



**Mbaka v Wanjiru (The Administrator of the Estate of Anne Wanjiru Mwaura – Deceased) & 2 others (Environment & Planning Appeal E001 of 2023) [2025] KEELC 4140 (KLR) (27 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 4140 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & PLANNING APPEAL E001 OF 2023**

**AY KOROSS, J**

**MAY 27, 2025**

**BETWEEN**

**PATRICK MURIITHI MBAKA ..... APPELLANT**

**AND**

**CAROLINE WANJIRA WANJIRU (THE ADMINISTRATOR OF THE ESTATE OF ANNE WANJIRU MWAURA – DECEASED) ..... 1<sup>ST</sup> RESPONDENT**

**KANTAFU COMPANY LTD ..... 2<sup>ND</sup> RESPONDENT**

**DISTRICT LAND REGISTRAR – MACHAKOS ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Background of the appeal**

1. Before the trial court, the appellant was one of the defendants together with the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, and the deceased 1<sup>st</sup> respondent was the plaintiff.
2. In an amended plaint dated 27/08/2021, it was contended that the deceased 1<sup>st</sup> respondent purchased Plot No. 073/LD/LK/98-Kantafu (“1<sup>st</sup> respondent’s land”) from the 2<sup>nd</sup> respondent, and a share certificate was issued to her.
3. It was contended between 2004 and 2012, the deceased 1<sup>st</sup> respondent’s legal representative, Caroline Wanjira Wanjiru (Caroline), paid requisite site showing charges to the 2<sup>nd</sup> respondent, and thereafter, its surveyor showed her the 1<sup>st</sup> respondent’s land.
4. According to her, sometime in July 2018, the appellant illegally trespassed onto the deceased 1<sup>st</sup> respondent’s land. She also accused the 2<sup>nd</sup> respondent of the unlawful act of double allocation of land. Thus, she sought the following reliefs from the trial court: -



- a. A declaration that the deceased 1<sup>st</sup> respondent was the legal owner of plot no. 073/LD/LK/98-Kantafu, which by law devolves to Caroline.
  - b. An order does issue compelling the 2<sup>nd</sup> and 3<sup>rd</sup> respondents through their surveyors to identify the physical location of plot no. 073/LD/LK/98-Kantafu.
  - c. Upon grant of prayer (a) above, the court does issue a mandatory injunction directing the 2<sup>nd</sup> respondent to process the title documents in the 1<sup>st</sup> respondent's name, and the 3<sup>rd</sup> respondent does issue the title deed.
  - d. An order does issue compelling the 2<sup>nd</sup> and 3<sup>rd</sup> respondents through their surveyors to identify the physical location of KMRK/MKS/03/ (541).
  - e. If plot no. 073/LD/LK/98-Kantafu and plot no. KMRK/MKS/03/ (541), now described as title Donyo Sabuk/Komarok Block 1/67255, are found to be located at the same location, the subsequent allocation as KMRK/MKS/03/ (541) and issuance of a title deed in the appellant's name be declared unlawful, null and void.
  - f. Upon the grant of prayer (e) above, the court does issue an order directed to the 3<sup>rd</sup> respondent to cancel the appellant's title documents to Donyo Sabuk/Komarok Block 1/67255 and rectify the said land register and substitute the appellant's name with that of Caroline.
  - g. An order of eviction against the appellant from 073/LD/LK/98-Kantafu, and this order be enforced by the O.C.S. Maraa police station.
  - h. An order of permanent injunction restraining the appellant and 2<sup>nd</sup> respondent, their servants, agents or anyone acting through them from dealing with 073/LD/LK/98-Kantafu or interfering with the deceased 1<sup>st</sup> respondent's quiet occupation thereof.
  - i. General and exemplary or aggravated damages.
  - j. Costs of the suit and interest.
5. The appellant and 2<sup>nd</sup> respondent filed their respective defences dated 20/09/2021 and 2/11/2021, in which they averred they were strangers to the deceased 1<sup>st</sup> respondent's assertions and put her to strict proof.
  6. Furthermore, the 2<sup>nd</sup> respondent maintained that plot no. 073/LD/LK/98-Kantafu and plot no. KMRK/MKS/03/ (541), now described as title no. Donyo Sabuk/Komarok Block 1/67255 ("appellant's land") was not in the same location as the 1<sup>st</sup> respondent's land and put her to strict proof.
  7. It is worth noting that the 3<sup>rd</sup> respondent did not participate in the lower court proceedings, and the same position similarly obtains herein.
  8. The matter proceeded to a hearing, and the appellant testified as DW1 and his evidence was composed of an adopted witness statement, oral testimony and documents produced as Dex. 1-12.
  9. The 1<sup>st</sup> respondent's sole witness was Caroline (PW1), and her evidence was composed of her adopted witness statements, oral testimony, and documents she produced as Pex. 1-10.
  10. As for the 2<sup>nd</sup> respondent, it did not call any witnesses to testify, and it sufficed the assertions contained in its defence were unsubstantiated and became mere statements of fact.
  11. After hearing the parties, the matter was reserved for judgment. In the impugned judgment that the learned trial magistrate rendered, he framed 7 issues for determination.



