



**Munyasia v Makhanu & 3 others (Environment & Land Case
E007 of 2022) [2025] KEELC 3186 (KLR) (3 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3186 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE E007 OF 2022**

EC CHERONO, J

APRIL 3, 2025

BETWEEN

MAGARET NABANGALA MUNYASIA PLAINTIFF

AND

PIUS MUNYASIA MAKHANU 1ST DEFENDANT

LAND REGISTRAR-BUNGOMA COUNTY 2ND DEFENDANT

LAND SURVEYOR-BUNGOMA COUNTY 3RD DEFENDANT

NATIONAL LAND COMMISSION 4TH DEFENDANT

JUDGMENT

1. By a Plaint dated the 17/05/2022, the Plaintiff seeks for judgment against the Defendants for:
 - a. The Bungoma County Land Registrar and Bungoma County Surveyor do re-survey land parcel no. E. Bukusu/S.Kanduyi/9471, 13025,13671 and 13672 an reinstate the curved acreage of 0.36 ha which was unlawfully, illegally and unprocedurally curved/removed from land parcel no. E. Bukusu/S.Kanduyi/9471 to its original state to reflect the correct acreage of 1.64ha and further reinstate the tempered beacons between parcels in dispute herein.
 - b. Permanent injunction restraining the defendants whether by themselves, their agents and/ or third parties or anybody acting or claiming through them from encroachment on or demarcating, Tilling, wasting, occupying, alienating, an/or claiming ownership of any portion and/or whole of land parcel no. E.Bukusu/S.Kanduyi/9471 measuring approximately 1.64ha.
 - c. General damages for trespass on suit property land parcel no. E. Bukusu/S.Kanduyi/9471 measuring 1.64ha.
 - d. The caution registered on 05/05/2000 by the 1st defendant be removed or vacated.



- e. Costs of this suit and interest at court rates.
 - f. Any other relief court may deem fit to grant.
2. The plaintiffs claim is that she is the registered owner of land parcel no. E.Bukusu/S.Kanduyi/9471(hereinafter referred to as the “suit land”) measuring approximately 1.64ha. That land parcel no. E.Bukusu/S.Kanduyi/9268 measuring approximately 5.32ha was initially registered in the name of Munyasia Namuitako Etaiya who was her husband. That in the year 1999, the said Munyasia Namuitako Etaiya through the county surveyor sub-divided land parcel no. E.Bukusu/S.Kanduyi/9268 into four (4) portions. i.e. E.Bukusu/S.Kanduyi/9470,9471,9829 and 9830 measuring 3.53ha, 1.64ha, 0.05ha and 0.05ha respectively. That the said Munyasia Namuitako Etaiya thereafter on 07/03/2001 transferred land parcel no. E.Bukusu/S.Kanduyi/9471 to the plaintiff by then going by the name Magaret Nabangala Solomon prior to his demise on 31/01/2008.
 3. The said plaintiffs name was amended in the year 2008 to read Magaret Nabangala Munyasia. The plaintiff claims that the 1st defendant, without any color of right encroached, trespassed on her private property and tampered with the acreage of the land by sub-dividing it to create land parcel no. E.Bukusu/S.Kanduyi/13025 hence encroaching into her land by an approximate acreage of 0.38ha. That the said 1st defendant has further sub-divided land parcel no. E.Bukusu/S.Kanduyi/13025 to two (2) parcels being land parcel no. E.Bukusu/S.Kanduyi/13671 and 13672 which parcels have been leased to 3rd parties. That on 05/05/2000, the 1st defendant placed a caution over land parcel no. E.Bukusu/S.Kanduyi/9471 without any legal basis.
 4. The 2nd, 3rd and 5th defendants entered appearance and filed a joint statement of defence dated 03/06/2022 where they averred that if any action was carried out in relation to registration over the suit land, then the same was done lawfully, in good faith and within their statutory mandate. They urged the court to dismiss the case against them with costs
 5. The 1st defendant entered appearance and filed a defence dated 05/09/2022 where he denied the plaintiffs claim and averred that this suit offends the provisions of Section 6 of the *Civil Procedure Act* as there exists Bungoma ELC Case No. 41 of 2010 and Kisumu Court of Appeal Civil Appeal no. 223 of 2021 touching on the suit parcels of land between the plaintiff and the 1st defendant and that further, this suit is filed in total violation of section 18 of the *Land Registration Act*, No. 3 of 2012. He urged the court to strike out the suit with costs to him
 6. The plaintiff filed a reply to the 2nd, 3rd and 5th defendant defence dated 12/07/2022.

