



**Kalikania v Machuma (Environment and Land Appeal E033 of 2022)
[2025] KEELC 4551 (KLR) (22 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 4551 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E033 OF 2022**

EC CHERONO, J

MAY 22, 2025

BETWEEN

JOHN WAFULA KALIKANIA APPELLANT

AND

AGINETA MACHUMA RESPONDENT

JUDGMENT

Introduction

1. Through a memorandum of appeal dated 16/12/2022, the Appellant, John Wafula Kalikani who was the defendant in Bungoma CM ELC Case No. 111 of 2019 preferred this appeal challenging the judgment delivered by Hon. C.A.S Mutai, P.M on 1st November 2022 who ruled in favor of the Respondent, Agineta Machuma who was the plaintiff in the former suit.
2. The brief facts of the former suit are that the Respondent had sued the appellant vide a plaint dated 31/12/2019 in which she averred that she was the absolute registered proprietor of land parcel no. W.Bukusu/N.Mayanga/1206(hereinafter referred to as the 'suit land') and that the Appellant trespassed therein and started constructing temporary structures thereon thereby disrupting her quiet possession and occupation of the suit property. She sought for the following orders;

- a. As per paragraph 7 & 8 above.

The plaintiff's claim to this honourable court is for an eviction order to have the defendant and or his family, agents, servants and any other person working under his instructions vacate the plaintiff's parcel of land known as West Bukusu/N.Mayanga/1206.

The plaintiff's further claim is for an order for permanent injunction restraining the defendant and or his family, agents, servants and any other person working under his instructions from trespassing, entering, and/or use the plaintiff's parcel of land known as West Bukusu/N.Mayanga/1206.



- b. Costs and interest.
 - c. Any other relief and court deems fit to grant.
3. The Appellant filed a Statement of Defence and Counter-Claim dated 18/02/2021, in which he averred that the Respondent procured title to the suit property irregularly and in contravention of due legal process. He averred that he was the legal representative of the estate of the late Elizabeth Nanjala Wanyama who had obtained judgment and decree in Bungoma Land Disputes Tribunal Case No. 27 of 2009, which adopted the award made in Bumula LDT Case No. 4 of 2006. He stated that the said award related to the suit land originally registered in the name of one Reuben Wanyama Sindhika who had expressed an intention to transfer the same to the Respondent's deceased husband, Patrick Simeon Mukhechi, through a sale transaction.
 4. The Appellant further averred that pursuant to the aforestated intention, a sale agreement was entered into executed between Reuben Wanyama Sindhika and the said Patrick Simeon Mukhechi on 20/11/1989, which agreement was partly performed. It was averred that the Respondent subsequently and fraudulently caused the registration of the suit land in her name. The particulars of fraud were set out, including allegations that the Respondent colluded with the Land Registrar to facilitate the impugned transfer in the absence of a succession cause, and that she obtained a title deed while a lawful decree subsisted. The Appellant further contended that the present suit was res judicata, having been conclusively determined in Bungoma LDT Case No. 27 of 2009, and he therefore urged the court to dismiss the suit and allow his counter-claim.
 5. The suit proceeded by way of viva voce evidence with the Appellant calling one witness while the Respondent called two witnesses.
 6. PW1 Agineta Machuma testified that the DefendantAppellant entered into the suit land on 07/10/2019 and cut down her crops and erected some structures and a boundary. That the suit land belonged to her husband who transferred it to her. That she has been in possession of the suit land since the year 1991. She adopted as her evidence in chief her witness statement dated 17/05/2021. She produced into evidence a copy of title deed for the suit land as-P-Exhibit 1, copy of official search-P-Exhibit 2, a discharge of charge-P-Exhibit 3 and an agreement dated 20/11/1989-P-Exhibit 4.
 7. In cross-examination, she testified that the suit land first belonged to Reuben Wanyama Sindiha. That according to the agreement dated 20/11/1981, the consideration was paid leaving an outstanding balance of Kshs.25,830/=. She testified that she did not appeal against the award of the Bumula LDT nor the adopted judgment. That she obtained title of the suit land on 11/01/2018 after the demise of her husband, although she did not file a succession cause.
 8. PW2 Rasio Barasa Wanyama adopted his witness statement dated 17/05/2021 as his evidence-in-chief. He testified that he sold a piece of land to the Respondent through his father Reuben Wanyama Sindhika and was paid in full. In cross-examination, he stated that the Appellant was his brother and that their father Reuben Wanyama Sindhika sold the suit land to the Respondent's husband and they moved out but the Appellant later returned to the land.
 9. DW1 John Wafula Karikania adopted his witness statement dated 12/02/2021 as his evidence-in-chief and produced 7 documents as D-Exhibit 1-7. He testified that his father sold the suit land to the Respondent's husband and he witnessed the sale agreement. That the Appellant returned to the suit land after the award by the Bumula LDT and the resultant adoption by the Magistrate court as its judgment.