12. The 1<sup>st</sup> and 2<sup>nd</sup> issues of whether the 1<sup>st</sup> respondent's land belonged to her and whether fraud was committed were found in the affirmative.
13. On the 3<sup>rd</sup> and 4<sup>th</sup> issues of whether the 2<sup>nd</sup> and 3<sup>rd</sup> respondents could be compelled to process the 1<sup>st</sup> respondent's title deed and their surveyors identify the physical location of the 1<sup>st</sup> deceased respondent's land, the trial court stated that because of the finding of fraud, the relief of cancellation of the appellant's title document was merited.
14. On the 5<sup>th</sup> issue of whether reliefs for permanent injunction and eviction were merited, it found in the affirmative. The relief of general damages, which was the 6<sup>th</sup> issue, was declined, and on the last and 7<sup>th</sup> issue of costs was allowed by awarding costs to the deceased 1<sup>st</sup> respondent.
15. Eventually, and flowing from these findings, judgment was entered in the deceased 1<sup>st</sup> respondent's favour, and additionally, the learned trial magistrate directed the 2<sup>nd</sup> and 3<sup>rd</sup> respondents to allocate alternate land to the appellant.

### **Appeal to this court**

16. Dissatisfied with the impugned judgment, the appellant filed his memorandum of appeal dated 28/11/2023, which faulted the learned trial magistrate on 10 grounds.
17. Being aware of the shortcomings of the grounds as they were not concise, in submissions dated 28/02/2024 filed by the law firm of M/s. Wahome Gikonyo & Co. Advocates, he abandoned some of the grounds and consolidated others. Hence, the summarised grounds faulted the learned trial magistrate for: -
  - a. Finding that the deceased 1<sup>st</sup> respondent's land and the appellant's land were the same parcel.
  - b. Cancelling the appellant's title on the ground of fraud.
  - c. Finding that there was a double allocation of the 1<sup>st</sup> respondent's land and the appellant's land.
  - d. Issuing orders of permanent injunction and eviction.
18. Accordingly, the appellant implored this court to allow the appeal, set aside and/or vacate the impugned judgment and any consequential decree that ensued therefrom. Additionally, he urged this court to award costs of the appeal and the lower court suit to him.

### **Submissions.**

19. As directed by the court, all parties canvassed the appeal by written submissions except the 3<sup>rd</sup> respondent.
20. This court has considered submissions from the law firms of M/s Kinyua Mwaniki & Wainaina Advocates for the 1<sup>st</sup> respondent, dated 19/07/2024 and M/s. Wanjohi Wawuda Advocates for the 2<sup>nd</sup> respondent dated 27/11/2024 and is highly indebted to counsels for their well-researched submissions.
21. Upon identifying and considering the issues for determination, this court will, in its analysis and determination, consider the parties' rival arguments on the particular issue and also consider provisions of the law and judicial precedents that were relied upon to advance their respective arguments.



