



**Simiyu v Machembe (Environment and Land Appeal E001 of 2025)
[2025] KEELC 3085 (KLR) (2 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3085 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND APPEAL E001 OF 2025**

CK NZILI, J

APRIL 2, 2025

BETWEEN

TIMONA SIMIYU APPELLANT

AND

MATAYO ONGANI MACHEMBE RESPONDENT

*(Being an appeal from the judgment and decree of Hon. Owiti A.G. (PM) delivered on 13/4/2015
in Kitale CMCC No. 209 of 2001 between Matayo Ongani Muchembe -vs- Timona Simiyu)*

JUDGMENT

1. The appellant, who was the defendant at the lower court, has approached this court vide a memorandum of appeal dated 9/5/2015. He faults the judgment of the trial court for:
 - (1) Finding the case proved by the respondent against him.
 - (2) Arriving at an erroneous decision contrary to the law.
 - (3) Arriving at the decision based on issues and facts that were not raised, pleaded, or proved.
 - (4) Not relying on Section 34 of the *Co-operative Societies Act* Cap 419, the *Evidence Act* Cap 80 and Section 26 of the *Land Registration Act*.
 - (5) Relying on wrong facts contrary to the evidence on record.
 - (6) Finding the respondent as the absolute owner of the suit land, yet there was no such evidence in support of that finding.
 - (7) Arriving at a decision not premised on law.
2. As an appellate court of the first instance, the obligations of this court were set out in *Selle & Another -vs- Associated Motor Boat Co. Ltd & Others* [1968] eKLR, namely; to reconsider the evidence,



- evaluate it and draw its conclusions of facts and law and only depart from the findings of the court below if they were not based on the evidence on record, or where the court acted on the wrong principles of law.
3. The respondent had approached the trial court through a plaint dated 1/2/2001. His complaint as the registered owner of parcel LR. No. Kaisagat/Chepkoilel Block 3/Bwayi/9, measuring 2.5 acres that he bought from the late Kariuki Macharia, was that the appellant had trespassed into it. He, therefore, sought an order of eviction.
 4. The appellant opposed the suit by a statement of defense dated 17/5/2001. He denied the alleged trespass and maintained that he was the bona fide owner of the suit land after he bought a share through Bwayi Co-operative Society Limited. The appellant averred that the late Kariuki Macharia had tried to purchase a share through proceedings in Kitale Civil Suit No. 176 of 1980, but the judgment was set aside in High Court Kitale Civil Appeal No. 6 of 1983.
 5. The appellant averred that the late Kariuki Macharia, having lost his purported purchase of the suit land on appeal, went ahead and registered himself as the owner of the land illegally or fraudulently; otherwise, the beneficial owner of the land was him.
 6. At the trial, Matayo Ongani Machembe testified as PW1. He told the court he bought the land measuring 1½ acres from Kariuki Macharia in 1985 and later obtained a title deed in 2010. He produced the agreement; official search certificate and a title deed as P. Exhibit Nos. (1), (2) and (3). PW1 denied knowledge of the alleged claim of the appellant. Similarly, he said that he was not aware of any previous court proceedings involving the suit land and the seller of the land. PW1 also stated that he was not in occupation of the land.
 7. The suit at the lower court was listed for a defense hearing on 19/12/2011, 27/2/2012, 16/4/2012, 25/6/2012 and 27/8/2012, when the appellant did not attend court despite service with hearing notices. By an application dated 18/10/2013, the appellant sought to set aside the proceedings of 19/9/2011 and to re-open the defense. The same was allowed on 12/5/2014, paving the way for the appellant's testimony as DW1 on 17/11/2014. His testimony was that he bought the land as a shareholder of a Co-operative Society Farm in 1977, a share certificate, and a receipt were produced as D. Exhibits 1(a) and (b). DW1 told the court that upon buying the land, he took possession and erected a home where he has raised his children and grandchildren without interruption by anyone. DW1 told the court that he owed one Miriam Adongo Kshs.4,000/=, which she declined to receive, leading to a court case where he was ordered to refund the money.
 8. DW1 admitted that after Miriam Adongo trespassed into the land in question, the matter was determined at the Court of Appeal Eldoret, as per D. Exhibit No. (3). DW1 acknowledged registering a caution on the title register for the land in 1993, as per D. Exhibit No. (4), a receipt dated 7/12/1993. He denied encroaching on the suit land, for it belonged to him.
 9. In cross-examination, DW1 told the court that he never dwelt with the late Kariuki Macharia over the land. Equally, he said that he was never party to any sale agreement between Miriam Adongo and the late Kariuki Macharia. DW1 said that he was unable to tell how the respondent obtained title to the land; otherwise, he was a bona fide purchaser and the one residing on the land. Similarly, he denied knowledge that the land was sold via a public auction.
 10. The appeal was canvassed by way of written submissions. The respondent relies on a written submission dated 28/1/2025. It is submitted that after obtaining a stay of execution at the lower court, the appellant went to slumber and has even failed to file written submissions. The respondent submits that, on top of testifying, the respondent produced exhibits on how he acquired the land. It is



