



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kusimbwa v Kataka (Appeal E007 of 2024)
[2025] KEELC 1066 (KLR) (6 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1066 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
APPEAL E007 OF 2024
EC CHERONO, J
MARCH 6, 2025**

BETWEEN

DOMINIC KUSIMBWA APPELLANT

AND

ISAAC MARSHALL KATAKA RESPONDENT

*(Being an appeal from the judgment by Hon. T.M OLANDO (PM)
in Bungoma MC ELC No. E027OF 2022 delivered on 31/01/2024)*

JUDGMENT

1. This appeal arises from the judgment of the lower court in Bungoma CM-ELC E-027 of 2022 Dominic Kusimba Wasike v Isaac Marshelle Kataka (former suit). In the said former suit, Dominic Kusimbwa - the Appellant herein was the plaintiff while Isaac Marshall Kataka -the Respondent was the defendant.
2. The Appellant commenced the former suit by way of a plaint dated 21/03/2022 seeking judgment against the defendant/Respondent for;
 - a. Cancellation of land transfer dated 13/08/2008.
 - b. Cancellation of agreement dated 18/07/2006
 - c. Eviction.
 - d. Costs
 - e. Such other relief this court may deem fit and just to grant.
3. The Plaintiff/Appellant's claim was that he is the registered proprietor of land parcel no. E.Bukusu/ N.Kanduyi/1175. That he has never sold any part of the abovementioned land and that the Defendant/ Respondent unlawfully obtained the said land and sub-divided it into two portions i.e land parcel



- no. E. Bukusu/N.Kanduyi/ 3593 & 3594 without his knowledge. That the Defendant/Respondent forged a sale agreement dated 18/07/2006 and took possession of 5 acres of his land by fencing and putting up a storey building denying the Appellant use thereof.
4. The Defendant/Respondent filed an amended statement of defense and counterclaim dated 21/03/2023, and averred that land parcel No. E.Bukusu/N.Kanduyi/1175 no longer exist due to the sale of 5 acres pursuant to a sale agreement between the parties dated 18/07/2006. With the Land Control Board's consent dated 8/08/2006, a mutation form was prepared on 12/09/2006, leading to the subdivision of the original parcel into land parcels No. E.Bukusu/N.Kanduyi/3593 and 3594, as recorded in the green card on the same date. That upon receipt of Kshs. 1,750,000 via cheque, the Appellant transferred parcel No. E.Bukusu/N.Kanduyi/3594 (hereinafter referred to as "the suit land") to the Defendant/Respondent. That the Respondent subsequently registered the land jointly in his name and that of his wife, Beatrice Naliaka Wekesa, on 13/12/2006. He further stated that since purchasing the land, he has been in possession and has developed it by constructing Saruka Academy. He averred that he is a bona fide purchaser for value and therefore, the rightful owner of the suit land.
 5. In his counter-claim, the Defendant/Respondent averred that he is the bonafide registered owner of land parcel no. E.Bukusu/N.Kanduyi/3594 which the Appellant threatens to illegally occupy and deny him his quiet possession. That by an application dated 18/06/2019, the Appellant unprocedurally registered a caution against the suit property claiming beneficiary interest. He sought for the following orders by way of counter-claim;
 - a. The plaintiffs suit against him be dismissed in its entirety with costs.
 - b. A declaration that the defendant and his wife Beatrice Naliaka Wekesa are the absolute and indefeasible owner of land title no. E.Bukusu/N.Kanduyi/3594 pursuant to the title deed issued on 13/08/2008.
 - c. An order issued by this honourable court directing the District Land Registrar Bungoma to remove the caution lodged on Land title no. E.Bukusu/N.Kanduyi/3594 by the plaintiff on the 09/07/2018.
 - d. A permanent injunction to restrain the plaintiff by himself, his agents, his servants, his employees or otherwise or however from wrongfully and illegally interfering with the land title no. .Bukusu/N.Kanduyi/3594 in anyway whatsoever or however as would prejudice the defendant's interest.
 - e. A permanent injunction to restrain the plaintiff himself, his agents, his servants, his employees or otherwise or however from interfering with the defendants quite possession of land title no. .Bukusu/N.Kanduyi/3594 in anyway whatsoever or however as would prejudice the interests of the defendant.
 - f. All necessary and consequential accounts, directions and enquiries.
 - g. Any other relief this honourable court may deem just and expedient to grant in the circumstances of this suit.
 - h. Costs of the suit and counter-claim.
 6. When the suit came up for directions, the parties agreed to proceed by way of viva voce evidence where the Plaintiff/Appellant called three (3) witnesses while the Defendant/Respondent called two (2) witness.