## Issues for determination

22. This being the 1<sup>st</sup> appellate court, it reminds itself that the task at hand is to reappraise, reassess, and reanalyse the evidence as asserted by the parties and to establish if the findings reached by the learned trial magistrate should stand and give reasons if they do not.
23. This court's role was well illustrated in the Court of Appeal decision of *Ratilal Gova Sumaria & another v Allied Industries Limited* [2007] eKLR, in the following words: -
- “This being a first appeal we are obliged to reconsider the evidence, re-evaluate it and make our own conclusions, but as we do so it must be remembered that we have neither seen nor heard the witnesses – see *Peters Vs. Sunday Post Ltd* [1958] E.A. 424. *Selle & Another Vs. Associated Motor Boad Co. Ltd. & Others* [1968] E.A. 123 and *Ephantus Mwangi & Another Vs. Duncan Mwangi Wambugu* [1982-88] 1 KAR 278. In the last case *Hancox JA* (as he then was) put it thus at p. 292 of the Report: -
- “A Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding he did.” ”
24. Therefore, this court has carefully considered the records, parties' rival submissions, provisions of law and authorities relied upon, and the issues that arise for determination are: -
- a. What claim was pleaded by the deceased 1<sup>st</sup> respondent, and was it proved to the required standards?
  - b. What orders should this court issue, including an order as to costs?
25. Since the outcome of the 1<sup>st</sup> issue will determine the consequential orders that will ensue in the 2<sup>nd</sup> issue, these 2 issues shall be addressed together.

## Analysis and determination

26. The legal framework on the legitimacy of title documents is governed by Sections 24 and 25 of the *Land Registration ACT*. Even so, a title document can be challenged on the grounds set out in Section 26 of this Act.
27. Section 24 recognises the registered owner as the absolute owner of land, and this proviso of the law provides as follows: -
- “Subject to this Act—
- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
  - (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.’



28. While Section 26 of the [Land Registration Act](#) states as follows;

“26 (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.”

29. By these statutory provisions, courts consider title documents as prima facie evidence of ownership of land. This proprietorship allows the registered owner to enjoy rights of possession, occupation, and quiet use of his land. Still, the registered owner’s proprietorship can only be challenged on the grounds set out in Section 26.

30. In the circumstances of this case where all parties are in concurrence that the 1<sup>st</sup> respondent never pleaded fraud albeit the learned trial magistrate making such a finding and cancelling the appellant’s title on this unpleaded claim, the deceased 1<sup>st</sup> respondent argues the claim of illegality which was pleaded by the deceased 1<sup>st</sup> respondent, can interchangeably with be used with the claim of fraud.

31. This line of argument by the deceased 1<sup>st</sup> respondent’s counsel cannot stand because Section 26 of the [Land Registration Act](#) recognises them as 2 distinct causes of action.

32. Furthermore, Black’s Law Dictionary, 11<sup>th</sup> Edn, clarifies the distinctiveness of these 2 causes of action by defining illegality in the following words:

- “ 1. An act that is forbidden by law.
2. The state of not being legally authorized.”

33. Whereas fraud has been defined by the same dictionary at page 802 in the following words: -

- “ 1. A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment. Fraud is usu. a tort, but in some cases (esp. when conduct is willful) it maybe a crime.)- Also termed intentional fraud...
2. A reckless misrepresentation made without justified belief in its truth to induce another to act.
3. A tort arising from a knowing or reckless misrepresentation or concealment of material fact made to induce another to act to his or her detriment. Additional elements in a claim of fraud may include reasonable reliance on the misrepresentation and damages resulting from this reliance.



4. Unconscionable dealing; esp., in contract law, the unfair use of the power arising out of the parties' relative positions and resulting in an unconscionable bargain."

34. These definitions speak for themselves on the contrasts of these claims, and this court need not say more.

35. Therefore, this court agrees with the appellant and the 2<sup>nd</sup> respondent's counsel and finds that the deceased 1<sup>st</sup> respondent, having not been specifically pleaded fraud, the learned trial magistrate erred in deciding over a non-pleaded issue.

36. In arriving at this finding, direction is sought from the Court of Appeal decision of Douglas Mbugua Mungai v Harrison Munyi [2019] KECA 376 (KLR), where, when faced with a decision on the unpleaded issue of overriding interest over land, the court stated: -

"The appellant submitted, correctly in our view, that a party who relies on section 30 to affect the rights of a registered proprietor, ought to plead such case and provide requisite proof for it. But there was no such pleading in this case and the parties were not invited to make submissions on the issue. The trial court raised and decided on it suo motu. With respect, there was no jurisdiction to do so."

