

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT VIHIGA

ELCLA CASE NO. E021 OF 2024

ZAKAYO KWENDO AGOI.....APPELLANT

VERSUS

BENJAMIN AGUTU JOEL.....RESPONDENT

(An appeal from the judgement of the Honourable Magistrate J. A Agonda delivered on 8th October 2024 in VIHIGA PMC ELC NO. E024 OF 2023 ZAKAYO KWENDO AGOI VS BENJAMIN AGUTU JOEL)

JUDGEMENT

Introduction

Vide the Memorandum of Appeal dated 5th November 2024, ZAKAYO KWENDO AGOI, the appellant herein appealed against the whole of the judgment dated 8th October 2024 in Vihiga PMCELC No. E024 OF 2023 and sought for orders that: -

- a) The judgement be set aside.
- b) An order of permanent injunction be issued restraining the respondent, his servants and/or agents from interfering, trespassing and/or encroaching on the appellant's L.R NO. WEST BUNYORE/ITUMBU/564
- c) An order of eviction be issued against the respondent from L.R No. WEST BUNYORE/ITUMBU/564
- d) The officer Commanding Luanda police station to offer security during the eviction and compliance with the court order.

A brief background of the appeal as can be gathered from the record of appeal dated 8th May 2024 and filed on 13th May 2025 is that vide a plaint dated 5th May 2023, the appellant sued the respondent in Vihiga PMC MELC No. E024 of 2023(the suit). The subject matter of the suit was a parcel of land known as WEST BUNYORE/ITUMBU/564 (the suit land) which the appellant claimed to be the absolute registered owner of. The appellant's claim in the suit was that the Respondent had wrongfully occupied a portion of the suit land and therefore sought for orders of eviction, permanent injunction against the respondent and an order that the OCS Luanda police station provides security during the eviction and compliance of the orders.

The record shows further that the suit was defended vide the Statement of Defence dated 20th July 2023, vide which the respondent denied the appellant's claim and urged the court to dismiss the suit with costs.

The proceedings show that the suit was heard before the trial court and that the trial court vide its judgement date d8th October 2024 found that the appellant had not proved his case on a balance of probabilities and that the appellant was not entitled to the relief sought in the plaint. The court then entered judgment in favour of the Respondent and proceeded to make the following orders; -

- a) The appellant's suit dismissed with costs to the Respondent
- b) A declaration that the respondent was the lawful proprietor of the parcel of land known as W. BUNYORE/ITUMBU/567.
- c) An order for the Land Registrar to reconstruct and restore the original register for L.R No. W. BUNYORE/ITUMBU/567, the Respondent as the 2nd Registered owner after the Government of Kenya as per the Original greed card held by the respondent

d) Costs of the suit awarded to the Respondent.

The Appeal

Aggrieved by the judgment, the appellant preferred the present appeal. The grounds of appeal as contained in the Memorandum of Appeal are that

- a) The learned trial Magistrate erred in law and in fact by making an order to cancel the title deed for L.R No. WEST BUNYORE/ITUMBU/564 belonging to the appellant herein instead of ordering the cancellation of the title belonging to the Respondent L.R No. WEST BUNYORE/ITUMBU/567.
- b) The learned Magistrate erred in law and in fact by finding that the appellant did not have a good and/or a valid title as he had failed to conduct due diligence at the time of purchasing the suit property in the year 2000 a fact which was false as the Respondent had not sold the appellant any land.
- c) The learned Magistrate erred in law and in fact by finding that the acquired title for L.R No. WEST BUNYORE/ITUMBU/564 was fraudulently acquired by the appellant a fact which had not been challenged and/or proved by the respondent.
- d) The learned Magistrate erred in law and in fact by cancelling the appellant's title L.R. NO. WEST BUNYORE/ITUMBU/564 that no person had approached the honorable court to claim ownership instead of cancelling the respondent's title L.R. NO. WEST/BUNYORE/ITUMBU/567 which ownership has since been an issue between him and his cousin Joel Mukhwana Musengeli who had, using tricks sub-divided it into L.R No. west BUNYORE/ITUMBU/1594 and 1595.

