



Malaba (Suing as the Personal Representative of Edward Nabangi) v Wandabwa (Environment and Land Appeal E002 of 2023) [2025] KEELC 426 (KLR) (4 February 2025) (Judgment)

Neutral citation: [2025] KEELC 426 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E002 OF 2023
EC CHERONO, J
FEBRUARY 4, 2025**

BETWEEN

**CATHERINE NEKESA MALABA APPELLANT
SUING AS THE PERSONAL REPRESENTATIVE OF EDWARD NABANGI**

AND

JOSEPH WANDABWA RESPONDENT

(Being an appeal arising from the Judgment and decree delivered by P.N. GESORA in Bungoma CM ELC No.129 of 2002 delivered on 07/06/2022)

JUDGMENT

1. The Appellant herein was the 4th Defendant before the trial court while the Respondent was the plaintiff.
2. The Appellant in this appeal prays to have the judgment by the trial court quashed and/or set aside and consequently for a declaration that all land known as KIMILILI/KIMILILI/2457 was lawfully allocated to the Appellant by the Municipal Council of Kimilili and the Respondent ought to desist from interfering with the Appellant’s peaceful occupation plus costs of the appeal and the primary suit.
3. In the impugned judgment, the trial court entered judgment in favour of the Respondent herein jointly and severally in terms of the Amended plaint dated 14/04/2008.
4. Being aggrieved by the trial court’s judgment, the Appellant herein preferred the current appeal. The Grounds of appeal as contained in the Memorandum of Appeal and are summarized as follows;
 - a. The learned trial magistrate erred in law and in fact when he held that the appellants allocation and purchase of all land known as Kimilili/Kimilili/2457 was done irregularly, unprocedural and thus null and void.



- b. That the learned trial magistrate erred in law and in fact when he overlooked the fact that the parcel of land in dispute falls under Kimilili Trading Centre Extensions which parcel of land was compulsorily acquired and the respondent compensated.
- c. The learned trial magistrate erred in law and in fact when in his judgment held that the respondent is the legal owner of Kimilili/Kimilili/2457 overlooking the fact that the respondent was compensated by Kimilili Municipal Council
- d. That the trial magistrate erred in law and in fact when in his judgment held that the respondents is the legal owner of the suit title yet a survey was done and development plan approved by then Kimilili Municipal Council.
- e. That the trial magistrate erred in law and in fact when in his judgment he failed to take into account the history of the parcel of land which formed Kimilili/Kimilili/2457.
- f. That the trial magistrate erred in law and in fact when in his judgment he held that the respondent is the legal owner of the parent title Kimilili/Kimilili/55 yet the land was subdivided and 11 titles formed.
- g. That the trial magistrate erred in law and in fact when in his judgment he failed to take into account that Kimilili/Kimilili/55 was compulsorily acquired and owners compensated and 11 titles resulted after sub-division was done which are Kimilili/Kimilili/2457, 2458, 2459, 2560, 2461, 2462, 2463, 2464, 2465, 2467.
- h. That the trial magistrate erred in law and in fact when in his judgment failed to take into account that Kimilili/Kimilili/2457 was allocated to the appellant by the Kimilili Municipal Council.
- i. That the trial magistrate erred in law and in fact when in his judgment he took into account matters that were not canvassed in evidence to the prejudice of the appellant.
- j. That the trial magistrate completely failed in his duty to sufficiently analyze the evidence before him as required before making a determination based on evidence.
- k. The learned trial magistrate's judgement was against the weight of the evidence on record.
- l. That the trial magistrate erred in law and in fact by failing to take into account the appellants submissions.

Proceedings before the trial court.

5. The Respondent's claim was as stated in the further Amended plaint dated 14/04/2008 where he sought for the following orders;
 - a. A permanent injunction against the 1st and 2nd defendants from trespassing and/or working on plots No. Kimilili/Kimilili/2457-Kimilili D-14
 - b. An order that the purported remaining allocation and sale of the said plots are null and void.
 - c. That the further selling of the said plot Kimilili/Kimilili/2457 remained plot no. Kimilili D-14 by the 2nd defendant to the 4th Defendant is null and void.
 - d. An eviction order to issue against the 4th defendant, his agents, heirs, assignees or any other person claiming through him from land parcel no. Kimilili/Kimilili/2457-Kimilili D-14.



