Republic v Githaiga (Criminal Appeal E066 of 2023)
[2025] KEHC 5532 (KLR) (29 April 2025) (Judgment)

Neutral citation: [2025] KEHC 5532 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E066 OF 2023

DKN MAGARE, J

APRIL 29, 2025

BETWEEN

REPUBLIC .... APPELLANT

AND

DANIEL NGATIA GITHAIGA .... RESPONDENT

(Appeal arises from the Judgment of the trial court, Hon. N.W. Wanja, Resident Magistrate in Othaya PMCRC No. E377 of 2022 delivered on 18.09.2023.)

JUDGMENT

1. This appeal arises from the Judgment of the trial court, Hon. N.W. Wanja, Resident Magistrate in Othaya PMCRC No. E377 of 2022 delivered on 18.09.2023. The trial court considered the case and rendered judgment. The Court acquitted the Respondent.
2. The Respondent was charged that on 23.06.2022 and 8.7.2022 at Kiria-ini village, in Nyeri south sub-county within Nyeri County, stole napier grass valued at Kshs. 56,633=, the property of Allan Mwangi Wanjohi.
3. The plea was taken on 12.7.2022. The Respondent pleaded that “the land belongs to my father. How can it be said that I harvested someone else’s napier? The court gave me the land.” The court entered a plea of not guilty. However, the prosecutor did not take the hint that the matter was a purely civil matter at the time.
4. Subsequently, the investigation officer was sworn in and stated that the accused did not collect the documents he had. This was supposed to have happened a Friday before the hearing of 20.9.2022. The Respondent rightly refused to see the investigating officer while the case was ongoing. It is the duty of the office of the director of public prosecution to supply documents, not the investigating officer. The court directed the document be served on the hearing date and the matter to proceed.

5. The complainant, Allan Mwangi Wanjohi, PW1, stated that he bought part of land parcel No. Othaya/Kiahagu/X7 from the Respondent. He paid for the land and took possession. He developed the land and planted maize and napier grass. He used the land for 16 years. On 23.06.2022, he received a call from John Adome, his worker, that the Respondent had stopped the worker from entering the land. He stated that he had a title for Othaya/Kiahagu/X7. He also had a search dated 21.02.2007. He stated that he got the title for Othaya/Kiahagu/2XX3 in 2013. He said that 2018 he put the entire 0.6 acres to napier grass, which was cut and kept sprouting back.

6. The witness further stated that the grass was cut last year, in 2021. He stated that the Respondent did not cut the grass. He stated that he no longer had title to the land. The Respondent did not involve him in the cancellation of the title. He identified the Respondent on the dock and said he had no grudge against him. The court then noted that he had made the decision canceling the title and recused itself suo moto and ordered that the matter proceeds before Hon Wanja. Directions were taken under Section 200 of the *Criminal Procedure Code*.

7. On cross-examination, PW1 testified that the Respondent sold him land parcel No. Othaya/Kiahagu/2XX3. He stated that he did not search the land. He said that he was the one who planted napier grass on land parcel number Othaya/Kiahagu/2XX3. He denied that land parcel number Othaya/Kiahagu/2XX3 was nonexistent. He stated that he did not know about a sale agreement. He only knew that the Respondent stole his napier grass, though he did not see him doing so.

8. On re-examination, the witness stated that he bought land from the Respondent. The land belonged to the Respondent's father but was divided into 4. He stated that the Respondent is not the owner of the said parcel of land. However, PW1 bought a portion of the mother title. He continued that Francis Ngumo Munene, PW2, mentioned that the Respondent sold him the napier grass.

9. Francis Ngumo Munene testified as PW2. He stated that he was an employee of Samuel Karuga Gichuki as a farmhand. He further testified that he went to cut grass on 4.07.2022 at the farm. He decided to rest. Policemen arrived and arrested him. He was shown the grass by Wilson Nguyi. He did not know who sold the napier grass to the employer. He did not know the owner of the farm, nor did he know the Respondent?

10. On cross-examination, he stated that no one showed him the documents showing that the land belonged to the Respondent. He was arrested before he cut the grass. He stated that he was instructed by his employer, Samuel Karuga to cut the napier grass. It is not lost on the court that the witness did not corroborate the evidence of PW1 who had alleged that PW2 told him that it is the Respondent who sold the napeir grass.

11. PW3 was No. 198xxxxxxx PC Benson Githui who testified that he was an agricultural officer based at Othaya Sub-county. He realized that stemsstools had been destroyed and could not grow again. The total value of napier grass per acre is Ksh 94,388=. The value of the napier grass is 56,633=.