The Appeal.

10. This appeal is premised on the five grounds contained in the memorandum of appeal dated 16/12/2022 as follows:
 - a. The learned trial magistrate erred in law and in fact by allowing the respondents claim without any basis in law.
 - b. The learned trial magistrate erred in law and in fact by dismissing the appellants counter-claim against the law.
 - c. The learned trial magistrate erred in law and in fact by failing to appreciate the principle of res judicata.
 - d. The learned trial magistrate erred in law and in fact by not considering submissions by the appellant hence arriving at an erroneous decision.
 - e. The learned trial magistrate erred in law and in fact by not considering evidence on record hence arriving at an erroneous conclusion.
11. The appellant sought for the following orders;
 - a. The judgment and decree of the subordinate court be set aside and substituted with proper finding of this honourable court.
 - b. The appeal be allowed with costs to the appellant.
12. When this appeal came up for directions, the parties agreed to have it canvassed by way of written submissions.
13. The Appellants filed submissions dated 20/03/2025 and submitted on two issues. First, he submitted that the Respondent's husband failed to complete the balance of the purchase price for the suit land leading to the institution of a case before the Bumula LTD by Elizabeth Nanjala Wanyama in which an award was given in her favour for curving out of 2 acres out of the suit land. He stated that the award was subsequently adopted by Bungoma CMCC LDT Case no. 27 of 2009 and an order was issued for the surveyor to curve out 2 acres from the suit land for non-payment of the balance of the consideration. That the suit was res judicata.
14. On the second issue, it was submitted that the Respondent's husband who was a party to the case before the Tribunal did not appeal against it but instead, transferred ownership to the Respondent in order to defeat the award and judgment in Bungoma CMCC LDT Case no. 27 of 2009. Reliance was placed in the case of *Florence Nyaboke Machani v. Mogere Amosi Ombui & 2 Others Kisumu Court of Appeal Civil Appeal No. 184 of 2011* and the provisions of Section 26 (a) of the *Land Registration Act, 2012* on the impeachment of a title on grounds of fraud.
15. The Respondents filed submission dated 04/04/2025 in which she submitted on two issues. On the 1st issue, she submitted that the former suit was not res judicata as the parties in the former suit were different. That the parties in the former suit were Elizabeth Nanjala Wanyama and Patrick Simeon Mukuchi. Secondly, it was submitted that the Appellant did not have any locus standi to file the counter-claim since he was not a legal representative of the estate of Elizabeth Nanjala Wanyama. Further, it was submitted that the Land Disputes Tribunal acted in excess of its jurisdiction contrary to Section 3(1) of the land Disputes Tribunal *Act no.18 of 1990* and that the Chief Magistrate's Court erred in adopting its award.



16. Reliance was placed in the cases of Samuel Kamau Macharia & Another v. Kenya Commercial Bank Ltd & 2 Others (2012) eKLR and Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR. It was argued that the award of the Tribunal was null and void ab initio and any subsequent proceedings that followed based on that award were also incurably bad in law and therefore could not be upheld or enforced in law.

Analysis and determination.

17. I have considered the memorandum of appeal, the record of appeal, written submissions filed by the parties and the court record generally and although the appeal is premised on six grounds, I have identified the following as the probable issues that commend for determination:

- a. Whether this suit is res judicata.
- b. Whether the respondents satisfied the claim for eviction and permanent injunction.
- c. Whether the appellant satisfied his counter-claim.

18. As an appellate court of first instance, this court is not bound by the findings of fact and law made by the lower court and may on re-evaluation reach its own conclusion and findings. This principle was aptly enunciated in the case of *Selle & Another -vs- Associated Motor Boat Co. Ltd & others* (1968) EA 123 where the court of Appeal stated 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 retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen or heard the witnesses and should make due allowance in this respect”.

