



REPUBLIC OF KENYA



**Wakwoba v Nasambu (Environment and Land Appeal 3 of 2022)  
[2025] KEELC 464 (KLR) (6 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 464 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT AND LAND APPEAL 3 OF 2022  
EC CHERONO, J  
FEBRUARY 6, 2025**

**BETWEEN**

**ANTONY WAWIRE WAKWOBA ..... APPELLANT**

**AND**

**AKINETA NASAMBU ..... RESPONDENT**

*(Being an appeal from the judgment and decree delivered on  
07/12/2021 by Hon.N. Barasa (PM) in Webuye PMCC 138 OF 2011)*

**JUDGMENT**

1. This is an appeal arising from the judgment of the Hon. N. Barasa, Principal Magistrate delivered on 07/12/2021 in Webuye PM-ELC Case No 138 of 2011.

**Background.**

2. By a plaint dated 26/08/2011, the plaintiff/Appellant herein (Antony Wawire Wakwoba) had sought orders against the Defendant/Respondent herein (Akineta Nasambu) for eviction from land parcel no. Bokoli/Kituni/1182(hereinafter referred to as ‘the suit land’) which he claimed is registered in his name.
3. The Defendant/Respondent filed a statement of defence dated 26/03/2012 in which she averred that she bought 5 acres out of land parcel no. Bokoli/Kituni/1182 from one Brighton Wakwoba Wafula which she notoriously occupies. She stated that parties are involved in another suit being Bungoma HCCC No. 204/2001.
4. The case was subsequently set down for hearing before the trial Magistrate Hon.N.Barasa where the Plaintiff/Appellant Anthony Wawire Okwoba testified as PW1. He adopted his witness statement dated 12/01/2020 as his testimony-in-chief. He produced into evidence a title registered in his name as P-Exhibit 1. He also produced a decree in Tribunal LDT 6/2007 as P-Exhibit 2 where the Tribunal had



- awarded the Respondent the suit land. He stated that he appealed against the said decision in HCA 19/2007 where the court quashed the said award and produced a Ruling of the court as P-Exhibit 3.
5. It was further his evidence that the Respondent filed originating summons before the High court in Bungoma vide HCCC NO.204/2001 which case was dismissed. A judgment in this regard was produced as P-Exhibit 4. The Appellant argued that the Respondent claims to have bought land from his father (Brighton Okwoba Wafula) in the year 2001 yet his father died on 07/4/1996. On cross-examination and re-examination, he testified that his father bought the land from Wephukulu Biketi in 1977 and that the said Biketi transferred it to him since a transfer in his father's favour had not been taken out.
  6. DW1 Akineta Nasambu Wasike testified that she took possession and occupation of the suit land after purchasing it from Brighton Wakwoba Wafula on 20/06/1981 as per the agreement of sale produced as D-Exhibit 1. She stated the seller did not have a title and that one Wephukulu would issue the same after she paid to him a balance of Kshs. 10,000/= which she paid at the Chief's office. She produced an affidavit dated 25/6/1981 and an agreement dated 29/8/2001 as D-Exhibit 2 & 3. That the entire land was land parcel Bokoli/Kituni/861 and was subdivided into land parcels NO. BOKOLI/KITUNI/1181 and 1182. That she was to get land parcel Bokoli/Kituni/1182 but it was transferred to the Appellant instead. She produced a certificate of search for land parcel BOKOLI/KITUNI/861 and land parcel BOKOLI/KITUNI/1182 as D-Exhibit 4 and 5 respectively.
  7. In cross-examination and re-examination, she admitted that the particulars of the land she claims was not indicated in the agreement.
  8. Upon considering the evidence of the parties, the trial court found that the orders sought by the Plaintiff/Appellant had not been proved on a balance of probabilities and proceeded to dismiss the Plaintiff's/Appellant's suit with costs to the Defendant/Respondent.
  9. Aggrieved by the trial courts judgment, the appellant preferred the present appeal vide a Memorandum of appeal dated 17/01/2022 on the following grounds;
    - a. The learned trial magistrate erred in law and in fact by dismissing the appellants claim against the overwhelming evidence on the record.
    - b. The learned trial magistrate erred in law and in fact in disregarding the appellants submissions on record.
    - c. The learned trial magistrate erred in law and in fact in overlooking the evidence tendered by the plaintiff.
    - d. The learned trial magistrate erred in law and in fact by becoming a sympathizer to the respondent hence arriving at wrong decision.
    - e. The learned trial magistrate erred in law and in fact in holding that the respondent was not a trespasser when there was no evidence tendered before court.
    - f. The learned trial magistrate erred in law and in fact in not appreciating that a party (respondent) is bound to her pleadings.
    - g. The learned trial magistrate erred in law and in fact in declaring that the respondent had a right in the suit land when the respondent had not filed a counter-claim.