- e. Costs of the suit
- f. Any other reliefs the honourable court may deem fit.
6. It was the Respondent's claim that in the years 1969 and 1970 he purchased by then LR No. Kimilili/Kimilili/55 measuring 0.52ha from one Nga'ng'a Makuti and took vacant possession thereof. That he later sub-divided the above plot to 11 portions with plot no. Kimilili/Kimilili/2457 and 2458 (herein after referred to as 'the suit properties) being amongst them. That the Kimilili Municipal Council renamed plot no Kimilili/Kimilili/2457 as Plot no. Kimilili/ D-14 and Plot No. Kimilili/Kimilili/2458 as Plot No. Kimilili D-15. The said Kimilili Municipal Council purported to allocate the said 2 plots to one Florence A. Anyango (1st Defendant) who instead purported to sell to John Kimani Mwaniki (2nd defendant). The said John Kimani Mwaniki subsequently purported to sell plot no. Kimilili D-14 to the Appellant herein. He averred that the allocation and subsequent sale of the two plots was done without his consent and knowledge thus null and void.
7. The 1st and 2nd Defendant filed a joint statement of Defence dated 02/08/2002 where they averred that on 28.5.1996 the 1st Defendant (Florence A. Anyango) was allocated a double commercial plot known as Kimilili 14 & 15 'D' by the 3rd defendant (Kimilili Municipal Council) which she subsequently sold to the 2nd defendant (John Kimani Mwaniki) in the year 2000. That plot no. Kimilili 14 & 15 'D' is not the same as LR No. Kimilili/Kimilili/2457 and 2458.
8. The 3rd defendant filed a statement of defence dated 21/06/2002 where it averred that She was not aware that the Respondent has the alleged parcels of land within its territory. That the allocation of plot no. Kimilili 14 & 15 'D' to Florence A. Anyango was done legally. She averred that the land claimed by the Respondent within Kimilili Trading Centre Extensions were compulsorily acquired and the owners compensated pursuant to the provisions of the Native *Land Act*. Lastly She averred that if at all the Plaintiff/Respondent is the registered owner of the suit land, such registration is unlawful.
9. The Appellant's statement of defence cannot be traced from the lower court file, the record of appeal or the supplementary record of appeal. It appears the Appellant did not file a statement of defence.
10. After the parties complied with order 11 CPR, the suit proceeded for hearing by viva voce evidence where the Respondent called 2 witnesses and closed his case. The Appellant on his part called one witness and closed his defence case.
11. George Opando (PW1) testified that he is the District Land Registrar Bungoma. He had with him a report concerning Kimilili/Kimilili/1857 originally LR No. Kimilili/Kimilili/55 under the name Nganga Mukuti. That LR No. Kimilili/Kimilili/55 was sub-divided on 14/11/1994 to give to plot no. 1257 among others. That the said LR No. Kimilili/Kimilili/1257 was registered in the name of Joseph Wandabwa. He stated that he carried out a scene visit in the company of the Works Officer. He stated that D15 is on LR No. Kimilili/Kimilili/1257.
12. Joseph Wandabwa Wenane (PW2) reiterate his claim as per the plaint and as summarized in paragraph 6 above. He further testified that he is not aware of any compulsory acquisition of the land. He testified that since he purchased LR No. Kimilili/Kimilili 55 in 1970 and subdivided into 12 plots and even sold 9 of the resultant plots, no one had ever challenged his title until the year 1994.
13. John Kimani Mwaniki (DW1) testified that plot no. Kimilili 14D & 15D measure 100 by 100 feet and that he acquired them from one Florence Anyango for a consideration of Kshs.360,000/=. That she issued to him an allotment letter from Kimilili Municipal Council. That he received developments approval and he had begun to put up shops before he was stopped by the respondent. His application to stop the development was denied and he subsequently completed constructing three shops. That



the two plots were no's 245 and 2458. He later testified that he sold the plots for 2.9 million to the appellant.