7. PW1 Dominic Kusimba Wasike adopted his witness statement dated 23/03/2022 as his evidence in chief. He produced into evidence his list of documents dated 23/03/2022 which contains 6 items. In cross-examination he testified that he came to learn that his title had been closed and a title for land parcel no. E.Bukusu/N.Kanduyi/3594 issued to the respondent in the year 2016. That he lost his title deed after his house was broken into. It was his evidence that the sale agreement dated 18/07/2006 was forged. That his land was leased by its caretaker and that the name in the cheque i.e Christine Nakumicha Wasike is his wife's name. He denied ever meeting the respondent and receiving any money. It was his evidence that his signature in the cheque and transfer forms was forged.
8. PW2 Fredinand Funaka wamalwa & PW3 Anne Wafula Wamalwa adopted their respective witness statements dated 21/03/2022 as their evidence in chief. It was their evidence that there was a dispute between the parties herein and they all attended a meeting at the chief's office.
9. DW1 Isaac Marshelle Kataka adopted his witness statement dated 22/05/2023 as his evidence in chief. He produced into evidence his list of documents of an even date and those of 06/10/2023 as DExhibit 1-16. He testified that he entered into an agreement with the appellant where he paid the consideration in two instalments. The 1st instalment was for Kshs.1,000,000/= paid on 18/07/2006 which amount was received by his wife on his behalf while the 2nd instalment was made on 06/12/2006 received by the appellant who signed. That he was issued with a land control board consent on 12/09/2006. He testified that he did not attend the meeting said to be held at the chief's office. In cross examination he testified that there is no proof that the signatures of the appellant were forged.
10. DW2 Vincent Wekesa Khisa adopted his witness statement dated 06/10/2023 as his evidence in chief. He testified that the appellant did not attend the meeting but was represented by his wife. That he was present when the agreement was entered into and when the cheque was written.
11. The trial court in its determination dismissed the appellants suit and entered judgment for the defendant with costs.
12. Being dissatisfied with the learned trial magistrate's judgment, the appellant preferred this appeal on the following grounds;
 - a. The trial magistrate erred in law and in fact when he failed to shift the matter to this Honourable Court on jurisdiction issue which was raised by the defendant's counsel.
 - b. The learned trial magistrate erred in holding that the defendant had proved his case on a balance of probability.
 - c. The trial magistrate erred in law and in fact by shifting a burden basing on technicalities ruling the suit.
 - d. The trial magistrate erred in law and in fact by failing to peruse the plaintiff's documents.
 - e. The trial magistrate erred in failing to consider the evidence on part of the appellant adduced before this honourable court.
 - f. That the appellants testimonies together with his witness were never considered.
13. The Appellant prays that the appeal be allowed and the judgment by the trial magistrate be set aside and substituted with the orders sought in this appeal.
14. When this appeal came up for directions, the parties agreed to have the appeal canvassed by way of written submissions.