- h. The learned trial magistrate erred in law and in fact by not appreciating that the respondent had earlier filed a suit against the appellant vide Bungoma HCC No. 204 of 2001 which was dismissed in favour of the appellant.
  - i. The learned trial magistrate relying on the case law that was not applicable to the circumstance hence arriving at a wrong decision.
  - j. The learned trial magistrate erred in law and in fact in relying on exhibits which were never substantiated by the respondent hence arriving at a wrong decision.
  - k. The learned trial magistrate erred in law and in fact by deviating from her role as an arbitor and or ampire and became a player(litigant) hence arriving at a wrong decision.
10. The prayers of the appeal are;
- a. The appeal be allowed and the decision of the trial court be set aside.
  - b. The dismal order by trial court be substituted with an order allowing the appellants claim.
  - c. The respondent to pay costs of this appeal and costs in the subordinate court.
11. When this appeal came up for directions, the parties agreed to have the same canvassed by way of written submissions.

#### **Submissions on appeal.**

12. The Appellant filed his submissions dated 02/11/2024 where he submitted that the appeal remains valid notwithstanding the absence of a decree. It was submitted that pursuant to Order 42 Rule (13) (4)(f) of the CPR, the appeal is not fatal. He relied in the case of Mathew Owino Winja & Another vs Joyce Atieno Ogudah (2020) eKLR and Samuel Mwangi Gatukuru vs. Stephen Wangodu Kinini (2021) eKLR. It was further submitted that the appeal was filed in time in accordance with Section 79G of the Civil Procedure Act and Order 50 Rule 4 of the Civil Procedure Rules.
13. On the merits of the appeal, the Appellant submitted that he is the registered proprietor of the suit land and that the Respondent did not prove the allegations of fraud pursuant to Section 107(1) of the Evidence Act. He also submitted that the trial Magistrate in her judgment was not led by the law and procedure as can be seen from her judgment. Lastly, it was stated that the Respondent never recorded her witness statement and as such, it was irregular for the court to have allowed him to testify.
14. The Respondent also filed submissions dated 28/11/2024 where he submitted on six (6) issues. The first issue is whether the Appellant adduced sufficient evidence in support of his claim before the trial court which he answered in the negative and submitted that the Respondent's occupation of land parcel number BOKOLI/KITUNI/1182 was lawful, and the mere claim that the appellant is now the registered owner is not sufficient in attempting to evict the respondent. On whether the respondent has a lawful claim over land parcel number BOKOLI/KITUNI/1182, it was submitted that the Respondent has adduced evidence to show that she purchased Land Parcel Number BOKOLI/KITUNI/1182 from Brighton Wakwoba in 1981 even though at the time of purchase Land Parcel Number BOKOLI/KITUNI/1182 was non-existent but was identified as five acres out of Parcel Number BOKOLI/KITUNI/861.
15. The Respondent further submitted that the document named statement by the defence is clearly the witness statement and the argument by the Appellant is misplaced. It was the Respondent's submissions that the trial court correctly found that he was a lawful occupier and not a trespasser. He



cited the case of *Berta Kanini Baini vs. Agnes Ithuru Njoka Meru HCCA 90 of 2009*. The Respondent urged the court to dismiss this appeal with costs.

### **Analysis and Determination.**

16. This is a first appeal, hence it is the duty of this court to re-evaluate the evidence and draw its own conclusions – See *Selle –Vs- Associated Motor Boat Co. Limited 1968 E.A. 123*.
17. The Appellant, in her memorandum of appeal, primarily challenges the trial court's analysis of the evidence presented by the parties through their pleadings, oral and documentary evidence, submissions, and its application of the law.
18. The Appellant in this case contends that the Respondent is a trespasser and that she ought to be evicted from the suit land. He argues that he is the registered owner of the suit land and that the Respondent has no basis being there. The Respondent on the other hand argues that she is a purchaser for value and that the Appellant was registered as the owner of the suit land irregularly.
19. To succeed in an action for trespass, the onus is on he who alleges, in this case the Appellant to prove on a balance of probabilities that he is either the bona fide owner or proprietor of the suit land or that he is in or entitled to immediate possession of the suit property or both; and second, that the sued party/Respondent has intruded and/or occupied and/or remained in occupation of the suit property without any justifiable cause.
20. It is not in dispute and has been admitted by the Respondent that the suit property was and is still registered in the name of the Appellant. Therefore, in my considered view, what is in issue in the instant appeal is the sanctity of the registered title held by the Appellant. It was the Appellant's position that once he demonstrated that he was the registered proprietor of the suit property and he had not acquired the title fraudulently, the title became absolute and indefeasible in terms of Section 23 (1) of the Registration of Titles Act, Cap 281 Laws of Kenya (now repealed) and the new Section 26 (1) of the *Land Registration Act*, No. 3 of 2012.
21. Section 23 (1) of the Registration of Titles Act provides as follows:-

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- (1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive of evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.