37. Furthermore, it is trite law that in civil proceedings, issues are raised by way of pleadings and, as a rule, the court can only lawfully determine issues that are specifically pleaded and proved before it. See Douglas Mbugua Mungai (Supra).

38. Turning to the amended complaint, it arises the deceased 1<sup>st</sup> respondent's claim was on illegality and trespass. The particularisation of illegality is found in paragraph 5(b), where it is alleged that the 2<sup>nd</sup> respondent had illegally allocated the deceased 1<sup>st</sup> respondent's land to the appellant.

39. It was as a consequence of this illegal allocation that the amended complaint argued in paragraph 7 thereof that the appellant and the 2<sup>nd</sup> respondent were guilty of trespass.

40. Having scrutinised the judgment, it is obvious the trial magistrate did not address his mind on the claim of illegality. Respectfully, he appears to have confused this claim with the unpleaded claim of fraud.

41. Thus, this court will be asking itself whether, on consideration of the evidence, this claim of illegality that was specifically pleaded was proved to the required standards and if so, whether there is trespass.

42. Turning to matters of evidence, it is trite law that she who alleges must prove. On evidentiary burdens, courts are usually guided by Sections 107-109 of the *Evidence Act*.

43. The alleged acts of illegality having been rebutted by the appellant, the legal and evidential burden lay with the deceased 1<sup>st</sup> respondent to prove her case to the court's satisfaction. This evidential burden was well explicated in the Supreme Court of Kenya decision of Gichuru v Package Insurance Brokers Ltd [2021] KESC 12 (KLR): -

"Section 108 of the *Evidence Act* provided that the burden of proof in a suit or procedure lay on the person who would fail if no evidence at all were given on either side. Section 109 of the Act declared that, the burden of proof as to any particular fact lay on the person who wished the court to believe in its existence, unless it was provided by any law that the proof of



that fact would lie on any particular person. The petitioners bore the overriding obligation to lay substantial material before the court, in discharge of the evidential burden.”

44. Since the deceased 1<sup>st</sup> respondent affirmed that there was a double allocation of her land and that of the appellant, she bore the burden of proving so.
45. Having considered the evidence on record, this court agrees with the appellant and the 2<sup>nd</sup> respondents’ counsels that Caroline’s evidence fell far short.
46. This conclusion is so because none of the documents she produced as evidence were sufficient to prove the precise location of the deceased 1<sup>st</sup> respondent’s land vis-à-vis that of the appellant.
47. Furthermore, the deceased 1<sup>st</sup> respondent’s prayer for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents to show her the location of her land goes on to illustrate that even to the time of filing suit, she was still uncertain of where her land was.
48. One would have expected her to demonstrate by way of evidence that she paid for the site showing charges, call this particular surveyor who showed her the location of her land as a witness and for him to produce a map evidencing this position or at the very least call a survey expert who would produce a survey report substantiating her assertions. Unfortunately, this was not so.
49. In the absence of adducing evidence to back her claims on the exact location of her land, her claim fell into an “evidential vacuum”. Therefore, this court finds the deceased 1<sup>st</sup> respondent did not prove her claim of double allocation of her land to the required standards. Her claim of trespass also falls by the wayside.
50. To this end and for the reasons given and findings made, this court ultimately finds that this appeal is merited and allowed in its entirety. It therefore sets aside the entire judgment and decree appealed from.
51. Since costs follow the event, the appellant shall have costs of the appeal and lower cost suit, while 2<sup>nd</sup> respondent shall only have the costs of this appeal. Since the 3<sup>rd</sup> respondent did not participate in the lower court proceedings or those before this court, no costs are awarded to it.

Judgment accordingly.

**DELIVERED AND DATED AT MACHAKOS THIS 27<sup>TH</sup> DAY OF MAY, 2025.**

**HON. A. Y. KOROSS**

**JUDGE**

**27.05.2025**

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Mr gikonyo for appellant

Mr Githae holding brief for Mr Wanjohi for 2<sup>nd</sup> respondent

N/A for 1<sup>st</sup> respondent

Ms Kanja- Court Assistant