12. On cross-examination, he stated that he was given instructions from OCS Othaya but was not given a title deed for the land. The net effect of the evidence of the witness is that the grass was uprooted from the stems and stool. It is not the case of stealing but uprooting from the recently reclaimed land by dint of a court order cancelling title to Othaya/Kiahagu/2XX3 and reverting ownership to the estate of the Respondent's father. This was in fact an eviction and assertion of ownership and not theft.

13. PW4, Samuel Karuga Gichuki stated that on 23/6/2022, he was sourcing for napier grass for his cows when he was informed that the accused person had napier on his land. He realized that he knew him, looked for him, and they met. They agreed to sell the napier grass at Kshs. 4,200=. He then sent his farmhand and went about his business when he got a call from a police officer. At the time, he was in

Nyahururu and went to Othaya police station and explained his side of the events. He stated that the Respondent is known to him.

14. In cross-examination, he stated that he had known the Respondent for many years and that he had sold him napier grass for Kshs. 4,200-. He stated that no one showed him the title deed to indicate that the complainant was the owner of the land.

15. PW5. No. 61xxx Sgt. David Chege, a crime scene officer, stated that on 16/09/2022, he received a CD-ROM marked as pictures taken by an investigating officer. He processed 4 photos which show the scene where napier grass was cut and certified the same and appended his signature. In cross-examination, he stated that the investigating officers took the photos, and his job was to certify them as exhibits in this case.

16. PW6. No. 23xxxx Pius Mutua, stated that he was the investigating officer in this case. He stated that on 17,2022, he was instructed by OCS Mulwa to investigate napier grass theft. He called the complainant who showed him the land and gathered that the complainant bought the land in 2005-2006. He stated that the land was sold by one Daniel Ngatia. Prior to this, there was an agreement to the effect that the complainant would buy land at another place in Laikipia for the accused, and he proceeded to farm land parcel number Othaya/Kiahagu/2XX3. He stated that he was informed that the Respondent had cut and stolen napier grass. He produced the title deed as an exhibit and the green card.

17. In cross-examination, he stated that the complainant reported theft on the suit property, where he then conducted investigations. He stated that the value of the napier grass was set by the Agricultural Officer. He stated that he did not have the sale agreement. He said that he did not deny the accused to write his statement but only to indicate that he sold Mr. Karuga's napier grass. He stated that the complainant supplied him with the title deed and not a search certificate.

18. DW1, Daniel Ngatia Githaiga opted to give unsworn evidence. He stated that he lives on his father's land in Othaya/Kiahagu/X7. He stated that in July 2021, he sold napier grass to Mr. Karuga. He stated that he knew the complainant as he bought land from him in Laikipia. He stated that he lived in Kieni for 15 years, looking after livestock. He testified that he came to their Othaya home in 2020. He returned home to find that the complainant had deceived his brothers and stolen their father's land and a title issued.

19. He stated that the land he was alleged to have stolen, Othaya/Kiahagu/X7, belongs to their late father. He stated that he instituted ELC No. 8 of 2021 once he realized the fraud which cancelled Othaya/Kiahagu/2XX3 and produced the exhibit as Dexh.1. He stated that the land reverted to Othaya/Kiahagu/X7 and produced Dexh.2 as exhibit and Dexh 3, being a certified copy of the register for Othaya/Kiahagu/X7. He stated that he did not steal anyone's napier grass belonging to the complainant. His evidence was that the complainant had entered the land illegally as succession had not been done, and that the napier grass was in his father's land.

20. The court analysed the evidence and acquitted the Respondent under section 215 of the *Criminal Procedure Code*. The state was aggrieved and filed this appeal. The Appellant filed the Memorandum of Appeal on 02102023 wherein they cited five (5) grounds of appeal:

    1. The learned trial magistrate erred in law in acquitting the Respondent under Section 215 of the *Criminal Procedure Code* of the offence of Stealing contrary to Section 268(1) as read with Section 275 of the Penal code when the ingredients had been proven to the standard view.

    2. That the trial magistrate erred in finding that the Respondent has not committed the offence against the weight of overwhelming evidence.

3. That the trial magistrate erred in law and fact in making a finding that the prosecution failed to establish its case beyond reasonable doubt.

4. That the learned trial magistrate erred in law and fact in making a finding that the Respondent had established doubt in the prosecution's case when the Respondent's case was unbelievable and uncorroborated.

5. That trial magistrate erred in law and fact in failing to consider the Complainant's evidence and arrived at a conclusion contrary to law and weight of the evidence on record.