19. On the first issue, the Appellant argued that the former suit was res judicata Bungoma CMCC LDT No. 27 of 2009. This doctrine is provided for under section 7 of the [Civil Procedure Act](#) Cap 21 Laws of Kenya which defines the doctrine of Res Judicata in the following terms: -

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

20. In *Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others* [2017] eKLR, the Supreme Court held that all the elements outlined under section 7 of the [Civil Procedure Act](#) must be satisfied conjunctively for the doctrine of res judicata to be invoked. That is:

- (a) The suit or issue was directly and substantially in issue in the former suit.
- (b) That former suit was between the same parties or parties under whom they or any of them claim.
- (c) Those parties were litigating under the same title.
- (d) The issue was heard and finally determined in the former suit.



- (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.
21. In essence therefore, the doctrine implies that for a matter to be res judicata, the matters in issue must be similar to those previously in dispute between the same parties and that the same was heard and determined on merits by a court of competent jurisdiction. My examination of pleadings in both cases reveals that in Bungoma CMCC LDT No. 27 of 2009, the parties were Elizabeth Nanjala Wanyama v. Patrick Simeon Mukuchi while in the current suit, the parties are John Wafula Kalikania who is representing the estate of Elizabeth Nanjala Wanyama v. Agineta Machuma. The Respondent in this instance is suing on her own behalf and is not suing in a representative capacity. Secondly, the cause of action in the former suit was in respect to enforcement of a land sale agreement while the claim in the current suit is for trespass and fraud.
22. In view of the foregoing, it is my considered view that this suit is not res judicata and therefore suitable to proceed for hearing and determination on merit.
23. I shall discuss the second and third issue concurrently. In support of her claim, the Respondent averred that she was registered proprietor of the suit land after her late husband Patrick Simeon Mukuchi transferred the same to her before his demise. She produced a title deed in her name which shows that she was registered as proprietor on 11/01/2015(P-Exhibit 1). It was her evidence that her late husband purchased the suit land from one Reuben Wanyama Sindhika (P-Exhibit 5). That after her husband purchased the suit property, the vendor placed her and her husband in possession and has been in possession until the year 2019 when the Appellant trespassed therein thereby depriving her of her right to quiet enjoyment.
24. The Appellant on the other hand averred that the Respondent obtained ownership of the suit land fraudulently and without due process. He confirmed that his father Reuben Wanyama Sindhika sold the suit land to Patrick Simeon Mukuchi, the Respondent's husband. That the Respondent's husband failed to complete payment of the purchase price as a result of which Elizabeth Nanjala Wanyama lodged a claim against the said Patrick Simeon Mukuchi before the Bumula Land Dispute Tribunal (LDT) wherein an award was issued in her favour for two (2) acres to be curved out from the suit land (D-Exhibit 5). The said award was adopted as a judgment of the Court in Bungoma CMCC LDT No. 27 of 2009 and a decree issued directing the Land Registrar and Surveyor to curve out the 2 acres (D-Exhibit 6). That in compliance with the said decree, the suit land was sub-divided (D-Exhibit 7) and thereafter an order issued directing the Executive Officer to execute transfer documents to enable satisfaction of the decree (D-Exhibit 6). He therefore testified that his occupation of the suit land is justified Pursuant to the above-mentioned award and decree.
25. In rebuttal, the Respondent stated that the LDT acted ultra vires contrary to Section 3 of the Land Disputes Tribunal *Act no.18 of 1990*. It was her testimony that the said award was void ab initio and the Magistrates Court erred in adopting the same as an order of the court.
26. It is trite that he who alleges must prove. It is also trite that the standard of proof in civil cases such as the former suit is on a balance of probabilities. Sections 107, 108 and 109 of the *Evidence Act* states as much. Section 26 of the *Land Registration Act* provides for the sanctity of a title deed. Courts are therefore mandated by statute to take judicial notice of a title document as prima facie evidence of ownership to land that can only be challenged on grounds stipulated thereunder. In the present case, the title produced by the Respondent shows that the suit land is registered in her name. The Appellant did not deny this fact but alleged that the said title was obtained fraudulently.



