Wakhusama v Obwayi & 2 others (Environment and Land Appeal E011 of 2023) [2025] KEELC 4037 (KLR) (22 May 2025) (Judgment)

Neutral citation: [2025] KEELC 4037 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ENVIRONMENT AND LAND APPEAL E011 OF 2023

DO OHUNGO, J

MAY 22, 2025

BETWEEN

JACKTONE INDAKWA WAKHUSAMA ..... APPELLANT

AND

ELISEBA OBWAYI ..... 1ST RESPONDENT

GRACE KANGUHA ..... 2ND RESPONDENT

FRED ANYANGU OMUKANDA ..... 3RD RESPONDENT

(Being an appeal from the judgment and decree of the Principal Magistrate's Court at Butere (E. Wasike, Principal Magistrate) delivered on 5th July 2023 in Butere MCELC No. 15 of 2020)

JUDGMENT

1. Litigation leading to this appeal commenced in the Subordinate Court on 7th July 2020 when the Appellant filed Plaint of even datein Butere MCELC No. 15 of 2020, against the First and Second Respondents herein as the First and Second Defendants, respectively. The initial Plaint was replaced by Amended Plaint dated 7th October 2021.

2. The Appellant averred in the Amended Plaint that he was the registered proprietor of land parcel number Marama/Lunza/3566 (the suit property) which he acquired through transfer from his father following subdivision of land parcel number Marama/Lunza/1431 and that the First Respondent had illegally occupied the suit property and erected illegal structures on it. He further averred that the Second Respondent had unlawfully registered a caution against the suit property.

3. The Appellant therefore sought judgment against the First and Second Respondents for:

i. That the 1st Defendant be ordered to vacate the property Marama/Lunza/3566 belonging to the Plaintiff within ten (10) days from the date of the order failure to which forceful eviction be executed to pave way for vacant and quiet possession by the Plaintiff.

ii. That the land Registrar in Kakamega county be ordered to lift the caution placed by the 2nd Defendant on the suit land on 27th June, 2013 for lapse of time and since the same might interfere with quiet and vacant possession or of the said land by the Plaintiff.

iii. That in default of the provision of court order in (i) above, then the execution be supervised by the O.C.S Butere Police Station and the Assistant Chief Ibokolo Sub - location.

iv. That the 1st and 2nd Defendants be ordered to jointly compensate the Plaintiff with damages and mesne profits realized from the suit land since 2010.

v. That the costs of this suit and any other reliefs the court considers fit to grant be granted.

4. The First and Second Respondents filed Defence and Counterclaim dated 25th August 2020 in which they averred that the suit property was the subject of litigation in Kakamega ELC No. 374 of 2013 which upon transfer to the Subordinate Court became Butere MCELC No. 59 of 2018 and that the transfer to the Appellant was therefore null and void. That Appellant's father sold the suit property to the Second Respondent who then settled the First Respondent, who is her Mother-in-Law, on it. They further averred that the transfer in favour of the Appellant was fraudulent.

5. The First and Second Respondents prayed that the Appellant's suit be dismissed with costs and that judgment be entered against the Appellant for:

a. A permanent injunction restraining the [Appellant] his agents, servants or workmen from entering, remaining on, development or continuing with any construction on the suit property, evicting the [First and Second Respondents] or in any other manner howsoever interfering with the Defendant's possession and use of the suit property known as Butere/Lunza/3566.

b. Costs of this suit and interest.

6. As pointed out by the First and Second Respondents in their Defence and Counterclaim, an earlier suit, Butere MCELC No. 59 of 2018, had been filed by the Second Respondent, against William Omukanda Indakwa alias Dickson Omukanda Indakwa (hereinafter William). The said suit was initially filed in this Court through Plaint 19th December 2013 as Kakamega ELC No. 374 of 2013 but was later transferred to the Subordinate Court. The Second Respondent averred in the Plaint that on 14th May 2010 she entered into a sale agreement with William pursuant to which she purchased a 0.4 hectares portion of land parcel number Marama/Lunza/1431. That William declined to facilitate registration of title in her favour and that she later discovered that parcel number Marama/Lunza/1431 had been closed upon its subdivision into Marama/Lunza/3564 to 3568.

