



REPUBLIC OF KENYA



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**Mukhongo v Mwachabe (Environment and Land Appeal
E014 of 2023) [2025] KEELC 4257 (KLR) (21 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 4257 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E014 OF 2023**

EC CHERONO, J

MAY 21, 2025

BETWEEN

WYCLIFFE LALETI MUKHONGO APPELLANT

AND

ALICE NASAMBU MWICHABE RESPONDENT

*(being an appeal from the Judgment by Hon. T.M Orlando, P.M in
Bungoma CM-ELC Case NO. 53 of 2020 delivered on 07/09/2023)*

JUDGMENT

Introduction.

1. Vide a Memorandum of Appeal dated 14/11/2023, Wycliffe Laleti Mukhongo, the Appellant herein who was the defendant in Bungoma CM-ELC Case no. 53 of 2020 appeals to this court challenging the judgment of the trial Magistrate Hon. T. Orlando (Principal Magistrate) delivered on 07/09/2023 allowing the Respondent's suit in its entirety.
2. The brief facts of the case is that the Respondent sued the Appellant vide a plaint dated 20/07/2020 claiming that she is the owner of land parcel no. E.Bukusu/S.Nalondo/6880. She averred that the Appellant invaded the abovementioned parcel of land in 2015 and started cultivating without her consent and further that in the year 2017, he constructed a semi-permanent structure and a fence therein. That the Appellant tampered with the boundary put up by the surveyor at the time the suit land parcel no. E.Bukusu/S.Nalondo/1355 was being partitioned and during the distribution of the estate after succession. That she reported the incident to the Assistant County Commissioner, area chief Luuya Location and the police vide OB No. 08/11/02.2019. She sought judgment against the Appellant for;
 - a. Declaration that the occupation of Land Parcel No. E. Bukusu/S. Nalondo/6880 is unlawful and amounts to trespass.



- b. An eviction order against the defendant on land parcel no. E. Bukusu/S. Nalondo/6880.
 - c. Costs of the suit.
 - d. Interests.
3. By way of a defence, the Appellant filed a statement of defence and counter-claim dated 20/11/2020 in which he averred that his father, one Pharis Mukhongo Laleti-dcd purchased a portion of land measuring 7 acres from one Edward Mwachabe –deceased on 04/06/1988. He averred that the said 7 acres was to be excised from Land Parcel No. E. Bukusu/S. Nalondo/1355. He averred that after selling the land aforementioned, the seller relocated to another parcel of land. That the said portion of land measuring 7 acres was properly demarcated on the ground and his family has been in occupation since then to date. That the Appellant built a house on a portion of the land in the year 2014 where he has been residing to-date. He denied being in occupation of the Respondent’s claimed land being Land Parcel No. E. Bukusu/S. Nalondo/6880 and averred that the entire process of sub-dividing Land Parcel No. E. Bukusu/S. Nalondo/1355 was irregular and fraudulent.
4. In his counter-claim, the Appellant averred that jointly with one Bernadette Nakoba Mukhongo and Lonah Nafula Wamblianga, they are the legal representatives of the estate of Pharis Mukhongo Laleti who has been in occupation of 7 acres of land comprised in Land Parcel No. E. Bukusu/S. Nalondo/1355 since 1988 to date without any interruption. That upon the conclusion of the succession cause for the estate of Edward Kitinda Mwachabe(dcd) on 11/12/2014, Pharis Mukhongo Laleti was allocated his share of 7 acres while the Respondent was given 2 acres thereof. That the Respondent fraudulently caused the transfer of 5 acres of Land Parcel No. E. Bukusu/S. Nalondo/1355 to himself without regard for the other beneficiaries. He set out particulars of fraud against the Respondent and sought for the following orders against him;
- a. An order of the cancellation of the mutation form for Land Parcel No. E. Bukusu/S. Nalondo/1355, the new number created therefrom to wit LR NO. Land Parcel No. E. Bukusu/S. Nalondo/6879-6883 and the titles created therefrom and the land to revert back to the original Land Parcel No. E. Bukusu/S. Nalondo/1355 to pave way for a proper partition as per the certificate of confirmation of grant.
 - b. An order directing the County Land Surveyor to carry out portions of Land Parcel No. E. Bukusu/S. Nalondo/1355 in accordance with the certificate of confirmation of grant and as per the boundaries on the ground.
 - c. Costs of the counter-claim.

Evidence by parties.

5. The suit before the trial court proceeded by way of viva voce evidence with the Appellants calling two witnesses while the Respondents also called two witnesses.
6. Alice Nasambu Mwichebe (PW1) adopted her witness statement dated 20/06/2020 as her evidence-in-chief. She also produced into evidence a Title Deed P-Exhibit 1, Grant of letters of Administration P-Exhibit 2, certificate of confirmation of Grant P-Exhibit 3. A grant Notice P-Exhibit 4, application for confirmation of grant P-MFI 5. Letter of consent P-MFI 6, Mutation form P-MFI 7, letter from assistant county Commissioner-P-Exhibit 8 and demand notice P-Exhibit 9. In cross-examination, she stated that her title was curved out from Land Parcel No. E. Bukusu/S. Nalondo/1355 after succession cause no. 113 of 2012-(Estate of Edward Mwachabe). It was her testimony that Pharis Mukhongo



Laaleti was entitled to 7 acres while he was entitled to 2 acres of the land. That there were 10 beneficiaries entitled to the land and they undertook the partition of the land.