21. The appeal proceeded by way of written submissions.

22. The issue for determination is whether the Prosecution had proven beyond reasonable doubt that the Respondent had stolen from the Complainant. The complainant alleged that the Respondent got onto his land and cut napier grass growing on his land, an allegation that the Respondent denied in both the trial court and herein on appeal.

23. The Respondent filed submissions dated 5/11/2024. He submitted that the critical elements of the crime were not proved beyond reasonable doubt, and the court was right in acquitting him of the offence.

24. The Respondent submitted further as per his exhibits that there was uncontroverted evidence that the alleged napier grass was stolen between June 2022 and July 2022 by which time any title deeds emanating from the alleged subdivision of Othaya/Kiahagu/X7 to the resultant Othaya/Kiahagu/2XX3 had been cancelled in Othaya ELC E008 of 2021 on 11/02/2022. He argued that ownership of the land was not proved. And further that the land was illegally acquired as per the holding and resultant cancellation of title Othaya/Kiahagu/2XX3.

Analysis.

25. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In the case of Mbogo and Another vs. Shah [1968] EA 93 the court stated:

> " ...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

26. The duty of the first appellate court was stated in the locus classicus case of Selle and Another Vs Associated Motor Board Company and Others [1968]EA 123, where the judges in their usual gusto, held by as follows;-

> " .. 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 re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

27. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them. In Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017)eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;-

> Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it.

28. In Prudential Assurance Company of Kenya Limited V Sukhwender Singh Jutney and Another, Civil Appeal No. 23 of 2005, the court, citing a passage in Odgers Construction of Deeds and Statutes (5th edn.) at p.106 emphasized that in construing the terms of a written contract;

> “ It is a familiar rule of law that no parole evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well to deeds as to contracts in writing. Although the rule is expressed to relate to parole evidence, it does in fact apply to all forms of extrinsic evidence.”

29. The Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 stated that the duty of the first appellate court remains as follows:-

> “ On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”

30. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination. In the case of Okeno v Republic [1972] EA 32 at 36 the East Africa Court of Appeal stated on the duty of the Court on a first appeal:

> “ An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the

trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

31. The issue in this case is whether the prosecution proved its case to the required standards. Most oft quoted English decision of by Viscount Sankey L.C in the case of H.L. (E) Woolmington vs. DPP [1935] A.C 462 pp 481, comes in handy in describing the legal burden of proof in criminal matters, that;

> " Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.''

32. The accused enters criminal proceedings, presumed to be innocent. That presumption of innocence remains throughout the case until the state has presented evidence to the court to satisfy it beyond reasonable doubt that the accused is guilty. In the case of R vs. Lifchus {1997}3 SCR 320 the Supreme Court of Canada explained the standard of proof as doth:-

> " The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."

33. The legal burden is that the burden of proof remains on the state constantly throughout a trial. According to Halsbury's Laws of England, 4th Edition, Volume 17, 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. 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 of with separate issues."

34. Brennan J addressed the standard of proof required in such cases, in the United States Supreme Court decision in Re Winship 397 US 358 {1970}, at pages 361-64 stated that:-

> " The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction…Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."

35. Turning to the case in point, the Respondent was charged with stealing under Section 268 of the *Penal Code*. The section states as follows:

> 1.A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.
>
> 2.A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say-
>
> (a).an intent permanently to deprive the general or special owner of the thing of it;
>
> (b).an intent to use the thing as a pledge or security;
>
> (c).an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;
>
> (d).an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;
>
> (e).in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner; and "special owner" includes any person who has any charge or lien upon the thing in question, or any right arising from or dependent upon holding possession of the thing in question.

36. The punishment for the offence of stealing is provided under Section 275 of the *Penal Code*, which provides as follows:

> Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for three years.

37. The first question, therefore, is whether on the evidence before the court, the state proved all ingredients of stealing. These are:

    i. Taking without claim of right.

    ii. anything capable of being stolen,

    iii. or fraudulently converts to the use of any person,

38. The intent to steal is as follows:

    i. An intent permanently to deprive the general or special owner

ii. An intent to use the thing as a pledge or security;

iii. An intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;

iv. An intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;

39. The matter turns on two intertwined assumptions. The first one is to presume the complainant as an owner. Even if the complainant was presumed to be an owner, there was no evidence that the Respondent stole the napier grass. PW2, who was to cut the napier grass, was arrested before doing so; the actus reus was not affected.

40. Secondly, is the concept of the ownership of napier grass growing on the suit land. The court had determined the ownership of the land to be the estate of the deceased, Githaiga so Wambugu. Succession in respect of that estate had not been carried out. The complainant fraudulently transferred the land. This was rectified by the court. The estate of the deceased regained its ownership, which it should never have lost.