- e) The learned Magistrate erred in law and in fact by finding that the Respondent herein is the proprietor of the whole of land L.R No. WEST BUNYORE/ITUMBU/567 instead of analyzing the fact in issue which is the Respondent trespassing and/or encroaching L.R NO. WEST BUNYORE/ITUMBU/564 belonging to the appellant.
- f) The learned Magistrate misdirected himself in law and in fact by failing to find that the Respondent had trespassed and/or encroached onto a portion of L.R No. WEST BUNYORE/ITUMBU/564 registered in the name of the appellant as per the survey report annexed.
- g) The learned Magistrate erred in law and in fact by failing to appreciate the evidence adduced before her by the appellant.
- h) The trial Magistrate erred in law and in fact in not relying on the evidence produced by the appellant.
- i) The learned Magistrate misdirected herself on the assessment of evidence adduced before her by the appellant.

Submissions

Pursuant to directions given on 11/6/2025, the appeal was heard by way of written submissions.

On behalf of the appellant, written submissions dated 3rd July 2025 were filed by the firm of Ben Oduol Nyanga and Company Advocates. Counsel submitted that the trial court erred by mixing up issues in the judgement. That the trial court made an order cancelling the title deed issued to the plaintiff for land parcel known as WEST BUNYORE/ITUMBU/564 wherein the said title was never questioned and/or challenged. That further instead of the trial Magistrate awarding the plaintiff who is the appellant herein eviction orders as sought in the plaint dated 4th May

2025, the Magistrate went ahead and granted orders that were never prayed for as per page 7 of the judgement dated 8th October 2024. That the Defendant who is the Respondent herein never filed a counterclaim seeking for the orders which were granted.

Counsel further submitted that the trial Magistrate in discussing, analyzing and submitting on the validity of land parcel number WEST BUNYORE/ITUMBU/567 proceeded to erroneously cancel the title for land parcel No, WEST BUNYORE/ITUMBU/564 and not WEST BUNYORE/ITUMBU/567.

Counsel relied on the provisions of sections 24 and 26 of the Land Registration Act and submitted that the appellant was the absolute registered owner of the L.R No. W. BUNYORE/ITUMBU/564 and that this was never disputed by the Respondent and that the title deed which was produced as exhibit in proof thereof was not challenged in the hearing or by way of counterclaim.

Counsel submitted further that as the Respondent was in illegal occupation of the portion of land parcel WEST BUNYORE/ITUMBU/564 the trial court erred in failing to grant the injunctive and eviction orders sought.

Counsel relied on the provisions of article 40 of the constitution on the right to own property and the case of *Kweyu vs Omutu (1990- 1994) EA 284* for this submission. Relying on the provisions of section 27 of the Civil Procedure Act and the cases of *Cecilia Karuru Ngayu -vs Barclays Bank of Kenya & Another (2016) eKLR* Counsel urged the court to allow the appeal with costs to the appellant.

No submissions were filed on behalf of the Respondent on 8/7/2025 the court extended the time for exchange written submissions by 14 days.

Determination

This is a first appeal hence the court has obligation to re-examine and reanalyze the evidence placed before the trial court.

Although the appellant presented a total of 9 grounds of appeal, through his submissions, he compressed them into 3 issues for determination herein.

The evidence that was placed before the trial court by the appellant comprised of the testimony of the appellant and the exhibits he produced. The appellant who testified as PW1 adopted the contents of his statement dated 5/5/2023 as his evidence in chief. He had stated in the said statement that he was the absolute registered owner of the parcel of land known as WEST BUNYORE/ITUMBU/564 which he bought from one JOHN OSOME MAKHAJI in the year 2000 and immediately took possession of. That sometime in November 2021 his neighbor by the name of Joel Mukwhana Musengeli owner of land parcel No. WEST BUNYORE/ITUMBU/567 occasioned a survey on his land parcel to confirm whether the defendant herein had encroached onto his land.

That vide the survey he (the appellant) realized that the defendant (respondent herein) occupied 1.20 Ha. of his land parcel No. WEST BUNYORE/ITUMBU/564. That he immediately directed the defendant (Respondent) to vacate the land parcel No. WEST BUNYORE/ITUMBU/564 but the defendant (respondent) refused to do so hence he (Appellant) filed the suit seeking for eviction orders against the Defendant (respondent herein)

The appellant produced title deed, certificate of official search, land sale agreement and acknowledgement as exhibits.

