Hon Magistrate erred in applying the doctrine of priority when the same was inapplicable; whether the trial Court



erred in ignoring the 1st and 2nd Appellants' exhibits and lastly the Court erred in shifting the burden of proof to the Appellants.

15. On the first issue, the 1st Appellant was emphatic that he objected to the production of the impugned title deed during the hearing. That the trial Court's rendition on the said title deed was erroneous because it was contrary to the law on production of public documents; that the finding on issuance of the title deed in by Kiambu registry was unsupported by evidence and the conclusion that the police did not find any wrong doing was erroneous. Reliance was placed on Section 26(2) of the [Land Registration Act](#) and Section 81(2) of the [Evidence Act](#). That the impugned documents were not certified as required by law.
16. Secondly, that the finding on issuance of the title deed by Kiambu Registry as a predecessor of Thika Registry was not based on any evidence. That other than the title deed, the 1st Respondent did not tender any other evidence in support of its origin in form of a green card or valid transfer documents. That it was incumbent upon the 1st Respondent to go beyond the instrument of ownership in supporting her case as was held by the Court of Appeal in the case of *Martevé Guest Hiuse Limited Vs. Njenga & Others* [2022] KECA 539 KLR.
17. Regarding the doctrine of priority, the 1st Appellant argued that the same was misapplied. That the doctrine only applies in a case of two competing title deeds both issued by the Govt by mistake and in the absence of fraud. Reference was made to the case of *Gitwany Investment Ltd Vs. Tajmal Ltd & 3 others* (2006)eKLR.
18. The 1st Appellant further faulted the trial Court for disregarding the Appellants' evidence in particular the 2nd Appellant's ballot and letter dated 8/3/2001. That the Court erred in finding that there was no evidence that the 2nd Appellant's father balloted for the suit land.
19. Lastly it was posited that the burden of proof as laid down in section 107 and 109 of the [Evidence Act](#) lay with the 1st Respondent. That it was incumbent upon her to prove that the Appellants' title was obtained through fraud, misrepresentation or through a corrupt scheme. That the Hon Magistrate failed to appreciate the standard of proof in cases involving pleas of fraud which is higher than a balance of probabilities. In the end the Court was urged to find the appeal merited and allow it as prayed.

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. In addition to that, it is possible for an appellate Court to depart from the findings by the trial Court if it is apparent that such findings are not supported by evidence on record, or where the trial Court is shown to have acted on wrong principles of law, as held in *Jabane Vs. Olenja* [1986] KLR 661. See also the Court of Appeal decision in *Chief Justice and President of the Supreme Court of Kenya & Another Vs. Khaemba* [2021] KECA 322 (KLR).
23. Having considered the consolidated Record of appeal, trial Court record and evidence thereto and the submissions by the parties; I distil the following issues for determination;
 - a. Whether the appeal has merit?
 - b. Who bears costs?
24. In answering the first issue, the Court will determine whether the 1st Respondent proved her case in the trial Court on a balance of probabilities. Further the Court has to interrogate the issue framed for determination by the trial Court to wit; whether the Appellants were bonafide purchasers of the suit land and whether the Appellants are entitled to the orders ought.
25. It is trite that he who alleges must prove. The burden of proof in civil cases is on a balance of probabilities. Sections 107 – 109 of the *Evidence Act* which 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.”

26. The Court of Appeal in the case of *Mbuthia Macharia Vs. Annah Mutua Ndwiga & Another* [2017] eKLR explained that the legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. That constitutes evidential burden. The learned Judges cited with approval the same principle of law as amplified by the learned authors of the leading Text Book; - *The Halsbury's Laws of England*, 4th Edition, Volume 17, at paras 13 and 14:

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.



