



REPUBLIC OF KENYA



**Wekesa v Wambulwa (Environment and Land Appeal E024 of 2023)  
[2024] KEELC 5210 (KLR) (11 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5210 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT AND LAND APPEAL E024 OF 2023**

**EC CHERONO, J**

**JULY 11, 2024**

**BETWEEN**

**ESTHER MUKOYA WEKESA ..... APPELLANT**

**AND**

**MARY NASAMBU WAMBULWA ..... RESPONDENT**

*(Being an appeal arising from the judgment delivered by Hon. T.M.Olando  
(PM) in Bungoma CM ELC Case No. 44 of 2019 on 18th May, 2023.)*

**JUDGMENT**

1. The Appellant filed a memorandum of appeal dated 14<sup>th</sup> June, 2023 seeking to set aside and/or overturn the decision of the trial court and substitute with judgment being entered in her favour as per her counter-claim and for the Respondent to bear the costs of this appeal and the primary suit.
2. The Memorandum of appeal raises the following grounds;
  - a. The learned trial magistrate’s evaluation of the evidence before him was wanting.
  - b. The learned trial Magistrate erred in law and fact by making a finding that the respondent had proved he case to the required standard.
  - c. The learned Magistrate erred in law and fact by disregarding the appellant’s counter-claim.
  - d. The learned magistrate erred in law and fact by not finding that the disputed ground position belongs to the appellants parcel no. East Bukusu/North Kanduyi/4720 though also the respondent has a no. East Bukusu/North Kanduyi/8652 which has no ground position but overlaps on the appellants parcel of land.
  - e. The learned magistrate erred in law and in fact by not considering the appellants submissions.



- f. The learned trial magistrate completely disregarded the county surveyors and land registrar's reports on site visits on the court record.
  - g. The learned trial magistrate grossly erred in making findings not based on any evidence before him. The final orders of the magistrate have occasioned miscarriage of justice.
  - h. The learned trial magistrate grossly erred in making contradictory findings on the issues before him.
  - i. That the learned trial magistrate did not adhere to the civil law principle of balance of probability hence his findings are unsupportable both in law and in fact.
3. By way of background, the Respondent herein sued the Appellant in the former suit vide an amended plaint dated 15<sup>th</sup> December, 2021 where she averred that on 20<sup>th</sup> August, 2010 she entered into a land sale agreement with one Henry Kizito Muse for a portion of land measuring 50ft \* 100ft to be curved out of land parcel no. E.Bukusu/N.Kanduyi/3893 for a consideration of Kshs.280,000/=. The Respondent stated that upon full payment of the consideration, the said portion was transferred to her and a certificate of title was issued in her name on 23<sup>rd</sup> June, 2015. It was her position that she enjoyed peaceful occupation of the land until sometime in 2016 when she received a demand letter asking her to vacate from the suit land which was described as land parcel no. E.Bukusu/N.Kanduyi/4720 and another threatening to institute eviction proceedings against her. The Respondent alleged that the title deed issued to the Appellant was issued fraudulently by the Land Registrar.
  4. The Respondent set out particulars of fraud on the part of the Appellant and averred that the Appellant wrongly presented herself as a purchaser to the land Registrar and obtained title over a portion of parcel NO. E.Bukusu/N.Kanduyi/4255 and forged transfer documents. She also set out particulars of negligence against the Land Registrar. She sought for an order to revoke the title deed for land parcel no. E.Bukusu/N.Kanduyi/4720, for a declaration that she is the proprietor and occupier of land parcel no. E.Bukusu/N.Kanduyi/8652 and an order restraining the Appellant from interfering with her quiet enjoyment of land parcel no. E.Bukusu/N.Kanduyi/8652.
  5. The Appellant filed an amended defence and counterclaim dated 13<sup>th</sup> May, 2019 in which she denied the Respondent's claim in totality and averred that she bought land parcel no. East Bukusu/North Kanduyi/4720 from one Henry Kizito sometime in the year 2007 and acquired the requisite title documents. She averred that unknown to her, the Respondent took possession of her land and constructed thereon. The Appellant in her counter-claim sought for judgment against the Respondent/plaintiff for an order of eviction from land parcel no. East Bukusu/North Kanduyi/4720, costs of the suit and counterclaim, general damages and interests.
  6. During pre-trial conference, Parties confirmed compliance with order 11 and agreed to proceed with the hearing of the suit by way of viva voce evidence. The suit was heard on numerous dates where the Respondent/plaintiff called three witnesses and the Appellant called one witness.

