



REPUBLIC OF KENYA



**Wanyonyi v Nandwa (Environment and Land Appeal E044 of 2024)  
[2025] KEELC 6299 (KLR) (18 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 6299 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT AND LAND APPEAL E044 OF 2024  
EC CHERONO, J  
SEPTEMBER 18, 2025**

**BETWEEN**

**RENSON MAKHETI WANYONYI ..... APPELLANT**

**AND**

**ZIPPORAH NANDWA ..... RESPONDENT**

**JUDGMENT**

**Introduction.**

1. Vide a memorandum of appeal dated 11/09/2024, the Appellant herein who was the Plaintiff before Hon. T.M. Olando (Principal Magistrate) in Bungoma MC ELC Case no. 42 of 2019 appeals to this court challenging the judgment by the trial court delivered on 15/08/2024.
2. The brief background of the case is that the Appellant commenced this suit vide a plaint dated 09/08/2012 where he averred that he was the owner of LR NO. E.Bukusu/N.Sang'alo/2960 (herein after referred to as the "suit property") measuring approximately 0.05ha. That the Respondent herein, without any colour of right, entered the suit property and constructed thereon permanent and temporary structures. That all efforts to have her vacate the suit property have been futile. He sought for the following orders;
  - a. A declaration that the Defendant is a trespasser on the suit property and she should be forcefully evicted.
  - b. Mesne profits.
  - c. Costs of this suit together with interest thereon at such waste and such period of time or this honourable court may deem fit to grant.
  - d. Any such other or further relief this honourable court may deem fit to grant.



3. The Respondent filed a statement of defence dated 25/02/2013 where she denied the averments in the plaint and further averred that she occupies LR No. E.Bukusu/N.Sang'alo/4956 measuring 0.05 ha and not LR NO. E.Bukusu/N.Sang'alo/2960(the suit land).
4. The suit before the trial court was agreed to proceed by way of viva voce evidence with the Appellant calling one witness and the Respondent calling two witnesses in total.
5. PW1 Renson Maketi Wanyonyi adopted his witness statement dated 16/07/2018 as his evidence in chief. He also referred to his list of documents containing five (5) items dated 09/08/2012 which he produced into evidence as P-Exhibit 1 to 5. In cross examination, he testified that he bought the land from one Frank Ruto in the year 1997 and that he visited the suit property before the said purchase and purchased it procedurally.
6. DW1 Zipporah Chenoi Nandwa testified that she purchased LR No. E.Bukusu/N.Sang'alo/4956 in the year 2006 for a consideration of Kshs 90,000/=from one Cleophas Mwita after conducting due diligence. She adopted her witness statement dated 10/07/2018 as her evidence in chief and produced into evidence her list of documents dated 25/02/2013 as her documentary evidence. In cross-examination she testified that her claimed land was subdivided from plot no. 4116.
7. DW2 Gilbert Mukerembe testified that he is a village elder in Nandolia area and was an administrator of the estate of Cleophas Mwiti. He adopted his witness statement dated 13/07/2018 as his evidence in chief. It was his testimony that he did not know the Appellant. This witness was later recalled to produce a copy of judgment in case no.733 of 1994 as DExhibit 1
8. There after the court called for the evidence of the Land Surveyor Bungoma County (Brian Wafula Kubwa) as a friend of the court. He testified that he visited the land in 2018 for purposes of identifying the two parcels of land. He testified that the parcel claimed by the Appellant was sub-divided vide a map sheet no.19 while that for the Respondent was done through a map sheet no.27. That the maps were amended and map sheet no.27 was confirmed to be in map sheet no.19 and further that the said properties were in the same location. In cross-examination he testified that LR No. E.Bukusu/N.Sang'alo/2690 came before LR No. E.Bukusu/N.Sang'alo/4956. It was his evidence that the two parcels originated from the same person i.e Cleophas Lwiki Walumbe. He produced a letter dated 08/01/2024 for the court's consideration. When cross-examined by the court the land surveyor testified that LR No. E.Bukusu/N.Sang'alo/2690 does not exist on the map and that its title was issued without an amendment to the map.
9. Upon considering the issues before it the trial court found that the Appellant had not proved his case on a balance of probabilities and dismissed the same with no orders as to costs.

### **The Appeal.**

10. Aggrieved by the trial court's judgment the Appellant preferred the current appeal on the following grounds;
  - a. The learned trial magistrate erred in both law and fact in failing to note that the appellant's title deed superseded the defendants title deed.
  - b. The learned trial magistrate erred in both law and fact in dismissing the appellants suit.
  - c. The learned trial magistrate erred in both law and fact in failing to consider the evidence adduced by the plaintiff.