14. The legal burden of proof normally rests upon the party desiring the Court to take action; thus, a claimant must satisfy the Court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”
27. The 1st Respondent claimed ownership of the suit land by virtue of Lucy’s membership number 887 in Thika Landless Cooperative Society Ltd. That Lucy who resides abroad balloted for the suit land on 4/0/1994 through her late sister Paulina Wanjiru and was issued with ballot serial receipt no. 12910. That eventually on 13/9/1994 she paid for the land title deed, rents, rates and administration fees and was issued with receipt no. 1075 and subsequently a title deed was issued on 20/6/1995.
28. To support the above averments, PW1 produced the documents listed in the List of Documents dated 4/12/2020 namely; power of attorney, Plaintiff’s national ID card, Plaintiff’s PIN Certificate, Donor’s national ID, Donor’s PIN Certificate, ballot serial no 12910, receipt no 1075, transfer form dated 20/6/1995, title deed issued on 20/6/1995, death certificate for Paulina Wanjira Muchai, Eulogy for Paulina, Official search dated 2/7/2019, green card opened on 18/11/2013, photos of the suit land, Lease agreement dated 28/3/2019 and letter by lease - Trika Global dated 2/4/2019, authority to sign pleadings, demand letter and Letter to DCI.
29. Indeed, the record shows that the Appellants objected to the production of the documents numbered 6, 7, 8, 9 and 13 being ballot no. 12910, receipt no. 1075, transfer form dated 20/6/95 and title deed issued on 20/6/95 and green card opened on 18/11/2013. The trial Court reserved its Ruling on their admissibility in the Judgment and the subsequent finding is also challenged in this appeal. I will revert to this shortly.
30. Opposing the 1st Respondent’s suit, the Appellants filed their separate Statements of Defence as already summarized in paras 5- 7 above. Collectively they denied her averments and put her to strict proof thereto.
31. The 1st Appellant’s gist of Defence is that he validly purchased the suit land in 2014 from the 2nd Appellant for Kshs. 2.8 Million. That he duly paid for stamp duty of Kshs. 100,040/= and later a title deed in his favor was issued. That he took possession of the suit land in 2015 and commenced construction in 2019 upon being financed by Equity Bank to the tune of Kshs. 5 Million.
32. The 1st Appellant (DW2) vide his List of Documents dated 29/8/2022 produced the copy of letter from the liquidator of Thika Landless Cooperative Society Ltd and copy of Ballot for the suit property. These documents were similarly objected to by the 1st Respondent and they were marked DMFI 13 and 14.
33. In the same breath the 2nd Appellant (DW2) adopted his statement dated 19/3/2021. He claimed ownership of the suit land by virtue of a gift inter vivos from his late father who was a member of Thika Landless. That his father did not retain any ownership documents having surrendered them to Thika Landless for issuance of a title deed in DW2’s name. That having been in continuous occupation of the suit land, he sold it to the 1st Appellant and accordingly passed him a good title.
34. DW1 produced the documents contained in the List of Documents dated 11/5/2022 namely copy of RTGS, copy of a consent from Land Control Board, copy of rates Clearance Certificate, copy of spousal consent, copy of transfer document, copy of stamp duty declaration & deposit slip, copy of the booking form, receipt, copy of title deed, copy of approved building plan, photograph of the building



and sale agreement. All these documents except for the photographs were also objected to and marked as DMFI 1-10 and 12.

35. On the question of objection to the witnesses' documents, the Appellants impugn the Hon Magistrate Court finding that since both parties traced the origin of the suit land to Thika Landless and the Society having been liquidated, it would be unreasonable to insist on the makers to produce the assailed documents. That the parties were well in order to produce the documents issued to them as they were parties to their respective transactions and therefore allowed the documents marked as MFI be produced as exhibits for rival parties.
36. In their submissions dated 28/9/2022 at the trial Court, the 1st Appellant himself submitted that it would be impossible to have the makers to attend Court and urged the Court to invoke Section 35(2) of the Evidence Act and admit the documents as exhibits. On her part, the 1st Respondent did not address the issue of production of the aforesaid documents in her submissions dated 28/9/2022
37. I have appraised myself with Section 35 of the Evidence Act provides as follows;

“ 35. Admissibility of documentary evidence as to facts in issue

(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say—

(a) if the maker of the statement either—

(i) had personal knowledge of the matters dealt with by the statement;
or

(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters;
and

(b) if the maker of the statement is called as a witness in the proceedings:

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay



or expense which in the circumstances of the case appears to the Court unreasonable.

- (2) In any civil proceedings, the Court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) of this section shall be admissible or may, without any such order having been made, admit such a statement in evidence—
- (a) notwithstanding that the maker of the statement is available but is not called as a witness;
 - (b) notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or the Court may approve, as the case may be.”

38. The above provision is express that the Court may admit documents as evidence if it is satisfied that there will be undue delay or expense if such documents are not capable of being produced by the maker. In the instant case, none of the parties disputed the liquidation of Thika Landless as claimed. For the rival parties to insist that the makers of Thika Landless parties be availed to produce evidence in Court flies in the face the above provision.

39. The Court of Appeal in *Parkar & another v NO & 2 Others* [2023] KECA 908 (KLR) discussed in depth the exceptions contemplated under Section 35 of the *Evidence Act* as follows;

“The exception under section 35 are: if the maker of the document is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the Court unreasonable ...

....