14. Edward Tale Nabangi (DW2) testified that he purchased the suit land at Kshs.2.9Million and was issued with a letter of transfer from the Kimilili Municipal Council dated 28/07/2002, rates payment receipts, transfer forms and inspected the roll at the municipal council and was satisfied with the structure of ownership. That he was registered as owner of the suit properties in 2012 and was issued with a letter of transfer dated 19/12/2012. He also presented receipts for the rates he has paid so far. That he holds an allotment letter and not a certificate of lease for the suit properties.
15. Isaac Alinyo Okaka (DW3) testified that he is the superintendent Ministry of Lands Urban Physical Planning and Housing. That he previously was working with the National Government Municipal Council of Kimilili. That the suit properties were created from land parcel no. 11243 after a survey in by the government in 1962 and fixed boundaries created. With him he had the survey map plan of LR No. 11240-45 under folio number 99/13 approved in 1967 by the Commissioner of Lands. That the land was acquired by the Municipal Council of Kimilili allocated to Florence Anyango by the District Allocation Committee under the repealed Cap 256. That the said properties were later transferred to Joh Kimani and subsequently to Edward Nabangi. That developments were done on approval.
16. He stated that the Respondent did not acquire proper title as the person he purports to have purchased the suit properties from does not appear as one of the people compensated for LR No. 11243 as per a letter by the District Officer Eastern Division to the District Commissioner Bungoma referenced LLD 16/1/1 and dated 27/03/7961. He produced various other letters in support of the above assertion.
17. On cross examination, he testified that he worked with Kimilili Municipal Council from July 2000 to May 2007 and the engineer. That LR No. 11243 was under Native Land Act for development of Kimilili Town for public utility purposes. He stated that the survey that produced the title in the Respondent's name was superimposed on the original survey map. That in the year 2002, the issue on ownership of Kimilili LR No. 11243 was reported to the Ndungu Commission for investigations and that the recommendations were stood over. In re-examination, he stated that the land has always been government land and that it has never been degazetted as such. That Florence Anyango was allocated the suit properties by the Commissioner of Lands.

Submissions on appeal.

18. The Appellant filed submissions dated 24/07/2024 where it was submitted that the Appellant is a bonafide purchaser for value. Reliance was placed inter alia in the cases of Lilian Waithera Gachichi vs. David Shikuku Mzee (2005) eKLR, Mako Abdi Dolai vs. Ali Duane & 2 Others (2019) eKLR. Harrison Mwangi Nyota vs. Naivasha Municipal Council 7 20 Others (2019) eKLR, Mbau Saw Mills Ltd vs. Attorney General (for and on behalf of the Commissioner for Lands) & 2 Others (2014) eKLR and Republic vs. City Council of Nairobi & 3 Others (2014) eKLR. It was argued that the process of acquiring public was duly followed and that all the pre-conditions for the said allocation were fulfilled. That the said Florence Anyango legitimately acquired the suit properties and as such, John Kimani Mwaniki and subsequently the Appellant acquired proper title through the allotment letter. She urged the court to allow the appeal.
19. The Respondent filed submissions dated 24/07/2024. He begun by giving a background of the case and proceeded to address the issue of his title. It was submitted that he holds a valid title having acquired the same upon purchase from Ng'ang'a Makuti who was confirmed by the land Registrar to have been the registered proprietor of the LR No. Kimilili/Kimilili/55. That the said title as per Section 30 of the repealed Registered Land Act was indefeasible subject to any overriding interests. He cited the case



of *Obiero vs. Opiyo & Others* (1972)1 EA 227. That the appellant has not proved the unlawfulness of his title or called for its cancellation. It was argued that the Appellant failed to produce the alleged report by the National Land Commission invalidating his title.

20. It was submitted that despite calls to have the town clerk produce the records for the official documents of the suit properties, the same was never done and as such, the Appellant and his co-defendants failed to prove on a balance of probabilities how they came about the suit properties and neither did they sufficiently dispute that Plot No. Kimilili D14 and D15 are on Kimilili/Kimilili/2457 and 2458. It was submitted that no official published gazette notice was produced to show that the suit property is within Kimilili Trading Centre which was compulsorily acquired under the Native Land Trust Ordinance.
21. The Respondent argued that John Kimani Mwaniki acquired the suit property when there was an ongoing litigation between the Respondent and Florence Anyango and as such, his alleged title was unlawful. Reliance was placed in the case of *Re Estate of Solomon Muchiri Macharia* (2016) eKLR. It was argued that the Appellant argues that he is a bonafide purchaser for value yet he holds an allotment letter which is not considered to be a title and cannot defeat a registered title. He relied on the case of *Kaseve Welfare Society vs. Harp Housing Limited* (2020) eKLR. That the suit properties were not available for allocation and therefore if the correct procedure was followed by the Respondent and his co-defendants, they would have realised this and therefore their acquisition was flawed. He sought to have the appeal dismissed.

Nalysis and Determination.