15. The Appellant filed submissions dated 20/10/2024 where he faulted the trial magistrate for dismissing his suit on technicalities. He submitted that the trial court failed to consider the issue of jurisdiction raised by the Respondent in his counter-claim and to seek the findings of the DCI Bungoma pursuant to the order issued on 01/12/2022. He submitted that the court erred in failing to interrogate the 'fake' sale agreement produced by the Respondent and failed to consider the provisions of Section 24,25 & 26 of the LRA. He urged the court to allow the appeal.
16. The Respondent on the other hand filed submissions dated 28/01/2025 where he submitted on the five grounds of appeal raised. In his submission that despite pleading fraud, the Appellant did not strictly prove the elements of fraud as required under Section 107 and 108 of the *Evidence Act*. Reliance was placed in the case of *Mirko Blaeterman (Suing through his power of Attorney-Shabir Hatim Ali 7 Another v David Mwangi Muiruri & 2 Others (2015) eKLR*.
17. It was further submitted that despite claiming forgery, the Appellant did not produce any expert to support his allegation nor did he produce a report to the police on the alleged illegal sub-division of his claimed land nor did he produce a report of the alleged loss of his title deed document nor did he controvert the evidence that he received 1,750,000/= as consideration for the sale of 5 acres of his land. He stated that the Appellant did not produce a lease agreement to support his allegation that he had leased out the land to him (Respondent) for a period of 10 years nor did he demonstrate utilization and occupation of the suit land and lastly, he did not prove compliance with the order issued to have the DCIO investigate his allegations. He cited the case of *Central Bank of Kenya v Trust Bank Ltd & Others (1996) eKLR*.
18. The Respondent denied raising the issue of pecuniary jurisdiction as claimed by the Appellant in his memorandum of appeal. He however argued that the Appellant's suit before the trial court was time barred for having been filed 11 years (i.e. from 25/08/2011 to 12/10/2023 when the suit was filed) after the alleged fraud was discovered. He cited the case of *Bosire Ongero vs. Royal Media Services (2015) eKLR*.
19. It was further submitted that the Appellant did not meet the requirements under Section 26(1) and 80 of the *Land Registration Act* for the cancellation of the Respondent's title which the Respondent obtained lawfully and procedurally. He relied on the case of *Alice Chemutai Too v. Nickson Kipkirui Korir & 2 Others (2015) eKLR*. The respondent further cited the case of *Milkah Muthoni Wagoco v County Council of Kirinyaga & 2 Others (2017) eKLR* and the provisions of Section 71(1) and 73(1) and urged the court to order for a removal of the caution lodged by the Appellant on 09/07/2018. Lastly, he urged the court to grant a permanent injunction against the Appellant and relied on the case of *Malier Unissa Karim v. Edward Oluoch Odumbe (2015) eKLR*.

Legal Analysis and Determination

20. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand. In the case of *Mbogo and Another vs. Shah [1968] EA 93* where the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”



21. Law JJA, in the locus Classicus case of *Selle and another Vs Associated Motor Board Company and Others* [1968] EA 123, 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 re-trial and the Court of Appeal is not bound to follow the trial Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”

22. In the case of *Peters vs Sunday Post Limited* [1958] EA 424, court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

23. I have looked at the memorandum of appeal and am concerned that, despite being drafted by an advocate, it lacks the clarity and conciseness required by law. As presented, it places an undue burden on the court to fill in gaps and correct grammatical errors. I will remind counsel of the provisions of Order 42 Rule 1 of the Civil Procedure Rules, which provides as follows: -“

- “ 1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
2. The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.”

24. Upon consideration of the materials presented in respect to the Appeal herein including the Memorandum of Appeal, Record of Appeal and parties’ submissions, I have summarized the following issues for determination:

- a. Did the trial court have competent jurisdiction to entertain the suit?
- b. Who is the rightful owner of all the suit land and did the Court appreciate the evidence on record.

a. Did the trial court have competent jurisdiction to entertain the suit?

25. The Appellant argued that that the trial magistrate erred when he failed to transfer the suit to this court on the instance of the Respondent. The Respondent on his part claimed that he did not challenge the court’s jurisdiction. From the submissions, the Appellant seems to be referring to the pecuniary jurisdiction of the lower court on this ground. He asserts that the Respondent pleaded the same but the trial court brushed it off. The Respondent on the other hand submitted that he only raised a preliminary objection with regards to the suit being time barred and the trial court made a determination on the issue. I have had a chance to peruse the Respondent’s defence and counter-claim and I note in the said defence and counter claim that the Respondent’s only preliminary objection was that the suit was statute barred under the provisions of the *Limitation of Actions Act*. There was no pleading that the court had no pecuniary jurisdiction to hear and determine the matter.



26. As was appositely stated in the Owners of Motor Vessel "Lilian s" vs. Caltex Oil (K) Ltd [1989] KLR 1, it would be inconsequential for a Court of law to hear and determine a matter if it lacks the jurisdiction to do so. The Court of Appeal made this point thus:

“...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

“...It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. I can see no grounds why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado.”