- submitted that the appellant failed to appear for the hearing despite being served with hearing notices and only moved to court to set aside the judgment and was allowed to re-open the defense, to which he produced D. Exhibit Nos. 1(a) and (b), 3 and 4.
11. The respondent submits that the letter and receipts appearing on pages 8 and 14 of the record of appeal did not form part of the exhibits at the lower court and have been filed herein without leave of court to fill in the gaps on the findings of the trial court over non-refund of any money to Miriam Adongo.
 12. Further, the respondent submits that the cause of action as pleaded and the suit over the use, occupation of, and title to the land was properly before the trial court by dint of Articles 42, 69, 76, and 165(5) (b) of *the Constitution* as read together with Section 13 of the *Environment and Land Court Act*. Reliance was placed on The Owners of Motor Vessel "Lilian S" -vs- Caltex Oil (K) Ltd [1989] eKLR. The respondent also submits that he had pleaded, tendered evidence and proved his claim on a balance of probabilities, which the appellant did not manage to challenge. The respondent asks the court to find the appeal lacking merits.
 13. The issues for determination are:
 - (1) Whether the respondent proved his case to the required standard to be entitled to the order of eviction.
 - (2) If the appellant's defense had merits.
 - (3) Whether the appeal has merits.
 - (4) What is the order of costs?
 14. It is trite law that parties are bound by their pleadings, and issues for the court's determination flow from the pleadings. In IEBC -vs- Stephen Mutinda Mule (2014) eKLR, the court observed that a party should not be allowed in an adversarial system to travel outside his pleadings and that a court is not allowed to determine issues outside the pleadings unless where parties have agreed on the issues for the court's determination. See Raila Odinga & Others -vs- IEBC [2017] eKLR. Parties cannot also confer jurisdiction on a court. A court cannot arrogate to itself jurisdiction which is not donated to it by either a statute or *the Constitution*.
 15. Looking at the statement of defense by the appellant, it had not raised issues on the competence of the trial court to hear and determine the suit on account of Section 34 of the *Co-operative Societies Act*. Even if it had, the jurisdiction of the Co-operatives Tribunal does not, by dint of Section 76 of the *Co-operative Societies Act*, cover matters or disputes regarding use, occupation and title to land. Under Article 162 (2) (b) of *the Constitution*, that jurisdiction falls in the Environment and Land Court. See Freizer Mumu -vs- Jonah Kavithi Daniel & Magdalene Wayua Daniel (Sued as the representatives of the Estate of Daniel Mulwa Kavithi & 3 others [2020] eKLR.
 16. The dispute before the trial court was not over debt or membership of the parties in any Co-operative Society. It was on trespass to land. Trespass under the *Trespass Act* is defined as unjustified entry into and commission of acts on the private land of another person. In KPLC -vs- Ringera & Others, Civil Appeal E24 of 2020 (consolidated) [2022] KECA 104[KLR] (4th February 2022) (Judgment), the court cited Duncan Ndegwa -vs- Kenya Pipeline Co. Ltd & Another [2013] eKLR, the courts held that the erection of power lines on the parcels of land amounted to acts of continuing trespass, likely to cause loss of benefits over the land for the period to the owner.
 17. Trespass is actionable per se. Section 107 of the *Evidence Act* provides that the burden of proof vests on he who asserts the existence of specific facts. In this appeal, the claimant was expected to prove



ownership of the land, entry of the trespasser and commission of acts of trespass. Section 26 of the [Land Registration Act](#) provides that a certificate of title is to be taken by the court as prima facie evidence of ownership, subject to impeachment of the same on account of fraud, illegality or issuance through a corrupt scheme. See Dr. Joseph Arap Ng'ok -vs- Justice Moiyo Ole Keiuwa & Others Civil Appeal No. 60 of 1997.