In any event, admission of a document in evidence is not to be confused with proof of a document. When the Court is called upon to determine the admissibility of a document made by a witness who is dead or cannot be availed, the Court concentrates only on the document and the exceptions permitted under the *Evidence Act*. Conversely, when a Court is called upon to form a judicial opinion whether a document has been proved, disproved, or not proved the Court does not look at the document alone or only at the statement of the witness standing in the box. It takes into consideration probabilities of the case as emerging from the whole record. In our view, it could not have been the intention of the law that the Court should always apply its judicial mind to the entire record of the case, each time a document is placed before it for admission and form an opinion if it was proved before marking it as an exhibit.

Admissibility of a document is one thing and its probative value quite another. These two aspects cannot be combined. A document may be admissible and yet may not carry any conviction and weight or its probative value may be nil”



40. Based on the forgoing I do not find any misdirection on the part of the Hon Magistrate to admit the documents as exhibits. The Ruling applied *mutatis mutandis* for both rival sides in the suit. In any case the 1st Appellant is on record in urging the Court to do so and to turn around and raise the issue as a ground amounts to blowing hot and cold at the same time. Grounds No 1 and 2 of the appeal accordingly fail.
41. The next issue is whether the 1st Respondent discharged the burden of proof placed on her. Inter alia PW1 produced the ballot no 12910 for Part one dated 4/9/94 in the name of Paulina, the Plaintiff's sister. She also produced receipt No. 1075 in the name of Lucy dated 13/9/94 for Kshs. 2,500/=. Further a transfer of land was produced dated 20/6/1995 leading to issuance of a title deed on 20/6/95. The Plaintiff testified that on 2/7/2019 while visiting the Lands registry she realized her green card was missing in the suit land binder records and new green card had been issued as replacement. She conducted an official search dated 2/7/2019 (Pex.8) which revealed that the 2nd Appellant was the registered of the suit land. The Plaintiff then resorted to report the matter to DCI leading to the 2nd Appellant's arrest and release in unclear circumstances. See P.Ex 19 dated 5/11/2019.
42. Tasked to shed light on the suit land title documents, PW1 said she was a care taker of the suit land on behalf of the Plaintiff. That prior to her role, her late sister Paulina was the custodian of the attendant documents. The fact of Paulina's death was proved by way of evidence through her death certificate issued on 23/1/2018. This evidence was not rebutted. The Plaintiff's case was hinged on third parties who she legally appointed to act for her due to the unchallenged fact that she resides abroad.
43. PW4 the Land Registrar also testified that the suit and initially belonged to Thika Landless. That there was a transfer of land dated 20/6/95 in favor of Lucy and another transfer from Thika landless to 2nd Appellant on 18/11/2013. PW4 conceded that it was not possible for a liquidated company to transfer land to a person, 13 years after its liquidation.
44. The Court of Appeal in the case of *Munyu Maina Vs. Hiram Gathiha Maina* [2013] eKLR it was stated,
“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 would not be noted in the register.”
45. Applying the standard of proof required herein on a balance of probabilities, I opine that the 1st Respondent proved her claim on the ownership of the suit land.
46. By his own admission, other than the ballot card No. 1172 and a green card showing an entry in his name the 2nd Appellant testified that he did not have any documents to prove his father's ownership over the suit land. That the copy of the ballot card bears the same date as the 1st Respondent's. This evidence was in line with PW4's testimony that at the Lands Registry there was no evidence that the suit land was ever transferred by Thika Landless to Kamau Muturi (the 2nd Appellant's father). He testified that the original documents were with the liquidator of Thika Landless. Moreover the 2nd Appellant failed to adduce evidence in form of a members register in support of his father's membership, receipts for payment of the land, land rates, title processing and other related expenses to the plot. There was no link between the ballot and the name of Kamau Muturi unlike the ballot of the 1st Respondent which showed that the ballot was in the name of Pauline her sister. Interestingly the Court upon keen scrutiny found that the ballot adduced by the 2nd Appellant bore the words “Surveyors copy” in contrast to the



ballot of the 1st Respondent which bore the “allottees copy”. The 2nd Appellant failed to address the Court on the meaning of the words on the ballot. Suffice to state that a simple interpretation is that the ballot adduced by the 2nd Appellant was the one that was given to the surveyor who was carrying out the partitioning of the land. He did not explain why he failed to adduce the ballot of the allottee, in this case that of his father. The only inference that can be made is that Kamau Muturi did not have an allottees ballot. A close scrutiny of the said ballot shows that the number 1172 contains an underlying erasure. Again the 2nd Appellant did not explain the erasure other than to demand that the Court ought to have taken judicial notice that the ballot was old and illegible. It is one thing for a ballot to appear old and another to contain an erasure. In the absence of any cogent explanation, the Court makes an inference that the number was tampered with. It was not in dispute that the 2nd Appellant failed to adduce evidence in form of a members register to show that his father was the allottee of the land and that he had transferred it to him. The Court must also raise the contradiction of the evidence of PW2 in his witness statement where he stated that his father did not collect the title until 2002 when due to his age, he authorized that the title be issued to him. There was no title in the name of Kamau Muturi in support of this averment. In any event the letter of the Company dated 8/3/2001 appears to state that the father had relinquished his interest to the 2nd Appellant. If that were to be true why was he collecting a title for the same land in 2002? The contradiction add to the doubt as to whether Kamau Muturi held any interest in the land and also whether he actually relinquished any interest to the 2nd Appellant.