Evidence by parties.

7. When the suit came up for directions, the parties agreed to proceed with the by way of viva-voce evidence where the plaintiffs called two (2) witnesses and the defendant called one (1) witness.
8. PW1Magaret Nabangala Munyasia adopted her witness statement dated 17/05/2022 as her evidence in chief and produced 8 items as contained in her list of documents dated 17/05/2022 as PExhibit 1,2,3,4,5,7,8, 10 & 11 She stated that when she was registered as the owner of the suit land her said husband was still alive. That the other portions were shared to his sons namely Solomon Juma Munyasia, Job Juma Munyasia and Pius Munyasia Makhanu. In cross-examination she testified that she changed her name from her father’s name to reflect that of her husband. That she was initially married to Zablon Simiyu Munyasia who was a grandson to Munyasia Namuitako Etaiya and who was given 2 acres. That she got married to Munyasia Namuitako Etaiya after her husband Zablon Simiyu



Munyasia died. In re-examination by the 2nd, 3rd and 5th defendants, she confirmed that she has not presented any evidence to show which officers from the said office invaded her land.

9. PW2 Brian Wafula Kubwa testified that he is a land surveyor and on the request of the plaintiff he re-surveyed the suit land whose acreage as per a certificate of search that he conducted was indicated to be 1.64 ha (about 4 acres). That he found the acreage on the ground to be 1.26 ha with a portion of 0.38ha having been excised and subsequent sub-divisions having been done. That he did not conduct a survey of the said excised portion. On cross examination, he testified that he surveyed the land registered in the plaintiff's name on request upon her paying the requisite fees. That he cannot tell where the missing 0.38ha is.
10. DW1 Pius Makhanu Munyasia adopted his witness statement dated 11/11/2023 as his evidence in chief. He also recorded into evidence documents in his list of documents containing 2 items dated 15/09/2022.

Submissions by parties

11. At the close of the case, the parties agreed to file written submissions in further support of their respective position taken.
12. The plaintiff filed submissions dated 16/01/2025 where she submitted that her claim is for the restoration of her land to the correct acreage as reflected in her certificate of title and the surveyors report dated 01/09/2021. That the allegation that there is a pending appeal on the subject matter herein has not been proved as no notice of appeal or appeal had been presented to this court. She urged the court to grant her prayers as sought.
13. The 1st defendant filed submissions dated 23/01/2025 where he submitted on five issues. On the first issue, he submitted that under Section 18 of the *Land Registration Act*, this court lacks the jurisdiction to determine the dispute before it as sought under to paragraph 13 and prayer (a) of the plaint which talk about reinstatement of tempered beacons which ideally are meant to mark boundaries. Reliance was placed in the case of Fumo vs. Farah (ELC 128 OF 2018) (2023) KEELC 16516(KLR) (21 March 2023) (Judgment). On the second issue, he submitted that an injunction cannot be issued to prevent a sub-division that has already occurred or to third parties who are not party to this suit. Reliance was placed on various cases inter alia Moses M. Wairimu & 24 Others vs. Kenya Power and Lighting Co. LTD & Another (2020) eKLR.
14. On the third issue, the 1st defendant submitted that the allegation of trespass has not been proved by the plaintiff against him as amongst her prayers she is asking the court to have the land re-surveyed and beacons fixed. He cited the case of John Kiragu Kimani vs. Rural Electrification Authority and Gladys Koskey vs. Benjamin Mutai (2017) eKLR. On the fourth issue, it was submitted that the caution in place is protecting his interests which he has been securing as well as in the cases Bungoma ELC Case No. 41 of 2010 and Kisumu Court of Appeal Civil Appeal no. 223 of 2021. That the removal of the caution will be prejudicial to him pending the determination of the said appeal. On the issue of costs, the 1st defendant sought to have the plaintiffs case dismissed with costs.

Analysis and Determination

15. I have carefully read and considered the pleadings by the parties, the evidence adduced, the rivals written submissions, authorities cited and the relevant provisions of law and finds that the issues that commend for determination are;
 - a. Whether this court has jurisdiction.