### **Respondent's/plaintiff's Summary Of Facts**

7. PW1-Mary Nasambu Wambulwa was sworn and referred to the Amended plaint and affirmed the contents pleaded thereon. She testified that she has constructed rental houses on her land being land parcel no. East Bukusu/North Kanduyi/8562. It was her testimony that she occupied the said land after obtaining title in the year 2015. She produced a list of documents which contained 6 items as PExhibit 1-6 which were a land sale agreement dated 20/8/2010, copy of title deed for land parcel no. East Bukusu/North Kanduyi/8652, a copy of green card for the said land, demand letter 9/1/2016, copy of letter from the area chief Tuuti sub-location dated 16/1/2016 and a demand letter dated 10/05/2016.



8. PW2 Theoda Mabele Muse Juma was sworn and testified that the respondent purchased land parcel no. East Bukusu/North Kanduyi/8562 from his father Henry Kizito Muse and that the Appellant has never bought land from his father and that the Appellant had been sued by Henry Kizito Muse wherein he was denying ever selling land to the Appellant.
9. PW3 The witness is not identified but sought to have the Land Registrar and County Surveyor visit the land and file a report on the status of the land.

### **Appellant's/defendant's summary of Facts**

10. DW1 Esther Mukoya Wkekesa Was the Appellant/Defendant who referred to her statement of defence and counterclaim and affirmed the contents thereof. She stated that she purchased land measuring 70\* by 100\* registered as land parcel no. East Bukusu/North Kanduyi/4720 in the year 2007 from one Henry Kizito Juma and was issued with a title deed in the year 2008. It was her testimony that she is the one who reported the said Henry Kizito Juma to the Directorate of Criminal Investigations and not the other way round as alleged by PW2. She however stated that Henry Kizito sued her claiming he did not sell any land to her. She referred to a list of documents dated 2<sup>nd</sup> August, 2019 containing 2 documents which she produced as D-Exhibit 1 & 2 respectively. The two are a mutation form showing the formation of land parcel no. East Bukusu/North Kanduyi/4720 and her certificate of title for the same plot.
11. In its judgment, the trial court allowed the Respondent's/Defendant's claim with costs. Being aggrieved by this judgment the Appellant lodged the present appeal.
12. During pre-directions, the parties agreed to canvass the appeal by way of written submissions. However, none had complied at the time of writing this judgment.
13. This being a first appeal, this court is under a duty to reconsider the evidence adduced and analyze it so as to be able to reach its own independent conclusions and thus determine whether the conclusions reached by the trial court are consistent with the evidence and the applicable law. In *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR the Court held:

“ this being a first appeal, it is trite law that this court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”
14. The Respondent/plaintiff challenged the Appellant/defendant's title claiming that it was obtained fraudulently and/or misrepresentation of facts. The evidence as presented by parties is that the Respondent/plaintiff purchased a plot measuring 50\*100feet to be curved out of LR No. E.Bukusu/N.Kanduyi/3893 bought from one Henry Kizito Muse on 20/08/2010 (P-Exhibit 1). She stated that she was issued with a certificate of title on 23/06/2015 for her portion of land being E.Bukusu/N.Kanduyi/8652(PExhibit 2). She stated that she took possession of the said land and developed it by constructing rental units thereon. The Appellant/defendant on the other hand alleged that she purchased land measuring 70\*100 feet from Henry Kizito Juma in the year 2007 and was issued with a title deed on 15/01/2016 for land parcel no. E.Bukusu/N.Kanduyi/4720(D-Exhibit 2). It should be noted that the parties herein claim the same piece of land despite the different titles and registration numbers. This fact was confirmed by the various reports by the Bungoma Land Registrar and County Surveyor.