27. Section 3(1) of *Trespass Act* cap 294 states as follows;-

“(1) Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”

28. The Black’s Law Dictionary 10th Edition at page 1733 defines trespass as an unlawful act committed against the person or property of another; especially wrongful entry on another’s real property. Clark & Lindsell on Torts, 18th Edition on page 923 defines trespass as any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the Respondent to prove that the Appellant encroached on her land without any justifiable reason.

29. Section 24 and 25 of the *Land Registration Act* affords the Plaintiff the right to peaceful enjoyment of the suit land. The Respondent, being the registered proprietor of the suit land means that the Appellant needed to justify his presence in the said land. As stated above, he placed reliance in the award of the LDT and the decree of the Magistrate’s Court in Bungoma CMCC LDT No. 27 of 2009. From the record, the Respondent challenged the validity of both the award and decree.

30. The jurisdiction of the Land Disputes Tribunal is established under Section 3(1) of the Land Disputes Tribunal Act 1990 (CAP 303) (repealed) which states as follows:

“Subject to this Act, all cases of a civil nature involving a dispute as to—

- a) the division of, or the determination of boundaries to land, including land held in common;
- (b) a claim to occupy or work land; or
- (c) trespass to land shall be heard and determined by a Tribunal established under section 4.”

31. In *James Alukoye Were.Vs.Lurambi Division Land Disputes Tribunal*, Misc. Civil Appl. No.165 of 2005, the Court held that:-

“The Land Disputes Tribunal has no powers to arbitrate on matters involving title to land or give such order to grant specific performance to rectify the register”.

32. From the above, it is clear that the Land Disputes Tribunal could not entertain a dispute where their decision would result to an order affecting title to registered land as was the case herein. Such jurisdiction is vested in the Courts and in this case, the Environment and Land Court. Section 7 of the Land Disputes Tribunal Act (repealed) gives the Magistrates Court jurisdiction to adopt awards of the Tribunal and provides as follows;

“The Chairman of the tribunal shall cause the decision of the Tribunal to be filed in the magistrate’s court together with any depositions or documents which have been taken or proved before the Tribunal.

- (2) The court shall enter judgement in accordance with the decision of the Tribunal and upon judgement being entered a decree shall issue and shall be enforceable in the manner provided for under the *Civil Procedure Act*.”



33. In exercising the powers as donated above, the Magistrates Court is only mandated to adopt the award of the Tribunal and issue a decree. See the decision of the Court of Appeal in the case of Florence Nyaboke Machani v Mogere Amosi Ombui & 2 others Civil Appeal 184 of 2011 [2014] eKLR) where it was held that;

“In any event I do not think that the SRM’s court at Keroka has jurisdiction under the Land Disputes Tribunals Act to review, vary, rescind, vacate and or set aside an award filed. The role of that court is merely to adopt the award as a judgment of the court on application and thereafter issue a decree. It has no jurisdiction to examine the award in order to satisfy itself whether it is bad in law and therefore void ab initio”

34. From the evidence before this court, no appeal was preferred against the award of the Bumula Land Disputes Tribunal or the decree of the Magistrate Court which adopted the same. In the case of John Mungai Tama v Anjelica Muthoni Tama [2005] eKLR, Khamoni J stated as follows regarding a decision of the Land Disputes Tribunal that had been adopted as an order of the Court but had not been appealed against;

“...In law once a decision of a Land Disputes Tribunal has been adopted by a court of law as a judgment of that court, it is unsound for a party thereof to ignore that judgment of the court ...”

35. In Florence Nyaboke Machani v Mogere Amosi Ombui & 2 Others (Supra), the Court of Appeal rendered itself as follows;

“...The appellant in this appeal did not challenge the decision of the tribunal in accordance with the said procedure set out in the Act...As the learned Judge found in the judgement appealed from...” It is trite law that a valid judgment of a court unless overturned by an appellate court remains a judgment of court and is enforceable, the issue of jurisdiction notwithstanding. The plaintiff had all avenues to impugn the award as well as the judgment. He did nothing. As sarcastically put by counsel for the defendants in his submissions, the plaintiff chose to sleep on his rights like the Alaskan fox which went into hibernation and forgot that winter was over. “(Emphasis Ours).