- b. Whether the plaintiff has made a case for the orders sought.
- c. Who bears the costs.
16. On the first issue, the 1st defendant contends that this court lacks jurisdiction to address the dispute at hand on grounds that the reliefs sought in the plaint fall within the scope of Section 18(2) of the [Land Registration Act](#) that the Court is without jurisdiction on boundary disputes of registered land until after the Land Registrar's determination on the same has been rendered. Section 13 of the [Environment and Land Court Act](#) provides for the jurisdiction of this Court. In Hon. Henry Kosgey v Brian Cuthbert & Another (2019) Eklr, the court stated that the jurisdiction of the Court in determining boundary disputes should be considered in view of section 18 of the [Land Registration Act](#) which provides;
18. Boundaries
- (1) Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.
- (2) The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.
- (3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary:
- Provided that where all the boundaries are defined under section 19(3), the determination of the position of any uncertain boundary shall be done as stipulated in the [Survey Act](#), (Cap. 299).
17. The Court in the above case further stated that unless a boundary is determined by the land registrar, it is premature for a party to come to this Court to ascertain its rights to the land. Also see William Opondo Omalla v Gabriel Ochong Oriwo & another [2019] eKLR
18. This court takes note of prayer no. prayer (a) in the plaint. Contrary to the 1st defendant's assertion, my understanding of the above prayer is that the plaintiff is seeking for the reinstatement of what she claims to be tampered beacons, not the establishment of a boundary. It is clear from the mutation form produced as P-Exhibit 6 endorsed by the lands registrar that there exist boundaries all around the suit land which established the approximate area of the said land. PW2 who is a County Surveyor and an expert witness also noted in his report that there are existing boundaries.
19. Further, I have noted that the plaintiff's cause of action is based on trespass. The Plaintiff has among others, sought for orders of permanent injunction against the defendants, general damages for trespass and the lifting of a caution. It is my view that from the nature of the prayers sought, these are matters that are fit and proper to be argued in the substantive suit. They are also matters that this Court has power to hear and determine under section 13(2) of the [Environment and Land Court Act](#), 2011.



20. In Thika Environment & Land Court Case No. ELC 602 of 2017-Fredrick Nganga v Prof. Peter Mungai Njuho the Court weighed on this issue and stated;

“The Plaintiff has also sought for an order of permanent injunction and damages for trespass. The above prayer falls under the jurisdiction of the Environment and Land Court as provided by Section 13(2) of the Environment and Land Court Act 2011....The Plaintiff has brought a case for trespass which relates to land use and boundaries. These are disputes mentioned in section 13(2) of the Environment and Land Court Act 2011 and the Court has power to hear and determine them. Therefore, this Court finds and holds that it has jurisdiction to hear and determine the issues raised by the Plaintiff and not the Land Registrar.”

21. Similarly, the Court in Hudson Kulundu & 2 others v Martha Chibetti & another, Kakamega ELC Case No. 57 OF 2019 [2020] eKLR held that;

‘On perusal of the pleadings in this case the plaintiffs prayed for an order directed at the defendants to open the access road. This seems to me to be more than the issue of ownership and boundaries alone and does not fall exclusively as envisaged in Section 18 (2) of the Land Registration Act, 2012 which ousts the jurisdiction of the court where the dispute is purely boundary.’

22. It is therefore my considered view that this court is clothed with jurisdiction to determine the issues in question in this case.
23. The second issue for determination is whether the plaintiff has proved her case on a balance of probabilities. The plaintiff asked this court to order for the resurvey of the suit land and the reinstatement of its original beacons which she asserts were tampered with when land parcel no. E.Bukusu/S.Kanduyi/13025, 13671 and 13672 were created by curving out a portion from her land measuring approximately 0.36ha. In support of her case, she stated that she is the registered owner of the suit land and produced a certificate of title and a copy of a certificate of official search as P-Exhibit 2 & 3.
24. Section 26 of the Land Registration Act is categorical that a certificate of title is prima facie evidence that the person named therein is the proprietor of the land and the owner of such is not subject to challenge except where the Certificate of title has been acquired through fraud or misrepresentation to which the person is proved as a party or the title has been acquired illegally, unprocedurally or through a corrupt scheme. See *Elijah Makeri Nyangwa vs. Stephen Mungai Njuguna & Another* (2013) eKLR and *Chemei Investments Limited vs. The Attorney General & Others* Nairobi Petition No. 94 of 2005. The above section envisages 2 instances where a title document may be challenged and the same is where the title is acquired through fraud or misrepresentation or acquired illegally, unprocedurally or a corrupt scheme.
25. The 1st defendant in his testimony alleged that the plaintiff acquired her title over the suit land fraudulently, that she was not his father’s wife and that at the time of the alleged transfer to the plaintiff, his father was very sick and of advanced age. I have looked at the statement of defence and confirm that the Appellant did not specifically plead fraud nor lead any evidence to substantiate his allegations. No evidence was placed before this court to demonstrate that the age and health of the said Munyasia Namuitako Etaiya was critical such that he could not undertake the procedures complained of.