15. In a report dated 22<sup>nd</sup> September, 2020 filed in compliance with an order issued on 22<sup>nd</sup> July, 2020, one Simiyu W. Amos, a surveyor stated and I quote;“...The parcel E.Bukusu/N.Kanduyi/4720 is validly positioned on the ground and tallies with the mutation and the map. The parcel E. Bukusu/ N.Kanduyi/ 4720 was demarcated and surveyed earlier than parcel E.Bukusu/N.Kanduyi/8652. It is evident that Parcel E.Bukusu/N.Kanduyi/8652 was wrongly pointed out by the original owner and it was surveyed overlapping on the already existing parcel E.Bukusu/N.Kanduyi/4720...”
16. In a report dated 4<sup>th</sup> November 2022, the office of the Land Registrar Bungoma reported as follows:“...From the ground set up as shown in the attached surveyors report, Diag no.1 the two land parcels are overlapping with one land parcel being E. Bukusu/N.Kanduyi/ 4720 overlapping further into a neighboring land parcel number E. Bukusu/N.Kanduyi/ 4955 with almost 0.01ha...it is highly questionable how land parcel number E. Bukusu/N.Kanduyi/ 4720 measuring 0.07ha, was purportedly created since the available number could only fit a measurement of 0.05ha...”
17. The County surveyor on his part in a report dated 17<sup>th</sup> November, 2022 reported in summary that E. Bukusu/N.Kanduyi/ 4720 as at 31/10/2022 was amended on the PID map while E. Bukusu/ N.Kanduyi/ 8652 was not. It was reported that parcel E. Bukusu/N.Kanduyi/ 4720 originated from E. Bukusu/N.Kanduyi/ 4255 which was subdivided on or about July 2007 by Henry Kizito Juma. Parcel no. E. Bukusu/N.Kanduyi/ 8106 was subdivided into E. Bukusu/N.Kanduyi/ 8369 and 8370 on or about January, 2015 by Henry Kizito Muse. Parcel E. Bukusu/N.Kanduyi/ 8651 and 8652 are the resultant subdivisions of E. Bukusu/N.Kanduyi/ 8369 done on or about April, 2015 by Henry Kizito Muse. It stated that in the mutation form subdividing parcel E. Bukusu/N.Kanduyi/ 8369 into E. Bukusu/N.Kanduyi/ 8652 and 8651, parcel E. Bukusu/N.Kanduyi/ 4720 is shifted un-procedurally. That in the mutation sub-dividing E. Bukusu/N.Kanduyi/ 8106 into E. Bukusu/N.Kanduyi/ 8369 and 8370 placed E. Bukusu/N.Kanduyi/ 4720 between E. Bukusu/N.Kanduyi/ 4719 and E. Bukusu/ N.Kanduyi/ 4955. That in sub-dividing E. Bukusu/N.Kanduyi/ 8369, the surveyor shifted E. Bukusu/ N.Kanduyi/ 4720 to a new place i.e between E. Bukusu/N.Kanduyi/ 4955 and 8107 and 7053.
18. As can be seen from the two reports and the annexures thereto, the subdivision of E. Bukusu/ N.Kanduyi/4255 which created E. Bukusu/N.Kanduyi/ 4720, 4718 and 4719 was done in the year 2008 while the sub-division of E. Bukusu/N.Kanduyi/ 8106 which gave rise to E. Bukusu/N.Kanduyi/ 8369 was done in the year 2015. It also emerges that parcel E. Bukusu/N.Kanduyi/ 4720 as placed, spills over into E. Bukusu/N.Kanduyi/ 4955 by approximately 0.01ha since the space in between the neighboring parcels only fits 0.05ha.

### **Legal Analysis And Decision**

19. I have read the Memorandum of Appeal, the Record of Appeal, written submissions filed by the parties and the court record generally and identify the following as the issues that emerge for determination:
  - i. Are there two parcels of land/two titles over one parcel of land?
  - ii. Whether the parties proved their respective cases to the required standards;
  - iii. Whether the trial Court erred in reaching its determinations and
  - iv. who bears costs?
  - v. On the first issue, it is apparent that the Appellant holds a title to parcel E. Bukusu/ N.Kanduyi/ 4720 while the Respondent hold title to parcel E. Bukusu/N.Kanduyi/ 8652 and that the said parcels of land are overlapping on the ground despite the distinct titles.



vi. On the second issue, both parties claim to be the lawful proprietors of the land in question according to their respective titles. Article 40 of [the Constitution](#) of Kenya, 2010, elaborates on the right to own property in Kenya. It provides as follows; -

- “(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
- (a) of any description; and
  - (b) in any part of Kenya.
- (2) Parliament shall not enact a law that permits the State or any person—
- (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
  - (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).
- (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation-
- (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
  - (b) is for a public purpose or in the public interest and is carried out in accordance with this 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.

vii. Indefeasibility of the title is provided for in Section 26 (1) (b) of the [Land Registration Act](#) which states;

- “The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer ... 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 ... 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.”