27. It would therefore have been prudent for the Appellant to raise the question of jurisdiction before the trial court. However in Floriculture International Ltd v Central Kenya Ltd & 3 others (1995) eKLR, the court held that the issue of jurisdiction can be argued at any time. The court remarked as follows:

“It has been held in the case of Kenindia Assurance Co. Ltd v Otiende (1989) 2 KAR 162 that the normal rule that a party could not raise for the first time on appeal a point he had failed to raise in the High Court, did not, and could not apply when the issue sought to be raised de novo on appeal went to jurisdiction.” The reasoning is that even where the question of jurisdiction is not raised that does not necessarily confer jurisdiction on the court if it has none. Accordingly, we find that the appellants are not precluded from raising the jurisdictional issue for the first time on appeal having not raised it in the superior court...”

28. Similarly, in Kenya Ports Authority v. Modern Holdings (E.A) Limited (2017) eKLR the Court of Appeal restated its stance thus: -We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage of the proceedings and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised:“...at any time, in any manner, even for the first time on appeal, or even viva voce and indeed, even by the court itself;- provided only that where the Court raises it suo motu, parties are to be accorded an opportunity to be heard.”

29. In this case, in as much as the Appellant alludes to the trial court not having pecuniary jurisdiction to determine the suit, he did not present a valuation report to demonstrate that the value of the suit land exceeds pecuniary jurisdiction as provided in the Magistrate’s Court Cap 10.

b. Who is the rightful owner of all the suit land and did the Court appreciate the the evidence on record.

30. The Appellant asserted that he was the registered owner of land parcel no. E.Bukusu/S.Kanduyi/1175 and produced a copy of certificate of title issued on 05/01/1989 as P-Exhibit 1. That he lost his title deed and that the Respondent had unlawfully occupied the land and put up structures contrary to a lease agreement between them thus denying him entry and use, an issue which he reported to the area chief resulting to a letter dated 04/11/2010 produced as P-Exhibit 2. He claimed that the Respondent fraudulently forged his signature on a sale agreement, mutation forms and transfer forms which he



produced as P-Exhibit 5,6 & 4 respectively. He urged the court to cancel the transfer forms and the sale agreement and to order for eviction of the Respondent from the suit land.

31. The Respondent on the other hand claimed that he purchased 5 acres of land to be curved out of land parcel no. E.Bukusu/S.Kanduyi/1175 through an agreement dated 18/07/2006(D-Exhibit 1) and paid the consideration thereof in two instalments vide two cheques drawn in the name of the plaintiff as cheque no. 913325 for Kshs.1,000,000/= and cheque no. 187193 for Kshs.750,000/= (D-Exhibit 2). That receipt of the 1st cheque was acknowledged by the Appellant's wife in a note dated 18/07/2006 while the Appellant confirmed receipt of the 2nd cheque by signing(D-Exhibit 14 & 15) That they applied for the LCB Consent (D-Exhibit 3) and were issued with a consent on 08/08/2006(D-Exhibit 4) that the Appellant caused the transfer of land parcel no. E.Bukusu/S.Kanduyi/1175 and filed mutation forms dated 12/09/2006 (D-Exhibit 5). He produced a green card for land parcel no. E.Bukusu/S.Kanduyi/1175(D-Exhibit 6). That the Appellant having successfully applied for the transfer of land parcel no. E.Bukusu/S.Kanduyi/3594 to him, he received a consent (D-Exhibit 7 &8) He produced a green card for land parcel no. E.Bukusu/S.Kanduyi/3594 (D-Exhibit 9). He further produced a title deed for land parcel no. E.Bukusu/S.Kanduyi/3594 as D-Exhibit 10 issued on 13/12/2006 in his name. That he later transferred (D-Exhibit 11) land parcel no. E.Bukusu/S.Kanduyi/3594 and caused it to be registered in both his name and that of his Wife Beatrice Naliaka Wekesa and a title deed was issued on 13/08/2008. He went further and produced minutes by the assistant chief -Tuti area dated 20/11/2016 as D-Exhibit 13 & 16.
32. From the oral and documentary evidence before the trial court which I have considered, it is clear that the Appellant is not in possession of the title deed for land parcel no. E.Bukusu/S.Kanduyi/1175 having clearly stated that he lost the same in a break-in of his house while he was away. It is important to note that having stated that, the Appellant did not produce any proof that he reported the incident to the police for purposes of investigations either by way of an affidavit or OB number. In my considered view, it is unusual for a person to lose his belongings and in this case a title deed to his land and fail to report the same to the police or even begin the process of being issued with a provisional certificate of title as provided under the law. The Appellant who before the trial court sought for orders to have the DCIO Bungoma investigate the issue was making attempts to explain himself though the attempts were coming too late in the day. Further and despite the issuance of the orders, he did not follow up or report back to the trial court the outcome of the investigations. He however faults the court for failing to consider a non-existent report. It should be noted that the case belongs to the parties and not the court. It is not for the court to go out of its way to look for evidence.
33. The appellant alleged that the respondent fraudulently obtained the registration of Land parcel no. E.Bukusu/S.Kanduyi/1175 by forging his signature on a sale agreement, mutation forms and transfer forms. It was his case that he leased the land to the respondent for 10 years but did not sale the land to him.
34. The standard and burden of proof provided under the *Evidence Act* ought to be discharged; he who alleges must prove. Section 107 of the *Evidence Act* places the burden of proof on the party that alleges. In *Gatirau Peter Munya vs Dickson Mwenda Kithinji & 3 Others* (2014) eKLR the Supreme Court held inter alia:

