



**Misiko v Wekesa (Environment and Land Appeal E023 of 2023)  
[2025] KEELC 3182 (KLR) (3 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3182 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT AND LAND APPEAL E023 OF 2023**

**EC CHERONO, J**

**APRIL 3, 2025**

**BETWEEN**

**METRINE NAMALWA MISIKO ..... APPELLANT**

**AND**

**RAPHAEL KAKA WEKESA ..... RESPONDENT**

*(Being an appeal from the Judgment of Hon. G.P OMONDI P.M  
delivered on 16th May, 2023 in Bungoma CM-ELC Case No. 47 of 2020)*

**JUDGMENT**

1. The Appellant herein was the Defendant while the Respondent was the plaintiff in the former suit being BungomaCM-ELC Case No. 47 of 2020. In a plaint dated 3<sup>rd</sup> July 2020, the plaintiff/ Respondent had sought the following orders;
  - a. A permanent injunction restraining the Defendant, her servants, relatives, nominees and/or agents from encroaching, trespassing and/or interfering with the Plaintiff's quiet enjoyment of land parcel No. E.Bukusu/N.Sang'alo/3807
  - b. An order directing that the actual ground acreage for land parcel NO. E.Bukusu/ N.Sang'alo/3808 measuring approximately 4 acres be shared on prorata basis according to the ratio of their registered areas and upon the grant of prayers (2) above the register for land parcel NO. E.Bukusu/N.Sangalo/3807 and 3908 be amended to reflect the changes and the County Surveyor Bungoma be ordered to restore the boundaries between the two parcels on the ground accordingly.
  - c. Costs of this suit.
  - d. Interest.



- e. Any other suitable or alternative relief this Honourable court may deem fit and just to grant.
2. The Defendant/Appellant filed a statement of defence dated 10<sup>th</sup> June 2021 denying the Plaintiff/Respondent's claim and sought to have the suit dismissed with costs.
3. After pre-trial directions were taken, the suit was set down for hearing where the plaintiff/Respondent testified alone and closed his case. The defendant/Appellant also testified alone and closed her case. The parties evidence was as follows;

#### **Plaintiff/respondent's Case.**

4. Raphael Kaka Wekesa(PW1) was referred to his witness statement dated 3/7/2020 which he adopted as his testimony-in-chief. He was also referred to his list of documents dated 3<sup>rd</sup> July 2020 containing 10 items which he produced into evidence as P-Exhibits 1,2,3,4,5,6,7,8, 9 & 10 respectively. The plaintiff stated that he visited the suit land with the owner in the year 2002 and agreed to buy two (2) acres to be excised from the main title No. Ndivisi/Sang'alo/3115. He further stated that the said two acres had not been demarcated. They took a private Surveyor known as Mbanacho General Merchants who did subdivision on 28/05/2003. They were told that there was a caretaker on the land who is the defendant/Appellant herein but they did not find her on the suit land at the time. He stated that he bought the suit land in the year 2002 and was issued with a title deed in 2004. He stated that the defendant destroyed the boundary and he made a complaint at the Tribunal in Misc. Petition No. 79 of 2008. He stated that the Tribunal gave him the 2 acres but the defendant appealed to the High Court and the High Court set aside the Ruling by the Tribunal. He stated that he applied through HC Misc. Application No. 16 of 2016 for a Government Surveyor to go to the ground and determine the boundaries and the court granted the order and the Surveyor went to the ground and executed the court order.
5. On cross-examination, the plaintiff stated that he bought two acres in December, 2002 and the seller showed him the portion and was demarcated. He stated that his mutation number was no.3807 measuring 0.81 Ha. while mutation no.3808 was measuring 3 acres and that he came to know the defendant at the time the survey was done. He stated that the two parcels No. 3807 and 3898 share common boundary. He stated that he was aware the defendant had not moved to the suit land in 2003 when she was registered as proprietor and that he did not know the acreage of LR No. E.Bukusu/S.Kanduyi/3115
6. Defendant's Case(DW1) Adopted his witness statement as her testimony-in-chief. She referred to her list of documents dated 10/06/2021 which she produced as D-Exhibits 1, 2, 3 & 4.
7. On cross-examination, the defendant stated that she purchased the suit land parcel No. E.Bukusu/S.Kanduyi/3808 in 2003 while the plaintiff bought his portion being LR No. E.Bukusu/S.Kanduyi/3807 in 2004.
8. In his judgment delivered on 16/05/2023, the trial Magistrate entered judgment in favour of the plaintiff as prayed in the plaint. The defendant was aggrieved and preferred the present appeal on the following six grounds;
  1. The trial Magistrate erred in law and facts by allowing the Respondent's claim which had not been proved on a balance of probability.
  2. The trial Magistrate erred in law and facts by failing to dismiss the Respondent's claim for failing to account how he acquired and or processed the mutation forms as pertains to his Land Parcel No. East Bukusu/NorthSang'alo/3807.



