



REPUBLIC OF KENYA



**Ntuntumo v Murungi & another (Environment and Land Appeal
E043 of 2023) [2024] KEELC 6909 (KLR) (16 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6909 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E043 OF 2023
CK NZILI, J
OCTOBER 16, 2024**

BETWEEN

ISAAC MUCIEMI NTUNTUMO APPELLANT

AND

SILAS MURUNGI 1ST RESPONDENT

M'MUNJURI M'MPURUTHA 2ND RESPONDENT

*(Being an appeal from the judgment of S.K Obara – SPM Maua
delivered on 22.5.2023 in Maua CM ELC No. 190 of 2018)*

JUDGMENT

1. The appellant, who was the plaintiff at the lower court, had, by a plaint dated 21.6.2018, sued the respondents as the defendants for trespass into and malicious damage of his L.R No. Amwathi/ Maua/762 (the suit land), which he had acquired from his father. He sought for permanent injunction restraining the respondents from interfering with his peaceful use of the land, compensation for the damage to his tea bushes, and an order for eviction.
2. The 1st respondent opposed the suit with a statement of defense dated 4.7.2018. He denied the alleged ownership, trespass, or malicious damage to the suit land.
3. On the contrary, the 1st respondent averred that he bought the suit land from the appellant on 29.1.1980, following which he took possession of the land and later subdivided it among his sons in 1997. The 1st respondent denied that the appellant had occupied, planted crops or erected any structures therein following the sale in 1980 as alleged or at all.
4. The 2nd respondent opposed the claim through a statement of defense dated 28.11.2019. He denied the alleged ownership, occupation, and development of the land by the appellant. As to trespass and malicious damage, the 2nd respondent denied the same. On the contrary, the 2nd respondent averred



- that the 1st respondent sought to lawfully sold to him the suit land after lawfully acquiring it from the 1st respondent. He insisted that he had been in peaceful use and occupation of the suit land, which he had exclusively developed, contrary to the allegations by the appellant.
5. At the trial Isaac Muchemi Ntuntumo testified as PW 1. He told the court that he was the registered owner of L.R No. Amwathi/Maua/762, situated in the Karama area, which he acquired from his late father.
 6. PW 1 stated that on 26.4.2018, he was visiting his land alongside James Mutembei, Mugambi Iruki, Jacob Mungathia, Ibrahim Muthuri, Titus Kobia, and Gideon Muthomi, whom he had hired to go and assist in the fencing, only to find a group of intruders on the land. Upon inquiries, PW 1 said that they told him that his parcel of land had been sold to the 2nd respondent by one Kamanja. PW 1 told the court that he said people chased them away he reported at Maua Police station vide O.B. No. 50/26/4/2018. He termed the said actions as illegal, amounting to trespass and prayed for the reliefs sought in the plaint.
 7. In addition, PW 1 told the court that he acquired the land from his late father as a gift in 1967 and had planted yams, bananas, and trees. PW1 denied selling or transferring his land to anyone, as alleged by the respondents. Subsequently, PW.1 produced the title deed, official search certificate, crop damage assessment report dated 7.6.2018, and letters dated 6.6.2018 and 7.6.2018 as P. Exh No's. 1-5, respectively. PW 1 denied signing any sale agreement either at any offices of the advocates, chiefs or assistant chief in 1990, otherwise he was living in Moyale at the time.
 8. Similarly, PW 1 said that he had no identification card around the year 1990 or was available in Meru when the sale agreement is alleged to have been written or ever giving anyone permission or a letter authorizing a sale agreement to be written on his behalf. He equally denied transferring his land to the 1st respondent.
 9. In cross-examination, PW 1 stated that he was employed in Moyale in 1980; his residence was in the Mbinda area; had left his neighbour Kubai to look after his land; which he had a fence on one side with stones which was 2.60 acres only to establish that 2.38 acres had allegedly been sold off. However, had no papers to confirm the land size.
 10. In re-examination, PW 1 said that the land initially belonged to his late grandfather, who passed it on to his father. He termed the sale agreement before the court as forgery. Other than planting food crops and trees, PW 1 told the court that he had not erected any structures on the land.
 11. James Mutembei Mwititi testified as PW 2. He relied on his witness statement dated 21.6.2018. As a grandson of PW1, PW2 confirmed that he accompanied the appellant to reinforce the fence to the suit land on 26.4.2018, whose boundaries he was familiar with. He was unable to verify if the 2nd respondent was charged before a court of law with any offense relating to the suit land. Prior to the fencing, PW 2 said that his grandfather had no dispute over the land with the neighbors.
 12. Jacob Mung'athia testified a PW 3. Relying on his witness statement dated 21.6.2021, he told the court that he was a neighbor of other appellants for many years and was aware of the history of the land next to his Parcel No. 792 from his inheritance. He confirmed that the appellant used to live in Mbinda and Moyale and as a close relative and a friend, he would have notified him about the alleged sale and transfer of the land to the respondents. Similarly, PW 3 told the court that he had seen the gathering book and all the other records at the lands office; hence, he was confident that the land was family or ancestral, which the appellant had been tilling yams, bananas, and trees for many years.