The person who makes such allegations must lead evidence to prove the fact. She or he bears the initial legal burden of proof, which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already discharged initial burden. The evidential burden is the obligation to show, if



called upon to do so, that there is sufficient evidence to raise an issue as to the existence of a fact in issue.

35. The court notes that the appellant did not avail any documentary evidence to show that the only transaction he engaged with the respondent was for the lease of the land as claimed. Further he did not produce evidence which would lend credence to the allegation of forgery. An allegation of forgery is a serious allegation. It is an allegation that someone has committed a criminal offence in the nature of a felony. The standard of proof of such allegation is usually higher than on a balance of probabilities.
36. Since the appellant filed the suit alleging forgery of his signature, he did not tender any document from a handwriting expert or a document examiner to support this allegation. He did not even produce details of the occurrence book (OB) number despite claiming that he had reported the loss of his certificate of title and the alleged forgery to the Police for investigation. No results of any criminal investigation were tendered before court.
37. The court has also noted that the agreement and transfer forms were signed in the presence of advocates. The appellant who bore the burden of proof failed to summon the said advocates to testify on whether he indeed appeared before them and signed the documents complained of. In the absence of expert evidence to the contrary, the court is unable to hold that the appellants signature was forged.
38. The court has further noted that the appellant did not discredit the letter of consent or mutation form which was produced by the respondent. It was not demonstrated that the consent letter was a forgery and that it was not issued by the LCB. The appellant did not produce any letter or minutes from the LCB to the contrary. He also did not call an officer from the lands office to refute that he indeed submitted the mutation forms. In the circumstances, the court accepts the letter of consent and mutation forms as genuine and as having been issued by the LCB and approved by the land register respectively.
39. I have considered the sale agreement dated 18/07/2006 viz-a viz the provisions of Section 3 (3) of the [Law of Contract Act](#) Cap 23 which provides:
 - “ 3. No suit shall be brought upon a contract for the disposition of an interest in land unless
 - (a) the contract upon which the suit is founded –
 - (i) is in writing
 - (ii) is signed by all the parties thereto;
 - (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.”
40. And I note that the agreement presented by the respondent was clear on who the parties were, the land being sold, the consideration, it was signed by the seller and buyer and their signatures were attested by witnesses. In my view and in the absence of any factor vitiating the said sale agreement, I find that the same was lawful and enforceable. The respondent produced evidence to show that he paid the consideration, a fact which the appellants have not controverted. I say so because they have not demonstrated for what other reason they were receiving the monies from the respondent.
41. The suit property being registered in the name of the respondent under Cap 300, then as provided by Section 27 of the said Registered [Land Act](#), Cap 300 (now repealed), he is deemed to be the absolute owner together with all rights and privileges appurtenant thereto and this rights are not liable to be



defeated except as provided by the Act. This position has been repeated in Sections 24, 25 and 26 of the [Land Registration Act](#) 2012. Section 26(1) provides as follows:-

“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.

42. From the foregoing, this Court comes to the irresistible conclusion that the Respondent herein is the absolute and indefeasible owner of E.Bukusu/N.Kanduyi/3594 and therefore the rightful owner.
43. The upshot of my finding is that this appeal lacks merit and the same is hereby dismissed with costs to the Respondent.
44. Orders accordingly.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 06TH DAY OF MARCH, 2025.

.....

HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. M/S Wamboi H/B for Khisa for Respondent.
2. Mr. H.P Wamalwa for Appellant.
3. Bett C/A.