18. In the statement of defense by the appellant, he did not raise and plead any particulars of fraud, illegality or issuance by corrupt scheme of the title deed held by the respondent. There was no evidence led or tendered by DW1 to impeach the title deed held by the respondent. On the other hand, the respondent brought a paper trial on how he bought the land and acquired title to it. As to acts of trespass, the appellant did not tender evidence that he was justified in entering, occupying, remaining and committing tortious activities on the land. The appellant alleged that he was a bona fide purchaser of the land to be entitled to use it. Unfortunately, he never called for evidence from the person who sold him the land or tender any exhibits to show that he held a superior title to the land. A share certificate and a receipt cannot be used to impeach a title deed. The share certificate produced by the appellant had no title number to the land in issue. See Hubert L Martin & 2 others -vs- Margaret J. Kamar & 5 Others [2016] eKLR
19. Evidence of fraud or mistake under Section 80 of the [Land Registration Act](#) was not availed to impeach the title. Therefore, the respondent, as a title holder to the land that has not been impeached, has rights under Article 40 of [the Constitution](#) against intruders on his land.
20. When a title is under challenge, a party has to bring the paper trial to prove that the title deed was issued regularly, formerly, and free of any encumbrances and vice versa. See [Munyu Maina -vs- Hiram Gathiba Maina Civil Appeal No. 239 of 2009](#). In this appeal the respondent had brought all the paper trail to show the root of his title. Once this was done, the evidentiary burden, going by Raila Odinga & Another -vs- IEBC & Others [2017] eKLR, shifted to the appellant to impugn or prove allegations of irregularities, illegalities, and the unprocedural acquisition of the land by the respondent. The burden to prove fraud, illegality, and mistake is higher than in ordinary suits, as held in Emfil Limited -vs- Registrar of Titles Mombasa & 2 others [2014] eKLR. Looking at the totality of the pleadings, evidence tendered, and the law, I think the judgment of the trial court cannot be faulted on the grounds of appeal before this court.
21. It is trite that a party may not, at the appellate stage, rely on additional evidence or raise new issues that were not canvassed at the lower court without leave of court. In this appeal, I agree with the respondent that some documents forming part of the record of appeal are improperly before this court. Even if leave had been sought, a caution against the title per se did not justify ownership of or occupation of the land by the appellant.
22. The previous judgment in the High Court did not amount to a title deed or confer superior rights against the title and land held by the respondent. There was no counterclaim against the respondent's plaint based on the said caution and judgment. Occupation per se without ownership documents did not amount to impeaching the title held by the respondent. The appellant raised no counterclaim based on adverse possession or trust as overriding rights under Section 28(h) of the [Land Registration Act](#). A refund of the money in line with the judgment dated 25/11/1988 was not availed. The said Miriam Adongo, from the record, was not called to lead evidence to support the appellant's allegation that he was on the land lawfully on account of being a bona fide purchase for value without notice. See Katende -vs- Haridar & Company Limited [2008] 2 E.A.173
23. The upshot is that I find the appeal lacking merits. It is dismissed with costs. The appellant shall hand over vacant possession of the land after 90 days from the date hereof, in default of which he shall be



evicted from the said land at his costs and expenses, in line with Section 152 A-I of the *Land Act* upon expiry of the notice.

**JUDGMENT DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT
AT KITALE ON THIS 2ND DAY OF APRIL 2025.**

In the presence of:

Court Assistant - Laban

Lichuma for Khisa for appellant present

Miss Ruto for the respondent present

HON. C.K. NZILI

JUDGE, ELC KITALE.