13. PW 3 said that the respondents had not occupied, developed, or taken possession of the said land until 2018 if they bought the land in 1980, as alleged.
14. PW 3 said that as a close neighbor, he would have known about the sale agreement of the land or possession of the same as soon as the sale and transfer occurred.
15. M'Mujuri M'Mpurutha testified as DW 1. He relied on a witness statement dated 4.7.2018 as his evidence in chief. DW 1 stated that on 29.1.1980, he bought the suit land measuring 2.38 acres from the appellant for Kshs.2,200/=, which he transferred to him on 14.2.1997. However, the title deed ultimately came out in the name of the appellant. DW 1 said that since the value of the land had gone up, PW 1 was changing tune to reclaim the land. DW 1 said that after purchasing the land, PW 1 surrendered the land to him and has never cultivated or constructed any structure on it. He termed the police report a cover-up since he was the one who had been tilling the land for 40 years. DW. 1 produced a copy of the sale agreement and the application for transfer as D. Exh No's. (1) & (2).
16. In cross-examination, DW 1 confirmed that the appellant had inherited the land from his father. DW 1 also said that though his thumbprint was not on D. Exh No. (1) his witness was the late Stanley Thang'ombe.
17. Similarly, DW1 said that his transfer documents were at the land office; hence, the title deed held by the applicant was fraudulently obtained. DW 1 added that he eventually subdivided the land into 0.75 acres and 0.80 acres, respectively, which he gave to his sons Robert and Gerald. He however, had no documents for the subdivisions. DW 1 termed the appellant's alleged neighbors who testified as liars. DW 1 insisted that he paid the consideration to the appellant in cash in front of four witnesses, took over the land, signed the transfer forms, and attended the office to effect the changes to the register.
18. Silas Murungi Meme testified as DW 2. Relying on a witness statement dated 28.11.2019, he told the court that he bought the suit land from the 1st respondent's sons in 2017, namely, Gerald Michubu Ayub Mugambi M'Munjuri and Robert Mungania M'Muyuri measuring 0.80 acres, 0.80 acres, and 0.75 acres respectively who were yet to transfer to him and title deeds had not yet come out at the time of the sale. DW 2 said that all the sellers had been in the occupation since 1980, where they had planted miraa, bananas, and assorted trees.
19. DW 2 said that he conducted due diligence by visiting the lands office, where he confirmed that the parcels were numbers 10312 and 10313 in favor of Gerald and Robert. DW 2 told the court that after taking vacant possession, he planted more banana trees without any objection from the appellant. DW 2 also confirmed that there was a time the land was in the name of the appellant before subdivisions into Parcel No's 4584, 10312, and 10313, though he had not produced before the court official search certificate or sale agreements.
20. Moreso, DW2 denied the existence of the O.B. and crop damage assessment reports in the custody of the appellant, given that he had been cultivating the land since 2017. DW 2 said that he paid the entire purchase price to the sellers, who have never objected to his development.
21. Joseph Mbai testified as DW 3. Regarding the history of Parcel No. 561 and 762, he produced a report dated 14.10.2022, a copy of the title deed for Amwathi/Maua/10313, 10312, 4584, and a letter by the land adjudication officer dated 18.3.2022 as D. Exh No's. 3-7, respectively.
22. In cross-examination, DW 3 said that the sale between the appellant and the 1st respondent occurred during the land demarcation stage, of which an objection was heard and determined by the land adjudication officer. DW 3 said that the land adjudication records reflected the 1st respondent as the owner of Parcel No. 561, who gathered the three parcels of land. DW 3 said that Parcel No. 762



measured 2.38 acres, and therefore, at the time of transfer, 2.14 acres were transferred from Parcel No. 762, to create Parcel No 561 through Objection No. 1375, whose proceeding and the letter of transfer he did not have before the court.