7. The Second Respondent further averred that the subdivision and issuance of title deeds was fraudulent and incapable of passing a valid title to anyone other than herself. She therefore sought judgment against William for:

a. An Order of Specific Performance directed at the Defendant to transfer the portion already occupied and developed by the Plaintiff, to the Plaintiff.

b. In the alternative, a refund of the consideration at the current market value and the value of the improvements thereon to be determined.

c. General Damages for breach of contract.

d. Costs of this suit.

e. Interest at court rates.

f. Any other or further relief deemed fit by this Honourable Court.

8. Following an application made by the Second Respondent in which she stated that William had passed away on 22nd August 2020, the Subordinate Court consolidated Butere MCELC No. 15 of 2020 with Butere MCELC No. 59 of 2018 on 29th June 2021 and designated the former as the lead file. There was however no substitution of the deceased.

9. Subsequently, the Third Respondent filed Notice of Motion dated 14th July 2021 in which he stated that William who was his father had passed away on 22nd August 2020 and that he had obtained Letters of Administration Ad Litem in respect of William's estate. He prayed that he be allowed to join the proceedings as an Interested Party. The application was allowed on 7th September 2021.

10. Upon hearing the consolidated cases, the Subordinate Court (E. Wasike, Principal Magistrate) delivered judgment on 5th July 2023 wherein it dismissed the Appellant's case and granted an order of specific performance compelling the Appellant "to transfer the portion already occupied and developed" by the First and Second Respondents and in the alternative "a refund of the consideration at the current market value and the value of the improvement thereon."

11. Dissatisfied with the outcome, the Appellant filed this appeal on 4th August 2023, through Memorandum of Appeal dated 3rd August 2023. He prayed that the appeal be allowed, the judgment of the Subordinate Court be set aside and that his claim be allowed. He further prayed for costs.

12. The following grounds of appeal are listed on the face of the Memorandum of Appeal:

a. That the Honorable Trial Magistrate erred both in law and in principle by failing to declare that the agreement dated 14th May, 2010, which was mainly relied on by the Respondent in the suit and the Magistrate in his judgment, was void ab initio as it failed to meet the conditions set out in section 3(3) of the *Law of Contract Act*, cap 23 Laws of Kenya.

b. That the Honorable Trial Magistrate erred in law and in fact to grant the Respondents an order of specific performance directing the Defendant (sic) (meaning Appellant) to 'transfer the portion already occupied and developed by the Defendants' when indeed there was no privity of contract between the Appellant and the 2nd Respondent.

c. That the Honorable Trial Magistrate erred in law and fact by granting an order of specific performance directing the Appellant to, in the alternative, refund a consideration at the current market value and the value of improvements thereon when the Appellant is notthe legal or personal Representative of the Estate of the late William Omukanda Indakwa (deceased) who was sued in Kakamega High Court ELC No. 374 of 2013.

d. That the Honorable Trial Magistrate erred in law and principle by delivering his judgment based on emotions by usurping the roles of both an arbiter and a litigant on behalf of the 1st and 2nd Respondents who did not attend court to testify in Defense on issues of contention raised by the Appellant, including lack of knowledge of the existence of the agreement dated 14th day of May, 2010.

e. That the Honorable Trial Magistrate erred both in law and in principle by deciding that the late William Omukanda sold a portion of land parcel number Butere/Lunza/3566 (sic) when indeed the transaction involved land parcel number Marama/Lunza/3289.

f. That the Honorable Trial Magistrate erred in law and fact by putting all the burdens on the Appellant and not any of his other siblings when the late William Omukanda Indakwa, who died intestate, left behind land parcel number Marama/Lunza/3564 in his names that ought to be used to take care of any of his estate liabilities.

g. That the Honorable Trial Magistrate erred in law and in fact by wrongly relying on section 4(2) of the Limitations of Action Act (cap 22) Laws of Kenya in his judgment to rule that the Plaintiff's suit was statute barred and bad in law when indeed the claim over the suit land began in 2013 vide KakamegaHCELC No. 374 of 2013, then Butere ELC No. 59 of 2018, and later Butere ELC 15 of 2020 that were consolidated, hence the doctrine of lashes does not apply.

h. That the Honorable Trial Magistrate erred in law and fact by directing the Appellant to transfer the portion already occupied and developed by the Respondents when indeed there was no demonstration or proof of fraud or misrepresentation or the title having been acquired illegally, unprocedurally and through a corrupt scheme on the part of the Appellant in order to warrant the transfer.

i. That the Honorable Trial Magistrate erred in law and fact by ruling that the agreement dated 14th May, 2020 was valid by wrongly interpreting Article 159(2) of *the constitution* of Kenya (2010) when courts have revoked agreements of similar nature signed by third parties with no capacity to do so.

j. That the Honorable Trial Magistrate erred in law and fact by relying heavily on the evidence of DW2 and making him to usurp the powers of both a litigant and a witness against the Law of *Evidence Act* and his testimony could not be used to offer rebuttal to the claims made by the Appellant.