22. While Section 26 (1) of the *Land Registration Act* provides:-

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- (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.
23. Having considered the Appellant's evidence and mainly the title deed (P-Exhibit 1), this Court, in accord with Section 23 (1) of the Registration of Titles Act (now repealed) and the new Section 26 (1) of the *Land Registration Act*, infers a rebuttable presumption in favour of the Appellant that the said title deed is prima facie evidence that he is the absolute and indefeasible owner of the suit property. In that regard, therefore the Plaintiff discharged his burden of proof. In this connection, the evidential burden shifted to the Respondent to prove that the said title is defeasible on account of having been acquired either by fraud or misrepresentation, illegally unprocedurally or through a corrupt scheme.
24. The Respondent's claim is that she purchased 5 acres of the suit land from the Appellant's father, one Brighton Wakwoba Wafula on 23/06/1981 who had bought it from one Biketi Wephukulu who was the registered proprietor at the time. That it was agreed that the said Biketi Wephukulu would transfer the Respondent's interest to her upon payment of a balance due to him which was done before the area chief. That instead, the said Biketi Wephukulu is said to have transferred the interest to the Appellant.  
  
It is noteworthy that the Appellant contends that the Respondent could not have purchased the suit land from his father in 1981, as his father had already passed away by that time. However, nothing has been presented before this court to prove the above assertion and therefore the same remains unsubstantiated Of no evidentiary value.
25. Upon examination of the sale agreement presented by the Respondent in his evidence, it reveals that it is in writing and is witnessed by three individuals who affixed their thumbprint. Although it contains the description of the parties entering into the contract and the purchase price, it does not have the description of the property being purchased. The description of the property is however indicated in a subsequent affidavit sworn by the said Brighton Waboba Wafula and commissioned by the Resident Magistrate, Webuye. In my view the two documents which are an extension of each other meets the criteria for a valid sale agreement in the absence of proof of any vitiating factors. See the case of Nelson Kivuvani vs Yuda Komora & Ano. Nairobi HCCC No. 956 of 1991 where the court held: -  
  
"The agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligation express or implied of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract."
26. Further, the Respondent testified that the suit land is the only home known to her and her family where they has been in occupation since she purchased the same to the exclusion of the Appellant. The Court of Appeal in the case of *Bandi v Dzomo & 76 others (Civil Appeal 16 of 2020) [2022] KECA 584 (KLR)* affirmed its previous findings in *Benja Properties Limited vs. Syedna Mohammed Burhannudin Sahed & 4 others [2015] eKLR*, that:  
  
"It is trite law that all titles to land are ultimately based upon possession in the sense that the title of the man seised prevails against all who can show no better right to seisin. Seisin is a root of title. The 1st, 2nd and 3rd respondents being in possession of the suit land have a better right to the same as against the appellant. The maxim is that possession is nine-tenths ownership. As was stated by the Privy Council in *Ghana of Wuta-Ofei -v-Danquah [1961] All ER 596 at 600*, the slightest amount of possession would be sufficient."



In addition section 116 of the *Evidence Act* states that:

“When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.”

27. Further and without delving much into that issue, the manner in which the said Biketi Wephukulu transferred the suit land to the Appellant with or without any objection as alleges; without first transferring it to Brighton Wakwoa Wafula and thereafter subjecting it to succession and transmission is just marred with irregularities to say the least. Therefore, when a title is bad, a party cannot claim indefeasibility of title as was held in the case of Republic –vs- District Land Registrar, Mombasa & 5 Others Ex-Parte Super Nove Properties Ltd [2016] eKLR where the court found that there can be no indefeasibility of title as against Article 40(6) of *the Constitution*.
28. In the end, I agree with the trial court that the appellant did not sufficiently prove his case against the Respondent and that the alienation of the suit property in his name was illegal, fraudulent, null and void and conferred no interest or estate in the Appellant and the remedies sought by the Appellant herein are declined.
29. For all the reasons given, this appeal is therefore lacking in merit and the same is hereby dismissed with costs to the Respondent.
30. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 06<sup>TH</sup> DAY OF FEBRUARY, 2025.**

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**HON.E.C CHERONO**

**ELC JUDGE**

In the presence of;

1. Mr Wamalwa R. for Appellant
2. M/S Kerre for the Respondent
3. Bett C/A