- viii. As earlier mentioned, the Respondent questions the authenticity of the Appellants title. In *Munyu Maina vs Hiram Gathiha Maina* [2013] eKLR the Court of Appeal stated that:
- “We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”
- ix. In *Daudi Kiptugen v Commissioner of Lands & 4 Others* [2015] eKLR the court stated that:
- “...the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title. If this were not the position then all one would need to do is to manufacture a Lease or a Certificate of title at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein.”
- x. In *Nairobi High Court Civil Suit No. 1024 of 2005(O.S), Milankumar Shah & 2 others v The City Council of Nairobi & another*, the court stated as follows:
- “We hold that the registration of title to land is absolute and indefeasible to the extent firstly that the creation of such title was in accord with the applicable law and secondly where it is demonstrated to a degree higher than the balance of probability that such registration was not procured through fraud and misrepresentation to which the person or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law, and the public interest”.
- xi. Furthermore, in the case of *Danson Kimani Gacina & Anor Vs Embakasi Ranching Company Ltd* [2014] eKLR the Court held that;
- “The law on unregistered land, unlike on registered land, is slightly unclear. Proof of ownership in the case of the former is found in documentary evidence which lead to the root of title. There must be shown an unbroken chain of documents showing the true owner. Once proof of ownership is tendered then the holder of the documents is entitled to the protection of the law. There is no doubt that such proof will be on a balance of probabilities but the Court must be left in no doubt that the holder of the documents proved is the one entitled to the property.”
- xii. The Respondent in support of her claim produced a sale agreement dated 20/08/2010 between herself and one Henry Kizito Muse to substantiate the origin of her title. In contrast, the Appellant presented a title deed and a mutation form. The Respondent argued that the Appellant misled the Land Registrar that she (the Appellant) had purchased land from Henry Kizito Muse, which resulted in an erroneous subdivision. To bolster her case, she called PW2, who testified that he was the son of Henry Kizito Muse and asserted that his father had not sold any land to the Appellant and therefore any alleged subdivision and allocation of land to the Appellant was fraudulent. The Appellant, in her testimony, affirmed PW2’s testimony,



acknowledging that the late Henry Kizito Musee had sued her, claiming he had not sold any land to her.

- xiii. Further, the Respondent produced a letter dated 16/01/2016 from the area chief of Tuuti Sub-location, informing the land Registrar of the aforementioned issues. However, the Appellant did not challenge these allegations with any evidence. Nothing was presented to this court to demonstrate that the Appellant indeed purchased land from the alleged seller or that the outcome of the case between her and Henry Kizito Musee was in her favor.
- xiv. Additionally, this Court observes that while parcel E. Bukusu/N.Kanduyi/4720, said to be a subdivision of parcel E. Bukusu/N.Kanduyi/4255, was allegedly created before the creation of parcel E. Bukusu/N.Kanduyi/8652, a subdivision of parcel E. Bukusu/N.Kanduyi/8369, the Land Registrar's report dated 4/11/2022 raises questions on how parcel E. Bukusu/N.Kanduyi/4720, measuring 0.07ha, was purportedly created since the available space could only accommodate 0.05ha. The County Surveyor's report dated 17/11/2022 states that parcel E. Bukusu/N.Kanduyi/4720 in the amended PID was placed between parcel E. Bukusu/N.Kanduyi/4955 to the north and parcel E. Bukusu/N.Kanduyi/4719 to the south. As shown in Diagram 1 attached to the respective reports, the land area between these two portions is 0.05ha. This court is, therefore, stumped as to how the Appellant supposedly obtained 0.07ha. I agree with the submissions by the Respondent that there were irregularities in the manner the Appellant acquired title to the suit land and the subdivision that led to her obtaining parcel E. Bukusu/N.Kanduyi/4720. It is my considered view that the Respondents proved her claim to the required standard and that the Appellant did nothing to assail it. Accordingly, I am satisfied that the Appellant did not explain the root of the title that she holds.
- xv. The totality of my above analysis leads me to the irresistible conclusion that the Respondent's title was procured illegally, unprocedurally or through a corrupt scheme. At best, it was issued by mistake. As such, It is not a title that can be regarded as absolute and indefeasible capable of being protected by this court. Consequently, this appeal has no merit and the same is hereby dismissed with costs to the Respondent.
- xvi. Orders accordingly.

**READ, DATED, AND SIGNED AT BUNGOMA THIS 11<sup>TH</sup> DAY OF JULY, 2024.**

.....  
**HON.E.C CHERONO**

**JUDGE**

In the presence of;

Mr. Alovi H/B for Paul Juma for Appellant.

Respondent/Advocate-absent

Bett C/A