23. D.W. 3 said that he was not in possession of a copy of the sale agreement on record to that effect. He added that during the land adjudication process, any error in the adjudication record must be countersigned. DW 3 admitted that there was an error in the land records for Parcel No. 762 since the acreage indicating as 2.14, 1.14 and 1.0 acres was not countersigned. DW 3 said that he had no objection records to show how the 1st respondent bought or was transferred the three portions or whether one of the sellers transferred to him more than he owned.
24. DW 3 also said that his office did not recommend to the chief land registrar that Parcel No. 762 measuring 0.1693 ha and that about 0.43 acres be issued with a title deed. DW 3 also insisted that according to their records, the appellant had no land since he had transferred it to different persons. He equally said that it would be irregular for his office to recommend a registration and issuance of title for a negative land size. In this instance, DW 3 said that no one, including the appellant, had complained about the adjudication record, irregular entries, and transferring land without consent; otherwise, the DLASO was not a party to the suit.
25. With the close of the respondent's defense, the trial court dismissed the appellant's suit. The appellant appeals against the trial court judgment on seven grounds set out in the memorandum of appeal dated 21.6.2023 that the court:
 - i. Misconstrued the evidence and failed to analyze it
 - ii. Held that fraud was not pleaded or sought for the cancelation of the titles, yet they were issued and produced in court in 2022 after he had closed his case.
 - iii. Relied on documents obtained and produced ten months after he had closed his case and which were not within his knowledge.
 - iv. Erred in holding that the respondents had legally acquired a title deed despite his title deed that was never canceled.
 - v. Relied on extraneous matters and wrong precedents.
 - vi. Gave a narrow interpretation of the dispute and placed bias on an imbalanced burden of proof against him.
 - vii. The decision was against the weight of evidence and therefore, bad in law.
26. This appeal was to be canvassed by way of written submissions due by 30.9.2024.
27. The appellant relied on written submissions dated 27.9.2024. it was submitted that courts of law do not re-write contracts but enforce them unless marred by fraud, illegalities, undue influence and unconscionability.
28. In this case the appellant submitted that he never signed or transferred the suit land to the 1st respondent or anybody else. Reliance was placed on *Elijah Makeri Nyanog vs Stephen Mungai Njuguna & another (2013) eKLR* on the impeachment of a title obtained illegally, unprocedurally and through a corrupt scheme. Further, the appellant submitted that given the inconsistencies in the respondent's case, the court should not allow such injustice to hold root. Reliance was placed on *Chemnei Investment Ltd vs A.G & others NRB Civil Appeal No. 60 of 1997*.