3. The trial Magistrate erred in law and facts by failing to appreciate the cogent evidence tendered by the Appellant save for the documentary evidence from a Ruling dated 7<sup>th</sup> July, 2009 by Justice F.N Muchemi vide BGM H Misc. No.79 of 2008.
4. The trial Magistrate erred in law and facts by failing to thoroughly analyse the expert reports which reports were satisfying before arriving to his decision.
5. The trial Magistrate erred in law and facts by overlooking them hence failing to realise that the Respondent's claim was a repeat exercise hence a waste of court's time aimed at frustrating the Appellant's lawful and peaceful use of her land.
6. The trial Magistrate erred in law and facts by failing to interact, frame issues and facts for determination hence arriving at the wrong decision.

#### Appellants Submissions

9. The Appellant through the Firm of M/S Wamalwa Simiyu & Co. Advocates submitted that at page 8 of the record of appeal, it is evident that the Respondent is the registered owner of all that piece of land known as E.Bukusu/N.Sangalo/3807 while the Appellant is the registered owner of all that parcel known measuring approximately 1.2 HA. comprised in LR NO. E.Bukusu/N.Sang'alo/3808. He cited sections 24(a) and 26(1) of the *Land Registration Act* NO.3 of 2012 and submitted that it is clear that the certificate of Title issued by the Registrar upon registration shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except on grounds of fraud or misrepresentation to which the person is proved to be a party; or where the title was acquired illegally, unprocedurally or through a corrupt scheme.
10. The learned Counsel further submitted that by ordering the Appellant to share her land with the Respondent is tantamount to revoking her title which act can only be proved by fraud and misrepresentation which is not the case herein. He relied in the case of *Selle & Anor v Associated Motor Boat Co. Ltd & Others* (1968) E.A 123; *Peters v Sunday Post Limited* (1958) EA 424; *Bwire v Wayo & Sailoki* (2022) KEHC 7 (KLR)

#### Respondents Written Submissions

11. The Respondent through the Firm of M/S Chengasia Murunga & Co. Advocates filed their submissions dated 18/02/2025 and submitted that as can be apparent from the mutation form for LR No. E.Bukusu/N.Sang'alo/3115, it is clear that it was the then registered owner Richard Makokha Wabukewho caused the subdivision of LR No. E.Bukusu/N.Sang'alo/3115 creating two new numbers wherein the Respondent was registered as proprietor of LR NO. E.Bukusu/N.Sang'alo/3807 Measuring approximately 0.81 HA. while the Appellant was registered as proprietor of LR NO.E.Bukusu/N.Sang'alo/3808 Measuring approximately 1.20 Ha. Reliance was placed in the following cases and authorities; *Kamoye v Tipango & 2 Others* (2023) eKLR; *Michael Githinji Kimotho v Nicholas Muratha Mugo* (1997) eKLR; *Pius Nyabuga Machoge v Ntinini Ole Tauta* (2020) KLR; *Francis Nyauma Obare & 3 Others v Maina Marwanga Omwamire & Another* (2017) eKLR; Sections 24, 25(1), 79, 80 of the *Land Registration Act*, 2012

#### Legal Analysis And Decision.

12. I have considered the Memorandum of appeal, the record of appeal, the submissions by the parties and the relevant law. This being a first appeal court, my duty is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusion, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. (see *Peters v Sunday Post Limited* (1958) EA