- d. The learned trial magistrate erred in both law and fact in dwelling on extraneous matters in coming up with his decision.
  - e. The learned trial magistrate erred in both law and fact by exhibiting bias against the appellant.
  - f. The learned trial magistrate erred in both law and fact in relying on a map as proof of ownership of land.
11. The Appellant sought to have the appeal allowed, the trial court's judgment set aside and the costs of the appeal provided for.

### **Submissions on the appeal.**

12. When this appeal came up for directions, the parties agreed to have the same canvassed by way of written submissions.
13. The Appellant filed submissions dated 07/07/2025 where he submitted that it is a fact of procedure that a title deed can only be issued to a proprietor once the cadastral map has been duly amended to capture and reflect the parcel number. That, in this case as per the County Surveyor's testimony, a valid title was issued without amending the Cadastral Map. The Appellant questioned why the lands office amended the Respondent's land from Map Sheet 27 to Map Sheet 19 and conveniently placed the Respondent's parcel number on the same spot as the appellant's land. Reliance was placed in the provisions of Section 26(1), 24 and 25 of the [Land Registration Act](#) and the case of *Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others* [2016]
14. The Respondents filed submissions dated 29/05/2025 and 17/07/2025 where it submitted that the trial court properly analysed the evidence before it and reached an informed decision having been well guided by the principles on the burden of proof. It was further submitted that whereas the appellant holds a title deed for E.bukusu/n.sang'alo/2960, the same was never created on the relevant map sheet No.19. The said title cannot therefore be said to be valid since its creation did not meet the threshold of a valid title and that the provisions of Sections 24, 25 and 26(1) of the [Land Registration Act](#) only apply to land that has been regularly and procedurally created.

### **Analysis and Determination.**

15. Being a first appeal, this court shall rely on a number of principles as set out in *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123:

“...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. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ...”

16. The Appellant case is that he is the registered proprietor of LR No. E. Bukusu/N. Sang'alo/2960 (“parcel 2960”), having been issued with a title deed on 01/03/1999 as shown in P-Exhibit 1. He contends that parcel 2960 was lawfully subdivided from LR No. E. Bukusu/N. Sang'alo 2071 to create parcels 2960 and 2959 as per P-Exhibit 3. This subdivision is reflected in the Registry Index Map (RIM) Sheet No. 19. The said mutation was done by one Gilbert Atwoko Bwakali.



17. The Respondent on the other hand claims ownership of LR No. E. Bukusu/N. Sang'alo/4956 ("parcel 4956") measuring 0.05 hectares as shown in D-Exhibit 1, a subdivision of LR No. E. Bukusu/N. Sang'alo 4116 which was subdivided to create land parcels NO. 4957, 4956, 4952, 4953, 4954 and 4955. A mutation was allegedly done on 02/02/2010 by one Gilbert Bukelembe produced as D-Exhibit 3 and a title deed was issued to the Respondent on 16/07/2010. However, parcel 4956 appears on the Registry Index Map Sheet No. 27.
18. The Respondent stated that she purchased the land from Cleophas Lwiki. The Respondent produced the record of Civil Case No. 733 of 1994 as D-Exhibit 4 where she averred that the sale of land by Cleophas Lwiki to Gabriel Atwoko Bwakali was rescinded with an order for the refund of the consideration advanced and therefore the Appellant could not have obtained proper title. DW3 in his evidence admitted that his father Cleophas Lwiki was at some point placed on civil jail over the abovementioned proceedings.
19. Having carefully considered the available evidence as contained in the Record of Appeal, the rival written submissions, cited authorities and the relevant provisions of law, this court finds one single issue for determination to wit; Whether the trial court properly directed itself on the evidence in arriving at its determination.
20. I do agree with the Appellants submissions that Section 24 (a) of *Land Registration Act* 2012 provides for the right of a registered owner. However, Section 26 provides as follows:-
  26. Certificate of title to be held as conclusive evidence of proprietorship
    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.
    2. A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.
21. This court is confronted with a scenario where two titles exist over the same parcel of land, referring to the same soil, same coordinates, and same boundaries. The central issue therefore is the authenticity of the rival titles and which one, if at all, should be upheld as the lawful and valid title.
22. The County Surveyor's report confirms that parcels 2960 and 4956 overlap on the same coordinates. Parcel 2960 appears on RIM 19, which corresponds to the actual location on the ground. Parcel 4956, however, initially appeared on RIM 27 but was subsequently superimposed onto RIM 19 through an amendment that was not properly explained. The surveyor admitted that parcel 2960 still exists physically, while parcel 4956 exists only on paper. I therefore find that both titles refer to the same ground. The evidence shows that parcel 2960 was created through subdivision of parcel 2071, mutation was approved on 15/10/1996, and a title deed issued on 01/03/1999 to the Appellant. The process followed the law in force at the time, and the parcel is duly reflected on RIM 19.