41. The death of a deceased person has the administration relating back to his death as section 16 of the *Limitation of Actions Act* provides:

Administration dates back to death for the purposes of the provisions of this Act relating to actions for the recovery of land, an administrator of the estate of a deceased person is taken to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration.

42. The deceased remained the owner of the land and everything growing thereon under the doctrine of Cujus est solum, eius est usque ad coelum et ad inferos. The deceased was thus the owner of the crops growing thereon from the soil, all the way to the heavens and into the depths of hell.

43. Further, it is prohibited to otherwise intermeddle with any free property of a deceased person. This is what the Complainant did. Section 45 of the Succession Act provides as follows:

(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

44. Ipso facto, an intermeddler cannot own anything growing on the deceased's land. The lower court in the land matter had already found the transfer of title was fraudulent. There can be no claim over grass growing on the deceased's land. In any case, PW3 stated that the napier grass was uprooted from the soil and cannot regrow. This was thus not theft but eviction of an intermeddler. If the complainant had issues regarding the eviction, the only recourse was in the land court, which ordered cancellation of the

title or an appeal to the Environment and Land Court. In the case of Re Estate of Kitur Chepsungulgei (Deceased) [2021] KEHC 7430 (KLR), Githinji J posited as follows:

> 42. Moreover, the balance of convenience tilts in favour of the applicants in order to preserve the estate pending the final determination of the succession proceedings and taking into consideration the guidance provided under Section 47 of the *Law of Succession Act* and Rule 73 of the Probate and Administration Rules to meet the ends of justice.
>
> 43. In this case, its clear that the 1st Respondent is an administrator of the estate of the deceased and holds it for the benefit of others who have a valid claim against the estate. Though the applicants have raised objection, the appointment of the Respondents has not been annulled and under law, remains valid. Consequently, the Respondents' have power to deal with the property of the deceased but within parameters permissible under law. Moreover, in the Matter of the Estate of Dr John Muia Kalii (deceased) Machakos High Court Succession Cause No. 81 of 1995, Mwera J was clear that since intermeddling is a criminal offence, evidence in support of the allegation should be strong. In our present case, I find at best the claims to be of mere allegations without tangible evidence.

45. The Respondent was granted letters of the estate of the deceased father and was entitled to deal with the estate of the late father without reference to the complainant, who was an intermeddler. While addressing the question of fraud against the genuine owner, the Court of Appeal [Waki, Nambuye & G.B.M. Kariuki, JJ.A] in Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR, posited as doth:

> 66. We have found already, on evaluation of the recorded evidence, that fraud was committed both at the registry of companies as well as the Lands office. The consequence is that West End did not divest its registered interest in the disputed land which was not an equitable one. It was the proprietor of the legal interest in the disputed land and did not part with it, as alleged or at all. The trial court held, following previous court decisions, that an innocent holder of legal Title to land cannot be dispossessed of that interest by a fraudster, and that Section 23 protects "Title issued to a purchaser upon the transfer or transmission by the proprietor thereof". Those decisions are the Alberta Mar Gacii vs. Attorney General & 4 Others [2006] eKLR. and the Iqbal Singh Rai vs. Mark Lecchini and the Registrar of Titles, Civil Case No. 1054 of 2001, which emanated from the High Court. With respect, we are persuaded by the reasoning in those cases as it accords with the law.
>
> 67. Furthermore, the protection accorded by law in the event of fraud is to a "bona fide purchaser without notice" and even then, only against equitable interests. We have seen the definition of "bona fide purchaser" from Black's Law Dictionary and from the Court of Appeal of Uganda in Katende vs. Haridas and Company Limited, EALR [2008] 2 EA 173 . The onus is on the person who wishes to rely on such defence to prove it, and the defence is against the claims of any prior equitable owner. Snell's Principles of Equity illustrate the issue, thus;-
>
> > " An important qualification to the basic rule is the doctrine of the purchaser without notice, which demonstrates a fundamental distinction between legal estates and equitable interests.
>
> The doctrine. A legal right is enforceable against any person who takes the property, whether he has notice of it or not, except where the right is overreached or is void against him for want of registration. If Asells to C land over which B has a legal right of way, C takes the land subject to B'sright, although he was ignorant of the right. But it is different as regards equitable rights.

Nothing can be clearer than that a purchaser for valuable consideration who obtains a legal estate at the time of his purchase without notice of a prior equitable right is entitled to priority in equity as well as at law. In such a case equity follows the law, the purchaser's conscience not being in any way affected by the equitable right. Where there is equal equity the law prevails."