29. The appellant submitted that the land office had knowingly and intentionally been compromised to swindle and corruptly interfere with his land rights and tamper with the land record to the advantage of the 1st respondent at the demarcation level and later to favour his sons who sold the resultant parcels of land to the 2nd respondent. The appellant submitted that DW 3 failed to produce documents to substantiate how the changes occurred hence his evidence bordered on hearsay especially to explain how a title deed would be issued to the appellant in 2018 he had sold and transferred his land rights in 1980.
30. On rectification of titles the appellant submitted that section 80 (1) of the [land registration act](#) allows the court to order for the same if it is satisfied that the titles were obtained fraudulently, illegally by mistake or unprocedurally. Reliance was placed on *Alice Chemutai Too vs Nickson Kipkurui Koriri & others* (2015) eKLR.
31. The respondent relied on written submissions dated 27.9.2024. it was submitted that the 1st and 2nd respondents tendered no documents to show that they procedurally obtained land rights on the suit land by way of a sale agreement and a transfer form produced as D. Exh No. (1) & (2) followed by the DLASO report and title deed produced by DW 4 as D. Exh No. (3) – (7) respectively.
32. The respondents submitted that in the report dated 14.10.2022 and in D. Exh No. (7) it was clear that the appellant's name was not deleted from the register owing to administrative errors hence the appellants should not take advantage and claim the land.
33. The respondents submitted that the appellant failed to plead fraud or seek the cancellation of other resultant title deeds but nevertheless DW 3's report was clear that his title deed was irregularly issued. In this case, since a party must show the root of his title deed, the respondent's title deeds are valid unlike that held by the appellant. R reliance was placed on *Hubert L. Martin & others vs Margaret J. Kamar & others* (2016) eKLR, *Munyu Maina vs Hiram Gathiha maina* Civil Appeal NO. 239 of 2009.
34. The respondent submitted that if the appellant had no land at the adjudication stage it was curious how he would obtain a title deed in 2018 when he relinquished his rights to the land to the 1st respondent in 1980 hence his title deed was not protectable under sections 25 and 26 of the [Land Registration Act](#).
35. As to the title deed held by the respondent submitted that the appellant was unable to prove any fraud, illegality and or corrupt scheme to obtain the title on their part and since he cannot eat his cake and at the same time have it the appellant ought to come into terms with the fact that he sold land, transferred the land in 1980. Reliance was placed on *Harrisson Kiambuthi Wanjiru and others vs District Land Registrar NRB & others* (2022) eKLR.
36. The mandate of this court is to rehearse and rehear the record of the trial court with an independent mind and come up with findings both on facts and the law while taking into consideration that the trial court had the benefit of seeing and hearing the witnesses testify.
37. In *Selle vs Associated Motor Boat Co.* (1968) E. A 123, the court observed that the court has to reconsider and evaluate the evidence, drawing its necessary following the findings of facts by the trial court, especially where the court had filed to take into account particular circumstances or probabilities materially to estimate the evidence. See also *Gitobu Imanyara & 2 others vs AG* (2016) eKLR. The jurisdiction of this court is only to consider the issues that were presented before the trial court. *Mary Kitsao Ngowa & others vs. Crystalline Ltd* (2015) eKLR, *Cross Current Indigenous Network vs Commissioner for Lands Civil Appeal No. 370 of 2018* (2024) KEECA 114 (K.L.R.) 20th September 2024 (Judgment).
38. The issues calling for my determination are:



- i. If the appellant pleaded and proved trespass into and malicious damage to his land.
 - ii. If the respondents pleaded and proved justification for being on the appellant's land.
 - iii. If the respondents had pleaded better title to the suit land.
 - iv. Whether the appeal has merits.
 - v. What is the order as to costs?
39. In *Diamond Homes Ltd vs Shapi* (Civil appeal 118 of 2021 (2024) KECA 1161 (K.L.R.) (20th September 2024) (Judgment), the court cited with approval *IEBC vs Stephen Mutinda Mule & others 2014* (eKLR), on the proposition that parties are bound by their pleadings and any evidence led by any party that does not support the averments in the pleadings or which is at variance with the averments of the pleadings goes to no issue and must be disregarded. The court held that having neglected to raise any objections to the cause of action on what the respondent claim was founded on the appellant was precluded from springing a surprise in its submissions.
 40. In this appeal, the appellant had pleaded that he was the owner of L.R No. Amwathi/Maua/762/ measuring 0.693 ha, initially owned by his late father. He produced a copy of the title deed dated 14.6.2018. In the said title deed it was indicated that the register for the parcel was opened on 15.5.2011 in the Registry Map Sheet No. 5/5.
 41. In *Jamal Salim vs Yusuf Abdullahi Abdi & another* (2018) eKLR, the court cited Clerk & Lindsell on Torts, Sweet & Maxwell, 18th Edition page 925, that trespass to land consists of any unjustifiable intrusion by one person upon the land in possession of another, and that to sustain a claim of trespass, it was enough to prove possession, without establishing ownership, for a person who is in possession could lodge a claim regardless of whether he is the owner or derives title from the owner.
 42. The burden of proof was upon the appellant to prove ownership and possession of the suit land. See *Raila Odinga & another vs IEBC* (2017) eKLR. He did this by producing a title deed and a crop damage assessment report. On the other hand, in the statement of defense by the 1st respondent, he pleaded that he bought 2.38 acres of the suit land on 29.1.1980, took vacant possession, and subdivided the land among his sons in 1997. On the part of the 2nd respondent, it was averred that he lawfully acquired the land from the son(s) of the 1st respondent, took vacant possession, and had been in quiet possession of the suit land throughout.
 43. He denied that there had been any trespass, malicious damage, or destruction of the appellant's crops. A party who files a statement of defense must accompany it with witness statements and a list of copies of documents as provided by Order 7 of the Civil Procedure Rules.
 44. The respondents filed a list of witness statements and documents dated 4.7.2018 and 19.2.2020. In the witness statements dated 4.7.2018 and 28.11.2019, the respondents attached no letters of confirmation of ownership from the land adjudication officers to show that they were recorded owners of part of or all of L.R No. Amwathi/Maua/762 before it became registered land. The respondents did not plead any details of their parcels of land in terms of the date of entry of their details in the adjudication register.
 45. There was no specific pleading by the respondents that the appellant sold and transferred all his interests or rights over the suit land during the adjudication process. The respondents did not plead that the title deed held by the appellant was erroneously, illegally, and procedurally issued since the appellant had already disposed of and ceded ownership.