26. It is well settled that allegations of fraud is a serious offence punishable by imprisonment and must be pleaded and strictly proved to the required standard. The Court of Appeal in *Vijay Morjaria vs Nansingh, Madhusingh Darbar & another* [2000] eKLR held that:

“It is well established that fraud must be specifically pleaded and the particulars of fraud alleged must be stated on the face of the pleading. The act alleged to be fraudulent must of course be set out and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from the facts.”

27. Therefore, in the absence of any proof that the plaintiff irregularly obtained title to the suit land unprocedurally, this court has no reason to doubt the authenticity of the said title. An examination of the said title reveals that the approximate area of the suit land is 1.64ha. The plaintiff argued that the 1st Respondent unlawfully entered into the suit land and curved out a portion of the same giving rise to L.R No. E.Bukusu/S.Kanduyi/13025 which was later sub-divided into two (2) parcels being L.R no. E.Bukusu/S.Kanduyi/13671 and 13672.

28. The plaintiff called PW2, a County Surveyor who testified and produced a report dated 01/09/2021. In the said report, the witness indicated that upon surveying the suit land, he made a finding that the approximate area on the ground was 1.26ha which was short of 0.38 ha from the recorded 1.64ha. He noted that the boundaries set during the sub-division and creation of the suit land had been tampered with during the sub-division and the portion used to create L.R No. E.Bukusu/S.Kanduyi/13025. To his report, he attached a mutation form in support of his evidence.

29. While the 1st defendant refrained himself from pleading, leading evidence or submitting on the creation of L.R No. E.Bukusu/S.Kanduyi/13025, it is clear that the creation of this plot and the resultant sub-division is the central issue in this suit. I have examined the mutation forms the surveyor relied on in preparation of his report and those he attached thereto and note that L.R No. E.Bukusu/S.Kanduyi/13025 is indicated to be a sub-division of plot no. 10590. Further, according to the green card produced as P-Exhibit 8, the register for L.R No. E.Bukusu/S.Kanduyi/13025 was opened on 03/06/2008 which clearly is after Munyasia Namuitako Etaiya had died indicating that the said sub-divisions were done by the 1st defendant as he stood to benefit from the said sub-division. The next entry in the register is the registration of the land in the name of the 1st defendant followed by sub-division.

30. Looking at the mutation form serial no.43960 attached to the surveyor’s report produced as P-Exhibit 9, it emerges that plot no. 10590 shares a common boundary with the suit land. This finding draws credence to PW2’s evidence that a portion of 0.38ha of the suit property was encroached as a result of the creation of L.R No. E.Bukusu/S.Kanduyi/13025. Additionally, I have compared the shape of the suit land as depicted in the mutation form attached to the surveyor’s report, which was prepared when the land was surveyed, with the mutation form used during the subdivision of L.R No. E.Bukusu/S.Kanduyi/9268 to create the suit land. I note discrepancies between the two shapes, further leading the court to conclude that indeed a portion of the suit land was curved out. I refer to the findings in *Ngaremani v Katete (Environment & Land Case 49 of 2017)* [2023] KEELC 17770 (KLR) (7 June 2023) (Judgment) where the court when faced with a similar issue stated that;

“The starting point for determination of this issue is to note that the boundary in issue is a general boundary and not a fixed one. It means that the areas or sizes of the parcels of land to which they attach or which they bound are merely approximate. They can never be exact unless the boundaries have been fixed. It goes without saying that it is possible then to find



that the acreage borne by the title deed is different from the actual size on the ground. What is merely representative of the true position of things is the shape of the parcel of land as shown on the Registry Index Map (RIM). Therefore, when the boundaries are to be fixed, the shape of the ground area will follow the general shape of the same as shown on the RIM.”

