



**Mbarak v Kalolo Kibaoni Bayamagonzi Upgrading Project (Sued Through its Chairman) & another (Environment and Land Appeal 030 of 2022) [2025] KEELC 3895 (KLR) (14 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 3895 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT AND LAND APPEAL 030 OF 2022**

**EK MAKORI, J**

**MAY 14, 2025**

**BETWEEN**

**ABDULKADIR ABDALLA MBARAK ..... APPELLANT**

**AND**

**KALOLO KIBAONI BAYAMAGONZI UPGRADING PROJECT (SUED THROUGH ITS CHAIRMAN) ..... 1<sup>ST</sup> RESPONDENT**

**PAUL MWAMUYE (SUED AS PAUL MWAMUYE) ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgment of the Hon. J.M. Kituku (Senior Principal Magistrate) dated and delivered on 25th May 2022)*

**JUDGMENT**

1. The appeal presented herein pertains to the judgment delivered on the 25th of May, 2022, in the Kilifi Senior Principal Magistrate Court for ELC SPM Case No. 308 of 2019. Through a Memorandum of Appeal dated the 23rd of August, 2022, the Appellant seeks to have the trial court's decision set aside based on the following grounds:
  - a. The learned Senior Principal Magistrate erred in fact and law by failing to consider that the most recent PDP map No. 117 was produced and approved by the Plaintiff and sanctioned by the Ministry of Lands and Physical Planning Department of Kilifi.
  - b. The learned Senior Principal Magistrate erred in both fact and law in determining that the Plaintiff was not the owner of plot 480.
  - c. The learned Senior Principal Magistrate erred in fact and law in asserting that plot No. 332 was originally plot No. 157, without any evidence supporting this assertion.



- d. The learned Senior Principal Magistrate erred in fact and law in concluding that the 1st Defendant's duty is to resolve disputes among its members, despite the absence of such averments from the 1st Defendant or evidence in the record.
  - e. The learned Senior Principal Magistrate erred in both fact and law in neglecting to ascertain the proper physical location of plot No. 480 as indicated by the PDP No. 117, as presented by the Appellant.
  - f. The learned Senior Principal Magistrate erred in both law and fact by considering the decision of the committee of the 1st Respondent without examining the merits of that decision.
  - g. The learned Senior Principal Magistrate erred in both law and fact in failing to recognize the appellant as the owner of the suit property, despite overwhelming evidence supporting his claim.
2. From the grounds of appeal, materials placed before me, and the parties' submissions, I frame the following issues for the court to determine: whether the Appellant proved ownership of the suit property, and whether plot No. 480, as per PDP 117, was identified correctly as the property in dispute.
  3. The appellate court holds a critical position at this juncture, entrusted with the responsibility of re-evaluating the evidence and formulating its independent conclusions. In the pivotal case of *Okeno v Republic* [1972] EA 32 at 36, the East African Court of Appeal delineated the duties of the court during an initial appeal as follows:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R.*, [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R.*, [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post*, [1958] E. A. 424.”
  4. The appellant, via an amended plaint dated 2nd July 2020, sought a permanent injunction from the trial court, inter alia, restraining the Respondents from trespassing and interfering with the peaceful enjoyment of plot No. 480 PDP No. 117, a declaration affirming that the suit property belongs to the Plaintiff, and eviction orders directed against the 2nd Respondent. The Respondents defended the suit, and the case proceeded to a hearing. The trial court rendered a judgment on the 25th of May 2022, dismissing the suit with costs awarded to the Respondents.
  5. Aggrieved by the trial court's decision, the Appellant lodged this appeal. The Appellant contended that he has been the landowner of plot No. 480 PDP No 117, has maintained continuous occupation since 1972, having been granted the same by the 1st Respondent. The Appellant testified that he had fully satisfied the payment for the property and was issued a clearance certificate and beacon certificate by the 1st Respondent in 2005. He further testified that the 2nd Respondent unlawfully invaded and trespassed onto the suit property, denying the Appellant access.
  6. The 1st Respondent, in addressing the dispute between the Appellant and the 2nd Respondent, resolved to subdivide the suit property without the authority or consent of the Appellant, subsequently awarding a portion to the 2nd Respondent. In his defense, the 1st Respondent asserted



that the Appellant's father owns plot No. 480, thus contending that the Appellant cannot institute this suit. Furthermore, the 1st Respondent determined, through a dispute committee, that the suit property be subdivided between the Appellant and the 2nd Respondent.