68. It is also stated therein that "the doctrine of purchaser without notice never enabled a purchaser to take free from legal rights, as distinct from equitable interests." So that, even if the issue of bona fide purchaser arose in this matter, which, in our finding, it did not, we are not satisfied that the evidence tendered by Arthi supports a credible finding that it was a bona fide purchaser of the disputed land.

46. The position in law is that anything founded on nullity is also null and void and of no consequence. I am bound by the decision of the Court of Appeal in Wambui v Mwangi & 3 others (Civil Appeal 465 of 2019) [2021] KECA 144 (KLR) (19 November 2021) (Judgment)that:

> Sixth, the title was also tainted with nullity in that the court process on the basis of which the title to the suit property was anchored was subsequently declared null and void ab initio. The position in law as we have already highlighted above is that anything founded on nullity is also null and void and of no consequence. The title allegedly vested in the 3rd Respondent and subsequently passed on to the appellant, having stemmed from court proceedings that were subsequently declared null and void, also stood vitiated by the same nullity and of no consequence. The Judge cannot therefore be faulted for stating the correct position in law in the manner done.

47. The above position echoes the decision of Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169, where Lord Denning, while delivering the opinion of the Privy Council at page 1172 (1) said:

> " If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

48. I have said enough to show that the complainant's claim to the napier grass growing in the deceased's parcel of land from which they had been lawfully evicted is tenuous and unfounded. In Mombasa Civil Appeal No. 83 of 2016 Co-operative Bank of Kenya Limited vs Patrick Kangethe Njuguna & 5 others, the court of appeal [Visram, Karanja & Koome, JJ.A] observed that:

> Article 260 aforesaid echoes the traditional definition of land under the common law doctrine known as Cujus est solum, eius est usque ad coelum et ad inferos (cujus doctrine)which translates to "whoever owns [the] soil, [it] is theirs all the way [up] to Heaven and [down] to Hell". As with our Constitution, the doctrine defines land as the surface thereof, everything above it and below it as well. The doctrine restricts the definition of land use to necessary and ordinary use and enjoyment of the land and structures upon it (see Lord Bernstein of Leigh v. Skyviews and General Limited [1978] QB 479).

49. The napier grass did not by law belong to the complainant. The Respondent cannot then be said to have stolen the same. Further, questions whether the title was lawfully canceled is outside the realm of criminal law. The Respondent cannot steal that which by law is his and growing on land belonging to his father, unless the father is the complainant. I find and hold that the court below was correct in finding that the case was not proved.

50. The court below was correct in finding that the grass was last cut in 2021. The Respondent took possession, and it was confirmed by 23.06.2022. The complaint was effectively dispossessed of the land by the rightful owners. The entries numbers 2, 3, and 4 in land parcel Othaya/Kiahagu/X7 were deleted by dint of a court order on 2.3.2022 vide a decree in Othaya MCCC E008 of 2021. The land belonged to Githaiga so Wambugu as of 2.3.2022. Ipso facto, the complainant had no claim on the suit land from midnight of 2.3.2022.

51. It is unnecessary to determine whether crucial witnesses were not called. The evidence before the court was scanty and fell far short of the test in criminal cases. The prosecution did rely on titles as per PW6, the investigating officer. However, it was proved that the ELC court in Othaya ELC E008 of 2021 cancelled the Title deed that was fraudulently obtained.

52. The title reverted to the Respondent's father's name, and thus, as far as titles go, the land on which the napier grass grew did not belong to the Complainant. The prosecution did not prove the ingredient fraudulently and without claim of right regarding the napier grass on the suit land, as the Respondent ably demonstrated that the title did not belong to the complainant on which the napier grass allegedly grew.

53. PW1, complainant alleged that he purchased land for the Respondent in Laikipia in fulfilment of purchasing land from him. The prosecution witness PW6, the investigation officer relied on titles and green card that were supplied by the complainant. PW6 did not produce any sale agreement of the alleged sale of land to the complainant to wit OthayaKiahagu2333. The mere fact that title Othaya/Kiahagu/2XX3 was cancelled by the ELC court in Othaya ELC E008 of 2021 in February 2022, and the theft as per the charge sheet, allegedly between 23rd June 2022 and 8th July 2022, simply means that whatever was on the now cancelled Othaya/Kiahagu/2XX3 did not belong to the complainant in the first instance and thus was incapable of being stolen.

54. The appeal fails, and the trial court's finding is affirmed as sound. The appeal is accordingly dismissed.

Determination.

55. In the upshot, I make the following orders:

    a. The appeal herein lacks merit and is accordingly dismissed.

    b. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 29TH DAY OF APRIL, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

Mr. Kimani for the Appellant

Respondent – Pro se

Court Assistant – Michael