46. The respondents had not pleaded that after vacating the land and upon the transfer of his interests during the adjudication section, the appellant could not have been registered as the owner. There was no evidence tendered by D.W. 1 and DW 2 trying to impeach the title held by the appellant in line with Sections 24, 25, 26 & 27 of the [Land Registration Act](#).
47. From the court record, I have not come across any court order that was made by the trial court directing the DLASO to avail a report dated 14.10.2020 or for leave that was granted to the respondents to file a further list of documents dated 6.9.2022.
48. Assuming that the respondents had obtained a title deed for L.R No. Amwathi/Maua/10313, 10312, and 4584 on 10.6.2022, 18.3.2022 going by the evidence of DW 3 would have been irrelevant or inconsequential since the parcels of land fell under registered land and not land under adjudication. In this case, therefore, the relevant officers would have been the land registrar and the land surveyor to establish if the respondents' parcels of land were on the same locality both as per registry index maps and on the ground with the title held by the appellant.
49. I say so because L.R No. Amwathi/Maua/762 has an acreage of 0.6193 ha and was issued on 14.6.2018; its register was opened on 15.5.2011 and fell under Registry Map Sheet No. 5/5. On the other hand, the titles for L.R No. Amwathi/Maua/10313, 10312, and 4584 have acreage of 0.2616 ha, 0.2611 ha, and 0.221 ha respectively were issued on 10.6.2022 and 18.3.2022; the registers were opened on 18.5.2011, 24.5.2017 and 24.5.2017 and fell under Registry Map Sheet No. 5/9. From the exhibits tendered, the appellant's title deed falls in a different registry map, as seen from the title deed of the defendants.
50. In *Munyu Maina vs Hiram Gathiha Maina* Court of Appeal, Civil Appeal No. 239/2009, the court said that when a registered proprietor's title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. The court further said that the proprietor must go beyond the instrument and prove that he acquired the title legally, formally, and free of any encumbrances.
51. The 1st respondent relied on a sale agreement, which was not translated into the official language used in court. It had no authentication at all. The application for transfer dated 14.2.1997 was not acknowledged receipt of by the land adjudication officer. The transferee and the transferors did not sign it. The two documents were not accompanied by any confirmation letters as to ownership and proceedings from the DLASO that the changes were actually effected in favor of the respondents.
52. DW 3 was unable to produce such proceedings and or record as proof that the 1st respondent was a one-time recorded owner of the suit land following a formal transfer to himself by the appellant. The Record of Existing Rights or demarcation register, was not authenticated. It was not accompanied by the adjudication register under Sections 26, 26A, 27 & 29 of the [Land Adjudication Act](#). The adjudication register is the one that is forwarded to the Director of the Land Adjudication for onward transmission to the Chief Land Registrar for titling.
53. DW 3 was unable to avail any such documents to show that the name of the 1st respondent had replaced that of the appellant in the adjudication register when the names were forwarded to the titling center. Without those documents, DW 3 had no basis to suggest that the title deed held by the appellant was unlawfully or irregularly obtained. See *Joseph Karisa Mutsonga vs Johnson Nyati* (1984) eKLR.
54. It is the Chief Land Registrar under Section 28 of the Act who is required to give effect to the adjudication register through registration thereof save for parcels of land where there are pending appeals after a certificate of finality has been issued under Section 27 of the Act. Evidence that the title deed held by the appellant was issued irregularly or unprocedurally and that those of the respondent should supersede was not availed at all in terms of Sections 26(1) (b) of the [Land Registration Act](#). DW 2 was unable to produce any documents of purchasing the land or acquiring his title deed.