22. In exercise of the duty vested in this court as a first appellate court, I have re-evaluated the evidence adduced before the lower court with a view of reaching my own conclusion on it. I have reminded myself that a first appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or were based on misapprehension of the evidence or unless it is demonstrated that the trial court acted upon wrong principles in reaching the finding. In that regard, see the case of *Selle & another v Associated Motor Boat Co. Ltd* (1968) E.A 123.
23. Having revealed the cases argued by the parties and the submissions made in respect thereto, I find the major issue for the court's determination is whether the trial court erred by allowing the Respondent's case and dismissing the Appellant's defence.
24. As mentioned elsewhere in this judgment, the Respondent instituted this case that forms the subject matter of this appeal based on the fact that he is the registered proprietor of the suit properties. During the hearing, the Respondent produced a certificate of title showing that as at the time he filed the former suit, he was the registered proprietor of the suit property. The basis of his claim is that his registration as the proprietor conferred on him the right of an absolute and indefeasible proprietor of the suit property. Indeed, the court of appeal in *Embakasi Properties Limited & Anor. vs. Commissioner of Land & Anor.* [2019] eKLR expressed itself as follows:

“Although it has been held time without end that the certificate of title is: “... conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof”, it is equally true that ownership can only be challenged on the ground of fraud or misrepresentation to which the proprietor named is proved to be a party. See section 23 of the repealed Registration of Titles Act. Section 26 of the [Land Registration Act, 2012](#) though not as emphatic as section 23 aforesaid on the conclusive nature of ownership, confirms that the certificate is prima facie evidence that the person named as proprietor is the absolute and indefeasible owner. It adds that apart from encumbrances,



easements, restrictions to which the title is subject, there is no guarantee of the title if it is acquired by fraud or misrepresentation or where it has been acquired “illegally, unprocedurally or through a corrupt scheme”

25. Notably, the Appellant did not plead either of the two grounds challenging the credibility of the Respondent’s title as mentioned above. Instead, the Appellant claimed that her husband Edward Nabangi(deceased) purchased the suit properties from the 2nd Defendant John Kimani Mwaniki who had purchased the same from Florence A. Anyango. She claimed to be the legal allottee of the plots which form part of Kimilili Trading Centre and had been set aside for the development of the town.
26. That the allotment originated from the Commissioner of Lands. It was her case that she holds a letter of transfer of Plot Kimilili 15D dated 19/12/2012 from the Municipal Council of Kimilili. Her predecessor, John Kimani Mwaniki was also issued with a similar letter dated 28/07/2002 for the transfer of plot Kimilili 15D and 14 D while his predecessor Florence A. Anyango was issued with her allocation letter for Kimilili 15D and 14 D dated 19/12/1996. The Respondent produced a demand notice for payment of rates for the said plot from the County Government of Bungoma.
27. It is worth noting that, the Appellant and her co-defendants before the trial court stated that the original owners of the parcels of land selected to form Kimilili Trading Centre were compensated in the 1950’s and 1960’s and the plots compulsorily acquired. Section 107 of the Evidence Act Cap 80 laws of Kenya provides;
 - (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
28. However, based on the foregoing, the documents presented do not indicate which parcels of land were acquired. While I acknowledge the contents of the letter dated 01/09/1967 from the Assistant Land Registrar, Bungoma District, to the Clerk of Bungoma County Council, which mentions the proposed acquisition of land from the listed owners, including Mr. Nga’ng’a Mukuti, the registered owner of parcel no. Kimilili/Kimilili/55, there is no subsequent documentation confirming that this parcel was indeed acquired or that the owner was compensated. In my considered view, the documents have no evidentiary value.
29. The letters produced by the Appellant seem to make reference to a previous acquisition exercise but even then, they do not clearly indicate the parcels being acquired neither do they confirm compensation. From my examination of the documents, it appears that the Government acquired parcels of land in the 1950’s or thereabouts for purposes of establishing Kimilili Trading Centre and later sought to expand the same in the 60’s. I say this because the documents produced referring to compensation are dated several years prior to the letter dated 01/09/1967 and, therefore, cannot reasonably be referring to the alleged acquisition of parcel no. Kimilili/Kimilili/55. All evidence considered, I find that this assertion has not been substantiated.
30. The Appellant further claimed to be a purchaser for value without notice and that her alleged ownership should not be impeached. In the case of Dina Management Limited vs County Government



of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR), the Supreme Court stated as follows;

for a court to establish whether a party is a bona fide purchaser for value, the court must first establish the root of the title right from the first allotment. In the case of Jones v. Smith [1841] 1 Hare 43, the Chancery Court held: “a purchaser has constructive notice of fraud if he had actual notice, that there was some encumbrance and a proper inquiry would have revealed what it was (but if) it abstained either deliberately, carelessly from making those inquiries which a prudent purchaser would have made...then the defence cannot be available to him or her”