36. Further, the Court of Appeal in the case of Kiragu Gicheha [2024] KECA 61 (KLR) stated that;

“In or view it matters not that the land Dispute Tribunal and the Provincial Land Appeals Tribunal did not have jurisdiction. Of crucial importance is that the award of the Provincial Land Appeals Tribunal was adopted as an order of the court and was thereafter not challenged.

Faced with a similar situation in the case of David Gombe Githinji v Mary Wanjiku Githinji (Legal Representative of Andrew Maina Githinji) [2014] eKLR, Obaga J persuasively stated thus: “The plaintiff’s suit cannot be sustained on this ground. I now move to address the issue of res-judicata. The proceedings before the Kwanza Land Disputes Tribunal were in respect of the same suit land. The parties in that suit as well as the present suit are the same. The dispute was resolved and the verdict adopted as judgment of the court vide Kitale Chief Magistrate Land Case No.63 of 2003. The tribunal was competent in the sense that the Act gave it powers to decide on the dispute. Whether it had jurisdiction to entertain the claim or not cannot be a subject of the present suit. It ought to have been attacked in the manner provided for under that Act. The verdict may have been null and void but that is a



matter outside the procedure followed by the plaintiff herein. Unless and until the tribunal verdict is set aside through proper procedure, it remains and had determined the dispute. I therefore find that this suit is not only improperly before the court but it is also res-judicata. The Court of Appeal decision cited by Mr. Kiarie is distinguishable in that, in that appeal, the High Court had quashed the decision of the tribunal and the Magistrate's Court which had adopted it. When an appeal was preferred against the High Court decision, the Court of Appeal found that the High Court judge was right in quashing the decision of the tribunal on account that the tribunal lacked jurisdiction to entertain the dispute. This is not the case in the present suit where the plaintiff is faulting the verdict of Kwanza Land Disputes Tribunal after failing to have the same quashed." (Emphasis Ours).

37. From the foregoing therefore, the decree issued in Bungoma CMCC LDT No. 27 of 2009 is valid and enforceable. It therefore follows that the estate of Elizabeth Nanjala Wanyama is entitled to 2 acres while the Respondent's claim can only be limited to 2 acres of the suit land.
38. Now, the Respondent sought for orders of eviction and permanent injunction. For an order of eviction to issue, the Respondent ought to prove that the Appellant is an intruder. As for the order of permanent injunction which is also known as perpetual injunction, the Respondent was required to go beyond the three-fold principles in *Giella v Cassman Brown & Co. Ltd* (1973) E.A. 358. Upon evaluating the entirety of the Appellant's evidence and considering the nature of the reliefs sought, it is my finding that the Appellant did not lead any evidence to prove that the Respondent trespassed onto her land.
39. The Appellant in his counter-claim accused the Respondent of colliding with the Land Registrar to cause the transfer of the suit land to her name without following the succession process, considering that there was a decree in place. The Respondent in rebuttal testified that her late husband transferred the suit land to her name prior to his demise and that there was no need for the Succession proceedings.
40. In the case of *Kinyanjui Kamau vs George Kamau* [2015] eKLR the court dismissed the appeal as it had not not been demonstrated that the Appellants had proved fraud to the required degree and stated as follows:

"It is trite law that any allegations of fraud must be pleaded and strictly proved. see *Ndolo vs Ndolo* (2008)1KLR (G & F) 742 wherein the court stated that "... we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove the allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely; proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases..."
In case where fraud is alleged it is not enough to simply infer fraud from the facts.

41. In this case, although the Appellant pleaded fraud, no evidence was presented to establish those allegations to the required standard, or at all. Notably, the Appellant failed to inform the court when the Respondent's husband's died or explain how the succession process would have been essential for the respondent to obtain title. As such, the allegation of fraud was wholly unsubstantiated and appeared to have been abandoned.
42. In the end, it is my finding that the Respondent's claim was not merited and the trial court therefore erred in allowing the same.
43. Consequently, I find this appeal merited and the same is hereby allowed with costs.



44. Orders accordingly.

DATED AND SIGNED AND DELIVERED AT BUNGOMA THIS 22ND DAY OF MAY, 2025.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. Mr. Oira H/B for Kweyu for Appellant.
2. Mr. Masiga H/B for Wekesa for the Respondent.
3. Bett C/A.