55. The *Land Adjudication Act* does not permit any omissions of any procedural steps. The chief land registrar can only register the adjudication register and issue titles after the process of adjudicating is finalized in regard to any affected parcels. See *Kipkobel Arap Misoi vs Priscilla Chepkorir* (2016) eKLR. A land adjudication officer cannot recommend a title deed to be invalidated.
56. There was no pleading by the respondents that the title deed held by the appellant was invalid or fraudulently obtained. The issue was not pleaded and proved before the trial court through tangible and cogent evidence on a balance higher than in ordinary suits. See *Virjay Morjaria vs Darbar Madhusing* (2000) eKLR. Evidence that the respondent's parcels of land were situated in the same locality as that of the appellant was also missing.
57. As to whether the appellant had sold and transferred his interests to the 1st respondent during the adjudication process, the 1st respondent was unable to tender a valid acknowledgment note duly signed by the appellant together with witnesses that he took vacant possession of the land in 1980 in line with the *Law of Contract Act* pre- 2003.
58. Evidence of an application form or letter or transfer form duly executed by the appellant addressed to the land adjudication officer and objection proceedings to that effect, showing that there was a valid transfer at the adjudication stage that was not availed by the 1st respondent or DW 3 is not before the trial court.
59. Evidence that the 1st respondent's names and those of his sons were entered into the adjudication register in 1980 and 1997, was not availed save for the R.E.R. or demarcation register, which has glaring errors and lacks authentication. See *Solomon Meme Muthamia vs Ntaari Kabutura & Land Adjudication Officer Meru* (2001) eKLR.
60. DW 2 produced no sale agreements, transfer forms, payment records, or acknowledgments notes and copies of an adjudication register showing that he was a recorded owner of the three parcels by 2017. DW 4 was calling upon the trial court to interfere with or impeach the appellant's title on account of errors committed during the adjudication process. The respondents had not pleaded such issues and made reliefs to that effect. Any party with such a grievance has to follow the internal mechanism set under the *Land Adjudication Act*. The court had no such jurisdiction to re-open the land adjudication process. See in *Kianyamal Ole Tare vs Sotua Sakana Muyia* (2015) eKLR, *Mohamad Ahmed Khalid & others vs Land Adjudication Officer & others* (2015) eKLR and *Tobias Achola Osindi Ogalo & others vs Cyprianus Otieno Ogalo* (2013) eKLR.
61. The respondents did not plead and prove any mistake or misrepresentation on the part of the appellant in obtaining title to their parcels of land and remaining on the suit land.
62. In the absence of such evidence, I find the appellant had proved ownership of the suit land to be entitled to all the ownership and occupation rights under Order 40 Civil Procedure Rules Section 24, 25 & 26 of the *Land Registration Act* and Article 40 of *the Constitution*.
63. The appeal is allowed. The Lower court suit is allowed in terms of prayer (1) only. Costs of the appeal and at the lower court to the appellant. The respondents shall hand over vacant possession to the appellant after 90 days from the date hereof in line with Section 152 A-F of the *Land Act*, in default of which they shall be forcefully evicted at their own expense and costs by the appellant in line with the law.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 16TH DAY OF OCTOBER, 2024

In presence of



C.A Kananu

Otieno for appellant

Asuma for Mutembei for the respondent

HON. C K NZILI

JUDGE