47. It was the 1st Respondents case that upon carrying out a search she discovered that the green card in her name was missing and that in its place there was a green card in the names of the Appellants. The Court agrees with the 1st Appellants proposition that the title should be a mirror of the green card which is the register maintained by the 2nd Respondent statutorily. PW4 the Land Registrar who is the custodian of the register led evidence that the Land Registry was initially based in Kiambu District. However, upon the opening of the Thika Land Registry, the records for the lands within Thika were transferred to Thika. The title of the 1st Respondent was issued in Kiambu District on the 20/6/1995 while that of the 1st Appellant was issued at Thika Registry on the 25/6/2015. PW4 also informed the Court that there was no document to show that the suit land belonged to Kamau Muturi. This evidence was weighty. I say so because if that be the case, the question is what is the root of the 2nd Appellant’s title? PW4 also was clear that it is not possible that a company in liquidation can transfer the property to the 2nd Appellant in 2013 if it stood liquidated as at the year 2000. She was also quick to point to the Court the absence of the Land Control Board consent which was mandatory to the transaction. PW4 stated that the land emanated from the Government of Kenya before it was registered in the name of Thika Landless which was created as a commission to settle squatters in Thika Town. That being the case it therefore follows that the Commissioner of Lands was transferring the land on behalf of the Commission and in the absence of any challenge by the said Commissioner of Lands and Thika Landless, the Court finds that matter is a none issue.
48. The Land Registrar noted that the title and the transfer form in favour of the 1st Respondent were duly executed. Other than stating that the supporting documents are missing she did not offer any serious challenge to the said documents. That said, it follows that there must have been a register that was opened for the suit land. The Land Register failed to adduce the same in evidence and this supports the averment of the 1st Respondent that her green card was missing otherwise the Land Register would not have issued her with a title in 1995. The title of the 1st Appellant having been issued in 1995, the Court agrees with the Learned Magistrate that the land was not available for allotment in 2013 in the name of the 2nd Appellant.



49. The 1st Appellant has impugned the transfer form dated the 20/6/95 in favour of the 1st Respondent for want of execution by the Commissioner of Lands. The Court has scrutinized the documents and finds that it was stamped for stamp duty, executed by the 1st Respondent and the Land Registrar leading to the issuance of the title on even date. There was no evidence led to support any wrong doing or the speed in which the transfer was registered and title issued the same date.
50. On the Appellants' accusation of the trial shifting the burden of proof to them, I dare say that the said 'burden of proof' is actually referred to as the evidential burden that shifted to them when their titles were challenged. See the incidence of burden in Section 108 of the *Evidence Act* above and Court of Appeal decision in *Mbuthia Macharia supra* where the Court explained that the legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal.
51. In addition, the same Court in *Bandi Vs. Dzomo & 76 Others [2022] KECA 584 (KLR)* in addressing the evidential burden and dismissing the Appellant's appeal held as follows;
- “The Appellant had the evidential burden to show that he acquired the title to the suit property in a regular and law compliant fashion. The Appellant conveniently did not adduce any evidence to show how he acquired the suit property, how it was allocated to him, and through which process ...”
52. The Court finds that the 2nd Appellant failed to discharge the evidential burden to explain the root of his title.
53. For the reasons above the Court finds that the 1st Respondent proved fraud on the part of the 2nd Appellant. That 2nd Appellant having not acquired a valid title he could not have transferred any valid title to the 1st Appellant. In sum he transferred nothing and the 1st Appellant received nothing. Under Section 26(2) (b) the title of the 1st Appellant stands impugned for the actions or lack of it on the part of the 2nd Appellant.
54. Ultimately, I do not find any fault on the Hon. Magistrate's reasoning and final orders in the impugned Judgment.
55. The upshot of the forgoing is that the appeal is bereft of merit and it is dismissed with costs in favour of the 1st Respondent.
56. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 5TH DAY OF DECEMBER, 2024 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms. Kariuki HB Mugo for 1st and 2nd Appellants

Dennis Maina for 1st Respondent

2nd and 3rd Respondents - Absent

Court Assistants – Ann/Melita