7. The Appellant asserted that in establishing ownership of unregistered land, the court is required to verify that the historical documentation of the contested land is sufficiently clear and comprehensive, thereby facilitating the issuance of a title in favor of the party identified in the aforementioned documents. This principle was articulated in the case of *Patience Abaid Tsuma v Asha Said Tuaha* [2022] eKLR, where the court held:

“When dealing with unregistered land, the court must be certain that the documentation that will lead to the issuance of title and the history of the suit land must be clear.”

8. Further reliance is placed in the case of *Wangui & 2 others v Wangui & another* (Environment and Land Appeal 3 of 2021) [2022] KEELC 3755 (KLR) where the court stated that:

“The law on unregistered land unlike on registered land is slightly unclear. Proof of ownership is found in documentary evidence which lead to the root of title. There must be shown on unbroken chain of documents showing the true owner. 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.”

9. The Appellant asserted that documents like a clearance certificate, beacon certificate, and payment receipts for the property prove he is the valid owner. He said he corroborated these documents with unchallenged testimony, stating he has owned the property and made necessary payments, leading to the issuance of these documents.
10. The Appellant claims the provided documentation shows that any title issued would be in his name, and this court finds he has sufficiently proved ownership.
11. The Appellant noted that the dispute involves plot No. 480, subdivided into two, with a portion unjustly awarded to the 2nd Respondent due to his occupation of the property. Occupation does not grant proprietary rights.
12. Since the property belonged to the Appellant, the 2nd Respondent should have applied for adverse possession rather than having the 1st Respondent decide on the issue.
13. The Appellant presented the latest PDP map approved by the Ministry of Lands and the Kilifi County Planning Department, which prepares land use plans and maintains land information. The PDP includes the surveyor's name, preparation date, departmental reference, and approved development plan number, showcasing authenticity. Lack of numbering does not negate the government's intent to identify the disputed property.
14. The Appellant claims the trial court, by neglecting the latest PDP map No. 117, prejudiced the Plaintiff's case, prompting this appeal. The differing plot numbers suggests double allocation. All parties acknowledge the subdivision of the property between the Appellant and the 2nd Respondent, indicating that the inconsistency in plot numbers is central to the issue, as the property is currently trespassed by the 2nd Respondent.
15. Appellant submitted that where there is double allocation over the same property, the first to be allocated must be awarded the property. In *Denis Gitonga & another v Manyara Delamare Kiranji*



[2020] eKLR, the court cited the case of *Gitwany Investment Ltd v Tajmal Ltd & 3 others*, Nairobi HCC No.1114 of 2002, where it was held that:

“...like equity keeps teaching us, first in time prevails so that in the event such as this one, unlike by mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel of land, then if both are apparently and on the face of them issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail. It must prevail because without cancellation of the original title, it retains its sanctity”.