7. Matthew Nandi (PW2) testified that he visited Land Parcel No. E. Bukusu/S. Nalondo/1355 on 30/09/2022 pursuant to a court order issued on 11/10/2022. He produced the mutation form as P-Exhibit 7 and his reports as P-Exhibit 10. He testified that the mutation form was signed by various beneficiaries. That Pharis Mukhongo Laaleti was to get 7 acres but on the ground, he had 5.28 acres. In re-examination, he testified that the Respondent who is entitled to 2 acres on the ground has 1.55 acres.
8. Wycliff Laleti Mukhongo (DW1) adopted his witness statement dated 20/11/2020 as his evidence-in-chief and produced as his evidence 7 items as D-Exhibit 1-7. On cross-examination, he testified that according to the mutation form, his land is indicated as No.C and title is No. 6881.
9. Justus Wanjala Sabuni (DW2) adopted his witness statement dated 06/05/2021 as his evidence-in-chief. He testified that the mutation was fraudulently done and the Respondent's title is fake.
10. At the close of the plaintiff and defence case and after considering the materials placed by the parties, the trial Magistrate entered Judgment in favour of the Respondents. Being aggrieved by the impugned judgment, the Appellant preferred the current appeal on the following grounds;
 - a. That the learned magistrate erred in law and in fact in allowing the respondents suit when it was clear from the evidence on record that the respondents title in respect of LR No. E.Bukusu/S.Nalondo/6880 was tainted with fraud.
 - b. That the learned magistrate erred in law and in fact in dismissing the appellants counter-claim contrary to the evidence on record specifically the fact that the partition of LR No. E.Bukusu/S.Nalondo/1355 creating new numbers to wit of LR No. E.Bukusu/S.Nalondo/6879-6883 was done in an irregular and fraudulent manner.
 - c. That the learned magistrate did not fairly analyse the appellants evidence hence arriving at a wrong finding.
 - d. That the learned magistrate erred in law and in fact in issuing an order for eviction against the appellant when it was acknowledged by the respondent that the appellants father Pharis Mukongo Laleti (Deceased) was entitled to 7 acres comprised in LR No. E.Bukusu/S.Nalondo/1335 though as per the survey report dated 11/10/2022 the appellant was only occupying a portion of land measuring 2.14 ha-5.28 acres which is less than what they are entitled to as per the certificate of confirmation of grant.
 - e. That the learned magistrate did not fully and adequately appraise himself of the evidence on record, frame issues for determination and hence his findings fell below the threshold required by the law.
 - f. The judgment and/or decision of the learned magistrate was against the weight of evidence on record.
11. The appellant in his appeal sought for the following prayers;
 - a. That the appeal be allowed.
 - b. That the judgment and/or decision of the honourable trial magistrate delivered on the 07/09/2023 be set aside and in its place the respondent's suit in lower court be dismissed and the counter-claim be allowed.
 - c. That costs of this appeal and in the lower court be born by the respondent.



Submissions by parties.

12. When this appeal came up for directions, the court directed the parties to file and exchange their submissions.
13. The Appellant filed his submissions dated 30/01/2025 in which he contends that they had proved their claim against the Respondents on grounds of fraud to the required standard. He submitted that the mutation form dated 09/01/2016 was purportedly signed by Pharis Mukhongo Laleti yet he died on 25/06/2012. He also argued that there was a serious contention on who signed the said mutation form which points to fraud. He therefore submitted that his counter-claim was merited and asked the court to find in his favour. He placed reliance in the case of *Dina Management Limited v. County Government of Mombasa & 5 Others* 2023 KESC 30[KLR] and *Alice Chemutai Too v. Nickson Kipkirui Kosir & 20 Others* 2015 eKLR.
14. The Respondent also filed her submissions dated 20/03/2025 in which she stated that she obtained her title through transmission in a Kitale Succession Cause no. 113 of 2012 and that the said parcel was excised as per the mutation form produced by the land surveyor.

Legal Analysis And Decision

15. I have considered 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 commend for determination:
 - a. Whether the trial magistrate erred in his analysis of evidence in reaching his determination.
 - b. Who bears the costs
16. This being a first appeal, I am under a duty to reconsider the evidence adduced and analyze it and come up with my own independent conclusions and therefore 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.”
17. It is not in contention that the Respondent is the registered owner of land parcel no. E. Bukusu/S.Nalondo/6880, having been so registered and issued with a certificate of title on 24/01/2018 as per P-Exhibit 1. She explained that she obtained her title through transmission upon the conclusion of Kitale HC Succession Cause no. 113 of 2012 where she was allocated 2acres of land parcel no. E. Bukusu/S.Nalondo/1355 as per P-Exhibit 2. That after the succession cause, she obtained a consent to transfer to herself a portion allocated to her as shown in P-Exhibit 4, & 6. She argued that she reported the Appellants’ unlawful occupation of her land to various authorities including the Assistant County Commissioner as shown in P-Exhibit 8.
18. The Appellant on his part alleged that his father purchased a portion of land measuring 7 acres to be curved out of land parcel no. E. Bukusu/S.Nalondo/1355 back in the year 1988 as per D-Exhibit 6 and that he has since been in occupation of the said land even after their father died and post succession



of his estate. He contends that the seller, one Pharis Mukongolo Laleti equally died on 25/06/2012 and his estate was succeeded and land parcel no. E. Bukusu/S.Nalondo/1355 was shared amongst 10 people.