13. The appeal was canvassed through written submissions. The Appellant filed submissions dated 26th February 2024. He identified three issues for determination: whether there was a relationship of agency between the Second Respondent and one Geoffrey Mito Anyembe; whether there was a valid contract between the Second Respondent and William; and whether the transaction became void in the absence of consent of the Land Control Board.

14. The Appellant argued that there was no relationship of agency between the Second Respondent and one Geoffrey Mito Anyembe. He contended that the sale agreement relied on by the Respondents was signed by Geoffrey Mito Anyembe who was not a party to it and who did not hold any power of attorney from the Second Respondent. That in those circumstances, there was no proof that Geoffrey Mito Anyembe purchased the land with the Second Respondent's authority. Relying on the case of Francis Mwangi Mugo v David Kamau Gachago [2017] KEELC 2804 (KLR), he submitted that the First and Second Respondents' action of occupying the land without having title amounted to trespass.

15. On the second issue for determination, as to whether there was a valid contract between the Second Respondent and William, the Appellant argued that the contract was illegal and unenforceable owing to absence of a power of attorney. That in the circumstances, the agreement is a nullity and cannot give the Respondents capacity to occupy the land. He relied on the case of Ocra Realtors Ltd v Abdulghani Kipkemboi Komen & 2 others [2019] eKLR in support of that contention.

16. Lastly, on the issue of whether the transaction became void in the absence of consent of the Land Control Board, the Appellant cited Section 6 (3) of the *Land Control Act* and contended that since the suit property was agricultural land, the transaction between the Second Respondent and William was void and unenforceable. Relying on the case of Cecilia Nyambura Murunga v John Ndung'u Maina [2018] eKLR, the Appellant contended that he had established his case.

17. In reply, the Respondents filed submissions dated 30th August 2024. They argued that no decree had been extracted in respect of the judgment and that the appeal should therefore be struck out. They relied on the cases of Kenya Commercial Bank Ltd & Fred Mogaka Okemwa v Pili Victoria [2020] KEHC 5094 (KLR) and Lucas Otieno Masaye v Lucia Olewe Kidi [2022] KEELC 489 (KLR) and urged the Court to dismiss the appeal with costs.

18. This is a first appeal. The remit of a first appellate court was restated by the Court of Appeal in Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR thus:

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority v Kuston (Kenya) Limited [2009] 2EA 212 wherein the Court of Appeal held inter alia that:
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> "On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence"

19. I have carefully considered the grounds of appeal, the entire record and the parties' submissions. The issues that arise for determination are whether the Appellant's suit was barred by the *Limitation of Actions Act*; whether there was a valid contract between the Second Respondent and William; and whether the reliefs sought ought to have issued.

20. Under ground (g) of the appeal, the Appellant faulted the Learned Magistrate for find that his suit was barred under Section 4 (2) of the *Limitation of Actions Act*. Although the parties did not address the issue of Limitation of Actions in their submissions in this appeal, I am alive to the reality that limitation is an issue that goes to the jurisdiction of the Court.

21. The courts have severally restated that jurisdiction is everything and that without it, the proceedings come to a certain end. See Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR. In Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, the Supreme Court emphasised the importance of jurisdiction as follows:

> A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. ...

22. In the subsequent case of R v. Karisa Chengo [2017] eKLR, the Supreme Court held that:

> " By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics... where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."

23. In resolving the issue of whether the suit was barred by limitation, the learned Magistrate held that the claim was one of trespass to land which is a tort and that it was therefore statute barred in view of the provisions of Section 4 (2) of the *Limitation of Actions Act*.

24. A perusal of the Appellant's Amended Plaint dated 7th October 2021 reveals that he primarily sought vacant and quiet possession of the suit property through eviction of the First Respondent. The Appellant's claim was grounded on his averment that he was the proprietor of the suit property and that the First Respondent had illegally occupied it. There is evidence on record that the First Respondent entered the suit property in the year 2010 and remained therein even as at trial. In those circumstances, what the Appellant placed before the learned Magistrate for determination was a claim based on the tort of continuing trespass. Neither Section 4 (2) nor Section 7 of the *Limitation of Actions Act* were therefore applicable.