16. Based on the evidence and testimonies during the trial, the Appellant stated that he was issued clearance and beacon certificates for plot no. 480 in 2005, while the 2<sup>nd</sup> Respondent was allocated his property number 332 in 2012 after the 1<sup>st</sup> Respondent resolved to subdivide the Appellant’s property.
17. The appellant herein states he was the first to be awarded plot 480. It would be fair and just if the 2<sup>nd</sup> Respondent’s allocation was cancelled and the Appellant declared the rightful owner.
18. The Respondents argued that the court rightly found the 1<sup>st</sup> Respondent, the custodian of official documents, had produced the clear PDP of the area, which allowed accurate identification of the two disputed plots, Plot No. 480 and Plot No. 332, located separately. The PDP from the Plaintiff was vague and lacked specification of its origin, and as a non-expert, he could not produce it. If the Plaintiff claims the documents were sanctioned by the Ministry of Lands and the Department of Physical Planning in Kilifi, those officials should have been summoned to court.
19. 2<sup>nd</sup> Respondent averred that on page 63 of the Record of Appeal, the First Respondent provided clear testimony stating the Plaintiff was not the owner of Plot No. 480 and admitted not being the original allottee. The Plaintiff did not establish where his late father was allocated land, and without Letters of Administration, he lacked locus standi to claim any land. The Plaintiff acknowledged the 1<sup>st</sup> Respondent’s mandate, and the witness confirmed the existence of a Dispute Resolution Committee. The Plaintiff participated in committee meetings and only initiated this case after being dissatisfied with the findings.
20. 2<sup>nd</sup> Respondent urges that the Plaintiff failed to prove his case and cannot fault the Committee’s decision, in which he actively participated. Additionally, any aggrieved individual had the right to appeal, which the Plaintiff did appropriately. There is no evidence that the suit property belongs to the Plaintiff, who was uncertain about the plot. His claim relied on ownership by his late father but lacked evidence. He also did not prove he was the Administrator of his father’s estate, thus lacking locus standi in the lower court proceedings. 2<sup>nd</sup> Respondent concludes the Magistrate did not err; he made a proper determination based on available evidence and testimonies.
21. After evaluating the evidence presented in the record and the documentary evidence submitted before the trial court, I concur that the court was addressing unregistered land. The principles applicable to ascertain ownership are established by the Appellant’s judicial authorities cited, which indicate that proof of ownership is substantiated through documentary evidence that leads to the root of the title. Furthermore, an unbroken chain of documents that delineate the true owner must be established.
22. In establishing this chain, the trial court ascertained that:

“In relation to the issue of the plot, the 1<sup>st</sup> Defendant, who is the custodian of the official records, produced a PDP of the area.

The one produced by the Plaintiff is not numbered, and it is not clear where he got it from.



From the PDP by the 1<sup>st</sup> Defendant (D Exhibit 5), Plots No. 480 and 332 are different and distinct situations.

They were also clear the plot in dispute is number 332 that according to their records and not 480 as claimed by the Plaintiff.

That being so, I hold the plot in dispute is 332 and is occupied by both the Plaintiff and the 2<sup>nd</sup> Defendant since 1970. It was originally Plot No. 157.

The committee of the 1<sup>st</sup> Defendant heard the parties and ordered the plot to be subdivided into equal shares between the Plaintiff and the 2<sup>nd</sup> Defendant.

I also note the plot did not belong to the Plaintiff but his late father and the Plaintiff is not the administrator of the estate.

For all the above reasons, the Plaintiff's suit is dismissed with costs to the Defendants.

Since the 2<sup>nd</sup> Defendant did not counter-claim in respect of plot No. 332, I make no positive order as to ownership of the suit property.”

23. I appreciate the trial court's findings. It's important to note that the first Respondent was responsible for the ownership documents and was aware of who owned each plot. I'd like to highlight that a dispute resolution mechanism was implemented, and all parties participated, resulting in a resolution that the Appellant did not own the plot he claimed; it was owned by his late father, and he had no letters of administration to sustain the suit before the trial court. Besides, the plot was decided to be subdivided among the parties.

24. Ultimately, the current appeal lacks merit and is therefore dismissed, with costs awarded to the Respondents.

**DATED, SIGNED, AND DELIVERED VIRTUALLY IN MALINDI ON THIS 14<sup>TH</sup> DAY OF MAY 2025.**

**E. K. MAKORI**

**JUDGE**

In the Presence of:

Mr. Mwarumba for the Appellant

Ms. Muronji for the 1st Respondent

Mr. Odhiambho for the 2nd Respondent

Happy: Court Assistant