31. Thus, it is my considered view that the prayer by the plaintiff that the Land Registrar and County Surveyor visit the suit parcels of land and establish the boundary between the mentioned portions is merited.
32. The plaintiff also sought for a permanent injunction against the defendants from entering and interfering with the occupation of the suit land. A permanent Injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act in order for the rights of the relevant party to be protected. This Court has the powers to grant the permanent injunction under Sections 1A, 3 & 3 A of the Civil Procedure Code, 2010 if it considers that the right of a party has been fringed, violated and/or threatened as the Court cannot just sit, wait and watch under the given circumstances.
33. The Principles on Injunction were established in the celebrated case of *Giella vs Cassman Brown & Co. Ltd* (1973) EA 358. Having looked at the Reports by the Land Registrar and the Surveyor dated 29.06.2018 and 04.06.2018 respectively and the Plaintiff's exhibits produced in court, I find and hold that the Plaintiff has indeed established a prima facie case and proved its case to the required standard to warrant the grant of the permanent injunction orders sought. From the evaluation of the evidence and the discussion in preceding paragraphs, this court has established that the plaintiff is the lawful owner of the suit land and that there was indeed an interference with the boundaries thereof. Consequently, I order that the defendants, whether by themselves, their agents and/or third parties or anybody acting or claiming through them be and are hereby restrained from encroachment on or demarcating, plaintiff's Tilling, wasting, occupying, alienating, an/or claiming ownership of the plaintiff's land.
34. The plaintiff also sought for general damages for trespass. From the foregoing, it is clear that the plaintiff is the absolute, rightful and indefeasible owner of the suit property herein, I have also found that the 1st defendant is guilty of encroaching and trespassing onto the plaintiff's land. The said encroachment whose magnitude was found to be 0.38Ha, did deny the plaintiff use, occupation, possession and enjoyment of the said land while the defendant has been cultivating, leasing and enjoying the use of the same unlawfully. It is this loss of use and all the incidental rights that have been infringed by the 1st defendant that the plaintiff now seeks for compensation.
35. In the case of *Duncan Nderitu Ndegwa v. KP& LC Limited & Another* (2013) eKLR where P. Nyamweya J. held that: -

“...once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff's right to use and enjoy the suit property occasioned by the 1st and 2nd Defendants trespass”
36. From the record, the plaintiff has proved trespass but there is nothing to enable this court determine the actual damage and/or measure of the damage or loss that the plaintiff and its members suffered to be compensated for the loss. However, in relying on the above case law and the principles laid out, I find the plaintiff indeed suffered damages as a result of the 1st defendant's continued acts of trespass. I will proceed and award him Kshs. 100,000/= as general damages.



37. The plaintiff also sought to have a caution registered on the suit land on 05/05/2000 removed or vacated. I note that the plaintiff despite attaching recent searches for the suit land i.e dated 26/01/2009 and 08/07/2008 which dates are after the said caution was registered; none of the certificates of official search indicate that there exists a caution. Although the 1st defendant does not deny the existence of the alleged caution, it is difficult for this court to issue orders in a vacuum and on the word of the parties. There has to be empirical evidence of existence of such caution. Therefore, this prayer cannot issue and the plaintiff may seek redress in accordance with Section 73 and 78 of the [Land Registration Act](#), if need arise.
38. On the issue of costs, given the circumstances and relations of the parties, I order each party to bear their own costs.
39. Accordingly, I make the following consequential orders.
- a. The Bungoma County Land Registrar and Bungoma County Surveyor do re-survey land parcel no. E. Bukusu/S.Kanduyi/9471, 13025,13671 and 13672 and reinstate the curved acreage of 0.36 ha which was unlawfully, illegally and unprocedurally curved/removed from land parcel no. E. Bukusu/S.Kanduyi/9471 to its original state to reflect the acreage of 1.64ha and further reinstate the beacons between parcels in dispute herein.
 - b. A Permanent injunction is hereby issued restraining the defendants whether by themselves, their agents and/or third parties or anybody acting or claiming through them from encroachment on or demarcating, Tilling, wasting, occupying, alienating, an/or claiming ownership of any portion and/or whole of land parcel no. E.Bukusu/S.Kanduyi/9471.
 - c. General damages for trespass of Kshs. 100,000/= to be paid by the 1st Defendant to the plaintiff
 - d. Each party to bear their own costs of this suit.
40. Orders accordingly.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 03RD DAY OF APRIL, 2025.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. Mr. Wattangah for the plaintiff.
2. M/S Wanyama H/B for Mr. Bwonchiri for the 1st Defendant.
3. Bett C/A.