- 424). In determining this appeal, I endeavour to combine the six grounds of appeal into one ground, to wit; Whether the Plaintiff/Respondent proved his case before the trial court to the required standard.
13. From the record of appeal, it is not in dispute that the Appellant is the registered owner of land parcel No. E.Bukusu/N.Sang'alo/3808 Measuring approximately 1.6 HA while the Respondent is the registered owner of land parcel No. E.Bukusu/N.Sang'alo/3807 Measuring approximately 0.81 HA.
  14. It is not also in dispute that the original land title No. E.Bukusu/N.Sang'alo/3115 Measuring 2.01 was registered in the name of Makokha Wabuke Richard and after selling to the parties herein, the same was closed on subdivision creating two resultant parcels being E.Bukusu/N.Sang'alo/3807 and 3808.
  15. When the Respondent instituted the former suit, he sought orders for inter-alia a permanent injunction restraining the defendant/Appellant, her servants, relatives, nominees and/or agents from encroaching, trespassing and/or interfering with the defendant's quiet enjoyment of land parcel No. E.Bukusu/N.sang'alo/3807 and an order directing that the actual ground acreage for land parcel No. E.Bukusu/N.Sang'alo/3807 and 3808 Measuring approximately 4 acres be shared on prorata basis according to the ratio of their registered areas and upon the grant of prayer above, the register for land parcels No. E.Bukusu/N.Sangalo/3807 and 3808 be amended to reflect the changes and the County Surveyor, Bungoma County be ordered to restore the boundaries between the two parcels on the ground accordingly. The Plaintiff also sought for costs of the suit.
  16. Section 26(1) of the [Land Registration Act](#) No.3 of 2012 provides as follows;
    - “(1) The Certificate of Title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-
      - a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
      - b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”
  17. From the above provision of the law, it is clear that a certificate of title issued to a proprietor of land is to be taken by the courts as a prima facie evidence that the person named as proprietor is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except on grounds stated thereunder. From the evidence on record, both the plaintiff/Respondent and the Defendant/Appellants have titles whose acreage is not in consonance with the actual acreage on the ground. The plaintiff's title indicates 0.81HA which is approximately 2.0 acres but she occupies approximately 1/2 an acre while the defendant/Appellant's title indicates 1.2 HA which is approximately 3 acres.
  18. The report by the County Surveyor does not indicate that the defendant had encroached the plaintiff's land. Instead, the County Surveyor made a proposal/recommendation to restore the boundary by dividing the actual ground acreage according to their ratio of the registered acres. No legal basis was laid for the said proposal/recommendation which was rightly rejected by the Defendant/Appellant.
  19. It is not in dispute that the plaintiff and the defendant bought their respective parcels and were put into possession and occupation by the seller. They did not engage a private surveyor to verify the acreage on the ground when the seller showed them their respective parcels. They only realised much later



that the acreage in the title did not march with the acreage on the ground. The plaintiff/Respondent had even filed numerous claims against the Defendant/Appellant with a view of getting a portion of her land with the latest being the former suit where he was claiming that the Defendant/Appellant had encroached his land and wanted the boundaries to be restored. No evidence was adduced that the Defendant/Appellant had interfered with boundary features and/or encroached the plaintiff/Respondent's land. Just like the Defendant/Appellant, the plaintiff agreed to occupy less acreage than what is indicated in the title. The vendor who sold the disputants the two disputed parcels and the surveyor who did the subdivision of the original land parcel NO. E.Bukusu/N.Sang'alo/3115 were never called as witness to shed light on what could have happened.

20. The trial Magistrate at page 3 of his judgment made the following observation;

“ However, on the ground, land parcel Numbers E.Bukusu/N.Sang'alo/3807 and E.Bukusu/N.Sang'alo/3808 is approximately 4 acres and not 5 acres. The defendant is occupying what she is claiming to be her rightful portion, probably 3 acres.

Similarly, if the plaintiff were to forcefully occupy 2 acres claiming that it was his rightful portion and leave the defendant with 2 acres, there would be discontentment by the defendant. These will create no peace between the plaintiff and the defendant.

Therefore I concur with the plaintiff that the sharing be on prorate basis according to the ration of the parties registered areas.

21. The trial Magistrate agreed to the proposal by the plaintiff/Respondent to share the Defendant/Appellant's land without any legal basis. I therefore find that the learned trial Magistrate fell into error in his decision which is liable to be interfered with by this court.

22. The Appellant also laments that the trial Magistrate failed to frame issues for determination hence arriving at the wrong decision. Order 2 Rule 4 and 5 of the Civil Procedure Rules provide as follows;

“4. Judgment in defended suits shall contain a concise statement of the case, the points of determination, the decision thereon, and the reasons for the decision.

5. In suits in which issues have been framed, the court shall state its findings or decision with the reasons therefore upon each separate issue.

23. The superior courts have weighed in on whether framing of issues is mandatory. In Norman v Overseas Motor Transport (Tanganyika) Limited Civil Appeal NO. 88 of 1958 (1959) E.A 131 the court held;

“If though no issue is framed on the fact, the parties adduce evidence on the fact and discuss it before the court and the court decides the point as if there was an issue framed on it, the decision will not be set aside on appeal on the ground merely that no issue was framed---”

24. I agree with the finding of the court in the case above and find that though the trial court was enjoined to frame issues for determination under order 2 of the Civil Procedure Rules, failure to do so was an irregularity which can be cured by the present appeal.

25. In view of my analysis above, I find that this appeal is merited and the same is allowed in the following terms;

1. This appeal is allowed.

2. An order be and is hereby issued reversing the trial court's judgment/decreed delivered on 16/05/2023 and substituting with an order dismissing the plaintiff/Respondent's former suit.



3. The plaintiff/Respondent is ordered to pay costs in the former suit before the trial court and this appeal.

**READ, DELIVERED AND SIGNED AT BUNGOMA THIS 03<sup>RD</sup> DAY OF APRIL, 2025**

**HON.E.C CHERONO**

**ELC JUDGE**

In the presence of;

1. M/S Wakasa H/B for Murunga for the Respondent.
2. Appellant/Advocate-absent.
3. Bett C/A.