25. Faced with a similar situation, the Court of Appeal stated in Warrakah (Suing as the *Administrator and Legal Representative of the Estate of Gakweli Mohamed Warrakah - Deceased) v Mwatsami (Civil Appeal E015 of 2020*) [2024] KECA 579 (KLR) (24 May 2024) (Judgment) thus:

> " Therefore, it can be discerned that trespass to land occurs when a person directly enters upon land in possession of another without permission and remains there, places or projects any object upon the land, and that the tort of trespass is designed to enforce possessory rights rather than proprietary rights from unlawful interference. As long as the act of trespass persists, it is a continuing trespass.
>
> ... All we will say is that, since it is plain from the above cited authorities that the cause of action complained of was in respect of the tort of continuous trespass, and was not a claim for recovery of land, the appellant's suit based on trespass, and more so a continuing one, was not time barred, since section 7 of the *Limitation of Actions Act* was not applicable to the suit."

26. It follows therefore that the Appellant's suit was not barred by the *Limitation of Actions Act* and that the learned Magistrate misdirected himself in holding that it was.

27. The next issue for determination is whether there was a valid contract between the Second Respondent and William. Under the first ground of the appeal, the Appellant contended that the contract was void for failure to meet the conditions stipulated under Section 3 (3) of the *Law of Contract Act*. The section provides:

> (3) No suit shall be brought upon a contract for the disposition of an interest in land unless -
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> (a) the contract upon which the suit is founded -

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust ...

28. Further, and of particular significance in regard to this case, Section 3 (6) provides that for the purposes of subsection (3):

> " party" includes any agent, auctioneer or advocate duly authorized in writing to act in the absence of the party who has given such authority.

29. Provisions similar to Section 3 (3) of the *Law of Contract Act* are also at Section 38 of the *Land Act*.

30. The First and Second Respondents' Defence and Counterclaim in Butere MCELC No. 15 of 2020 and the Second Respondent's claim in Butere MCELC No. 59 of 2018 were based on the sale agreement dated 14th May 2010 between the Second Respondent and William pursuant to which the Second Respondent purchased 1 acre of land to be excised from parcel number Marama/Lunza/1431. Her prayers for permanent injunction and specific performance were aimed at enforcing the contract. Clearly, both the counterclaim and the suit were actions founded on a contract for the disposition of an interest in land to which Section 3 (3) of the *Law of Contract Act* and Section 38 of the *Land Act* were applicable.

31. There is no dispute that the parties to the sale agreement dated 14th May 2010 were the Second Respondent as purchaser and William as vendor. It is further not disputed that the Second Respondent did not sign the agreement and that instead, it was purportedly signed on her behalf by Geoffrey Mito Anyembe who also testified as DW1.

32. Whereas pursuant to Section 3 (6) of the *Law of Contract Act*, an agent can validly sign an agreement on behalf of a party, such an agent must be authorized in writing. Neither Geoffrey Mito Anyembe nor the Second Respondent produced any such authorization. Further, the Second Respondent did not even testify before the Subordinate Court to vouch for the agreement.

33. While resolving the issue of validity of the agreement, the learned Magistrate resorted to Article 159 (2) of *the Constitution* and held that the mode of execution was a mere technicality that did not go to the root of the matter. With respect to the learned Magistrate, he manifestly misdirected himself. The explicit provisions of Section 3 (3) of the *Law of Contract Act* and Section 38 of the *Land Act* required that the agreement be signed only by the parties or agents duly authorized in writing. In Kabogo *v Gitau (Civil Appeal 82 of 2019*) [2025] KECA 193 (KLR) (7 February 2025) (Judgment), the Court of Appeal held:

> " It is clear that all contracts for disposition of interest in land must be in writing, signed by the parties thereto which signatures are to be attested by a witness at the time of their execution. Unless these requirements are complied with, the contract is unenforceable by a court, as was stated in Kukal Properties Development Ltd v Tafazzal H. Maloo & 3 others [1993] eKLR.

34. Failure by the Second Respondent to personally sign the agreement or to have it signed by an agent authorized in writing was not a technicality curable by Article 159 (2) of *the Constitution*, especially in a situation where the party on whose behalf an agent allegedly signed did not testify before the Subordinate Court to vouch for the execution. There are countless authorities to the effect that Article 159 (2) is not some magical wand that cures all legal maladies. In Kakuta Maimai Hamisi v Peris Pesi Tobiko, Independent Electoral And Boundary Commission (IEBC) & Returning Officer Kajiado East Constituency [2013] KECA 279 (KLR), the Court of Appeal held:

> " We do not consider Article 159 (2) (d) to be a panacea, nay, a general whitewash, that cures and mends all ills, misdeeds and defaults of litigation."