He contends that the suit land was intended to be subdivided into ten (10) portions but was instead subdivided into five (5) portions only. He set out specific particulars of the alleged fraud by the Respondents, including the subdivision of land parcel No. E. Bukusu/S. Nalondo/1355 which was not carried out in accordance with the certificate of grant; that the process was conducted through misrepresentation that Pharis Mukongolo Laleti had participated; that Laleti's signature was forged; that the subdivision disregarded existing boundaries; and that the Respondent unlawfully allocated herself the portion of land occupied by the Appellant.

19. Section 24 (a) the [Land Registration Act](#) provides thus;

“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”

20. Section 26 of the [Land Registration Act](#), 2012 provides;

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

21. As mentioned elsewhere in this judgment, it is not in dispute that the Respondent holds the title for land parcel No. E. Bukusu/S. Nalondo/6880. I take judicial notice that the law court requires the courts to consider a certificate of title as a prima facie evidence of ownership to land and can only be challenged on grounds stipulated thereunder.

22. The Appellant has challenged the Respondents' title on grounds of fraud particulars of which are set out thereunder. It is trite law that fraud, illegality and misrepresentation must be pleaded and proved. The Appellant did plead fraud and the same is confirmed by the Respondent in her reply to defence and defence to counter-claim dated 07/03/2021. At this juncture, I wish to refer to Section 109 of the [Evidence Act](#) which provides that: ‘The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.’ Also see *Arthi Highway Developers Ltd vs. West End Butchery Limited & 6 Others* (2015) eKLR as well as *Virjay Morjaria vs. Nansingh Madhusingh Darbar & Another* (2000) eKLR on the burden of proof in a claim for fraud.

23. I have considered the particulars of fraud set out by the Appellant and the evidence presented by the parties and note that it is not in contention that Phares Mukhongolo Laleti who is represented by the appellant was allocated 7 acres while the Respondent was allocated 2 acres out of land parcel no. E.Bukusu/S.Nalondo/1355 as can be seen from P-Exhibit 3. From the said document, it is clear that the said parcel of land was to be divided among 10 beneficiaries, to wit; Alice Nasambu Mwichabe, Collins Laleti Mwichabe, Phares Mukongolo Laleti, Alfayo Sindani Wanyama, Alfred



Sakwa Wanyama, Vitalis Wangila Wanyama, Zakaria Laleti Wanyama, Leonard Mabenga Wanyama. Francis Wachie Mbaya and Peter Nasibo Lukoye.

24. However, from the report of the land surveyor dated 11/10/2022, it seems the land parcel no. E.Bukusu/S.Nalondo/1355 was sub-divided into six portions as can be seen from the Mutation form produced as P-Exhibit 7. It is also shown that the same land was sub-divided into five portions. No explanation has been given why the sub-division was done in the manner it was done despite there being an order from the succession court on how the land was to be distributed. From the surveyor's report, it emerges that after the subdivision, the Appellant was allocated 1.55 acres while the Respondent got 5.28. This acreage is in conflict with the distribution by the succession court and again, no explanation has been given why that was done.
25. From the mutation form dated 29/01/2016, the application for consent and letter of consent dated 09/12/2015 indicates that the persons applying for the sub-division are Alice Nasambu Mwachabe, Collins Laleti Mwachabe and Phares Mukhongolo Laleti. No evidence has been presented by the Appellant that his father Phares Mukhongolo Laleti died on 25/06/2012. This therefore begs the question how he participated in such activities while deceased. Further, the Respondent in her oral testimony denied signing the mutation form. This therefore leads the court to the irresistible conclusion that the entire process of sub-dividing land parcel no. E.Bukusu/S.Nalondo/1355 was marred with irregularities, illegalities and a corrupt scheme.
26. In the case of *Munyu Maina V. Hiram Gathiba Maina, Civil Appeal No. 239 of 2009*, the Court held;

“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.” (Emphasis Supplied)
27. From the foregoing exposition and guided by the above cited cases, it is clear that the Respondent did not sufficiently explain the root of her title and the same is defeated on grounds fraud and misrepresentation.
28. In the final analysis, I find that the Learned Magistrate erred in his findings.
29. It is against the foregoing that I find this appeal merited and the same is hereby allowed as prayed with costs.
30. Orders accordingly.

DATED AND SIGNED AND DELIVERED AT BUNGOMA THIS 21ST DAY OF MAY, 2025.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

M/S Mukanda H/B for Nakitare for the Respondent

Mr. Murunga for the Appellant.

Bett C/A.