31. The Court of Appeal in the case of Said v Shume & 2 others (Civil Appeal E050 of 2023) [2024] KECA 866 (KLR) (26 July 2024) (Judgment) reaffirmed the law regarding the importance of due diligence in land transactions holding that,

“...Lands are not vegetables which are bought from unknown sellers. Lands are very valuable properties and buyers are expected to make thorough investigations not only on land but also of the owner before the purchase.”

32. In my considered view, the Appellant made no effort to conduct an inquiry into the ownership by John Kimani Mwaniki and Florence A. Anyango. In other words, he did not establish the root of their ownership and/or title if at all, which essentially required that he ascertain how it had come into existence. Had this been done, he would have uncovered the irregularities, specifically that, despite the allocation by the Kimilili Municipal Council in the year 1996, no plot card/plot ownership certificate or other form of ownership documentation was issued. It is also noteworthy that the Appellant purchased the suit land during the pendency of this suit. Further, the land was not available for allocation having been registered in the name of the Respondent under the Registered Land Act.

33. In support of his case, the Respondent called the land Registrar Bungoma who in his report dated 11/03/2009 produced as P-Exhibit 1 confirmed that the Respondent was issued with a title deed for LR No. Kimilili/Kimilili/ 2457 on 20/12/1994. That the said land is a sub-division of L.R. No. Kimilili/Kimilili/55 which was initially registered in the name of Ng'ang'a Muguti who was the first registered owner having been so registered on 10/08/1965. The said witness testified that LR No. Kimilili/Kimilili/ 2457 and Kimilili D15 are one and the same parcel of land. See the case of Solomon Omwega Omache & another –v- Zackery O. Ayieko & 2 others (2016) eKLR where it was held that the court has the duty to uphold the sanctity of the record at the Lands office.

34. My mind is drawn to the provisions of Article 40 of the Constitution 2010, which protects the right to own and acquire property in any part of Kenya and specifically provides that no one will be deprived of their property by the state unless the deprivation results in acquisition of land in accordance with Chapter Five of the Constitution or if it is for a public purpose, it has to be done in accordance with the Constitution and any Act of Parliament that;

- (i) requires prompt payment in full, of just compensation to the person; and
- (ii) allows any person who has an interest in or right over that property a right of access to a court of law.



35. Further, the Supreme Court in the case of *Attorney General v Zinj Limited (Petition 1 of 2020)* [2021] KESC 23 (KLR) (Civ) (3 December 2021) (Judgment) Stated that;

“It follows that any compulsory acquisition process, ought to have commenced with a requisite Notice to the respondent, and any other persons claiming an interest in the land. The public purpose for which the land was to be acquired, ought to have been clearly stated. Most critically, the resultant acquisition ought to have been attended with prompt payment in full, of a just compensation to the respondent. There is nothing on the record to show, that any of these mandatory processes, was followed before a portion of the suit property was acquired. This being the case, and despite the appellant’s protestations to the contrary, we must reach the conclusion, in agreement with the trial court, that the issuance of titles over a portion of the suit property, in favour of third parties was unlawful, un-procedural, and an egregious violation of the respondent’s right to property. We therefore have no doubt, that the issuance of titles to third parties over a portion of the suit property, amounted to a violation of article 40(3)(a) and (b) of *the Constitution*.”

36. In the end, it is my finding that there is no evidence that the county council of Kimilili ever acquired any portion of the suit property from the initial owner Ng’ang’a Makuti. A county council cannot purport to alienate private property and allocate it or a portion thereof to a third party without following the procedure set out under the law. The letter of allocation and subsequent transfer to the Appellant cannot override a title deed. If the county council of Kimilili did not lawfully acquire the land, it cannot pass a good title.

37. The upshot of the foregoing is that this appeal lacks merit and the same is hereby dismissed with costs.

38. Orders accordingly.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 04TH DAY OF FEBRUARY, 2025.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. Mr Wattanga appearing alongside Mr Angima for the Appellant
2. Respondent/Advocate-absent.
3. Bett C/A.