35. I find and hold that the contract between the Second Respondent and William was not enforceable in the manner that the First and Second Respondents sought. It follows therefore that the reliefs of permanent injunction which the First and Second Respondents sought and specific performance as well as value of improvements on the suit property which the Second Respondent sought could not issue to them.

36. The last issue for determination is whether the reliefs sought by the parties ought to have issued. I have partly resolved the issue in the preceding paragraph, as regards the reliefs of permanent injunction and specific performance which the First and Second Respondents variously sought.

37. The Second Respondent also sought, in the alternative, a refund of the consideration at the current market value and general damages for breach of contract. The contract that formed the foundation of the Second Respondent's case in Butere MCELC No. 59 of 2018 was, as per her case, exclusively between her and William. Thus, pursuant to the doctrine of privity of contract, the benefits and liabilities can only accrue to the parties to the contract. See Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another [2015] KECA 784 (KLR).

38. The Second Respondent did not testify to support her claim for refund and general damages for breach of contract. Even though her name is included in the pleadings before the Subordinate Court and in the Memorandum of the Appeal, it seems to me that she lost interest in the contract and the ensuing cases. She did not offer any evidence to form a foundation for determining the current market value and general damages. Even after William who she had sued as the sole Defendant in Butere MCELC No. 59 of 2018 passed away on 22nd August 2020, she did not take any step to have him substituted. I find that the Second Respondent did not establish her claim for refund of the consideration and general damages for breach of contract.

39. Regarding the reliefs that the Appellant sought, the entry point of the discussion is that there is no dispute that the Appellant is the registered proprietor of the suit property. To that extent, his right to property is protected under Article 40 of *the Constitution*. Those rights are further secured by Section 24 of the *Land Registration Act* as follows:

Subject to this Act—

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

40. Additionally, Section 26 of the *Land Registration Act* obligates the court to accept the Appellant's certificate of title as prima facie evidence of proprietorship, unless the provisos under Section 26 (1) (a) or (b) are established. Those provisos lay down the grounds on which a title can be nullified as fraud or misrepresentation to which the registered proprietor is proved to be a party or where it is shown that the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme. It is plain from the above holdings that the Respondents' challenge of the Appellant's title has failed.

41. There is no dispute that the First Respondent moved into the suit property in the year 2010 and has remained there since. The Appellant is therefore entitled to vacant possession. Further, a perusal of the certificate of search in respect of the suit property shows that a caution was registered against it on 22nd November 2013 in favour of the Second Respondent who was claiming a purchaser's interest. In view of the foregoing discourse, that caution can no longer remain in the register.

42. The Appellant also claimed mesne profits from 2010. Mesne profits are defined as the profit of an estate received by a tenant in wrongful possession between the dates when he entered the suit property and when he leaves. The law is that mesne profits must be pleaded and proved. See Christine Nyanchama Oanda v Catholic Diocese of Homa Bay Registered Trustees [2020] eKLR. To the extent that the Appellant did not plead the quantum of mesne profits that he sought and neither tendered evidence on it nor made submissions to form a basis for both liability and quantum of mesne profits, I find no merit in the prayer for mesne profits.

43. In the end, this appeal succeeds in part. I set aside the judgment of the Subordinbate Court and replace it with an order entering judgment in favour of the Appellant as follows:

    a. The First Respondent to vacate the parcel of land known as Marama/Lunza/3566 within ninety (90) days from the date of delivery of this judgment. In default, an eviction order to issue.

    b. The Land Registrar Kakamega County is hereby ordered to lift the caution registered against the parcel of land known as Marama/Lunza/3566 on 22nd November 2013 in favour of the Second Respondent.

    c. The Appellant shall have costs of both this appeal and of the proceedings before the Subordinate Court.

DATED, SIGNED, AND DELIVERED THROUGH MICROSOFT TEAMS, AT NYAMIRA, THIS 22ND DAY OF MAY 2025.

D. O. OHUNGO

JUDGE

Delivered in the presence of:

No appearance by the Appellant

No appearance by the Respondents

Court Assistant: B Kerubo