23. On the other hand, parcel 4956 is alleged to have been created from parcel 4006. The mutation was done on 02/02/2010, long after the title deed had already been issued to the Respondent on 16/07/2010. This anomaly raises serious questions of procedure for instance a title cannot precede its supporting mutation and survey process. Further, the shifting of parcel 4956 from RIM 27 to RIM 19 without explanation amounts to an illegality and renders the Respondent's title unprocedurally acquired. Applying the doctrine of equity that the first in time prevails, I find that the Appellant's title to parcel 2960, having been created and registered in 1999, is first in time and procedurally anchored in RIM 19. The Respondent's title, having been unprocedurally introduced into RIM 19 and existing only on paper without physical grounding, cannot stand.
24. I am persuaded by Justice Sila Munyao's holding in the case of *Hubert L. Martin & 2 others v Margaret J. Kamar & 5 others*[2016] eKLR, as follows;
- ‘A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.’
25. This position was emphasized in the case of *Wreck Motors Enterprises vs. The Commissioner of Lands and others* Civil Appeal Civil Appeal No. 71 of 1997, where the court held as follows;
- ‘Where there are two competing titles the one registered earlier is the one that takes priority’
26. The same position was held in the case of *Gitwany Investment ltd vs. Tajmal Ltd & 3 others* (2006) eKLR where the court held as follows:-
- ‘...the first in time prevails, so that in the event such as this one whereby a mistake that is admitted, the Commissioner of Lands issues two title 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’
27. It is my finding therefore that the Appellant's title was the first in time and as equity espouses in its maxim that; “when two equities are equal, the first in time prevails”, then the Appellants title deed was the first in time and should prevail. Article 40 (6) of the of *the Constitution* provides: -
40. Protection of right to property
- (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.
28. The Respondent argued that she is in possession. However, possession cannot cure an illegality in title acquisition. In *Funzi Development Ltd -vs- County Council of Kwale* [2014] eKLR, the court observed that a registered regular.
- if, and only if, the allocation was legal, proper and proprietor acquires an absolute and indefeasible title



29. Further, the Respondent relied on the record of Civil Case No. 733 of 1994 (D-Exhibit 4), where it was averred that the sale transaction between Cleophas Lwika and Gabriel Atwoko Bwakali was rescinded with an order for refund of the consideration advanced, and argued that the Appellant could not have obtained a proper title from the subsequent chain of transactions. DW3 admitted that his father, Cleophas Lwika, was at some point committed to civil jail in connection with those proceedings. However, there is no evidence that the refund ordered was ever effected, or how execution of the decree was implemented. Simply put, the judgment and execution documents from that case do not present a complete picture of the events that followed.
30. In my considered view, there is no sufficient proof of any irregularity in the ownership by Gabriel Atwoko Bwakali, who is said to have subsequently obtained title to Plot No. 2071 which was later subdivided into Plots No. 2959 and 2960 parcels which, as confirmed by the Surveyor's testimony, are still in existence and duly reflected on the Registry Index Map 19. In the absence of cogent evidence filling this gap, the Respondent having alleged this set of facts under Section 107(1) of the *Evidence Act* was obligated to prove them conclusively. In my considered view therefore, the assertion that Appellant's root of title is fatally defective cannot be sustained.
31. In the end, I find that the appeal is merited and proceed to allow the same and issue the following consequential orders;
- a. It is hereby declared that the Respondent is a trespasser on LR No. E.Bukusu/n.sang'alo/2960.
  - b. The Respondent shall vacate and hand over possession of the disputed parcel within 90 days, failure to which eviction shall issue.
  - c. Costs of this appeal are awarded to the Appellant.
32. It is so ordered.

**DATED AND SIGNED AND DELIVERED AT BUNGOMA THIS 18<sup>TH</sup> DAY OF SEPTEMBER, 2025.**

.....  
**HON.E.C CHERONO**  
**ELC JUDGE**

In the presence of

M/S Nekesa H/B for Mr. Wasilwa for the Respondent.

Mr. Masiga H/B for Mr. Wekesa for the Appellant.

Bett C/A.