The Respondent's evidence comprised of the testimonies of the Respondent and DW2. The Respondent adopted the contents of his witness statement dated 8/9/2023 as his evidence in chief. He had stated in the witness statement that he had been a proprietor of land parcel known as WEST BUNYORE/ITUMBU/567 which was allocated to him through a gift intervivos in 1978 and duly registered in his name. That the appellant and one Joel Musengeli had colluded and tried to dispossess him of the said property through unlawful means. That the appellant's assertion that the respondent had encroached on the appellant's land No. WEST BUNYORE/ITUMBU/564 are all fabricated because the parcel that he as the respondent occupies is WEST BUNYORE/ITUMBU/567 adjacent to the appellant's. That Joel Masengeli absconded a meeting of the Land Registrar who visited the scene to adjudicate on the issue of beacons and boundaries of the second adjacent parcels of land.

That the matter is still pending determination before the Land Registrar as far as ownership and boundaries of the two parcels is concerned. He produced the documents listed in his list of documents dated 8/9/2023 as exhibits namely, copy of chief's letter dated 29th September 2020, Copy of Green card, copy of certificate of official search and letter from County Land Registrar.

DW2 was one Samuel Eyauma Omotikhwi. He adopted the contents of his witness statement dated 8/9/2023 as his evidence in chief. He stated that Zakayo Kwendo Agoi bought Amakhayu's land parcel No. WEST BUNYORE /ITUMBU/564 from one Jonah Osome (deceased) who was Amakhayu Ilindie's son. That Benjamin Agutu Joel was born and has grown up on plot No, WEST BUNYORE/ITUMBU/567 together with his grandfather and brothers who all lived on land parcel No. WEST BUNYORE/ITUMBU/567. That in his lifetime Jonah

Osome and Benjamin Agutu , Joel lived in harmony and even planted beacons to mark the boundaries which boundaries had been in place in their parents' lifetime.

After hearing the foregoing evidence, the court record shows that the court found that the plaintiff was not the legitimate owner of the suit property, that the defendant was the bona fide and absolute proprietor of the suit property, that the plaintiff did not do due diligence at the time of purchasing the suit land, that it was out of fraud that the plaintiff managed to get the land transferred to his name and issued with title deed while in fact the land belonged to the Defendant.

Grounds 1 to 4 of the appeal challenge the trial court's finding that the title acquired by the plaintiff (Appellant) in respect of land parcel number 564 was fraudulently acquired and the order for rectification/cancellation of the title to the suit land so as to have it reverted to reflect that Defendant/Respondent as registered owner thereof.

The claim in the plaint was based on the tort of trespass wherein the appellant claimed that the respondent was occupying a portion of the suit land parcel No. 564. In his evidence, the appellant gave the size of the portion of the suit land allegedly occupied by the respondent as 1.20 Ha.

This claim was denied by the respondent who required the appellant to prove ownership of the suit land and the allegation that the respondent was occupying a portion of the sit land. The respondent averred that the land he occupied was an adjacent land parcel number 567.

In his evidence, the respondent maintained that the parcel of land he occupied was 567 which was adjacent to the appellant's land he occupied to the appellant's parcel.

DW2 stated that he knew bought plot Nos W. BUNYORE/ITUMBU/564 & 567 which No. 567 belonged to Joel Away Musengeli a grandfather to the defendant and No. 564 to Amakhangu Ilinde. That No. 564 was later bought by the plaintiff from Jonah Osome Amakhayu a son of Amakhayu Ilinde and that there were boundaries and beacons placed on the land.

The evidence placed before the trial court showed the existence of the 2 parcels of land as separate and distinct lands lying adjacent to each other.

The burden of proof that the appellant had was to prove that land parcel No. 564 which belonged to him had been encroached onto by the Respondent.

On ownership, the plaintiff (Appellant) produced a title deed and certificate of official search. Both showed that the land parcel No. WEST BUNYORE/ITUMBU/564 belonged to the appellant while the title deed showed the size of the land in acres, the certificate of Official search showed the same in Hectares. Conversion of the 3 acres shown in the title deed to Hectares is 1.21 Ha. Shown in the certificate of official search. The certificate of official search was bought on 17th February 2023 just before the suit was filed on 10th May 2023.

This evidence proves that the suit land belonged to the appellant. The root of the appellant's title to the suit land was never questioned by the respondent.

Regarding trespass or encroachment, I find no evidence placed before the trial court in proof of the same. The surveyor's report marked as MFI P5 was never produced as exhibit. Although an order was made for the surveyor to visit the site, prepare and file a report, the same was never done. The appellant did not discharge the burden of prove. To prove, trespass one needs a surveyor report. The appellant alleged that the extent of the trespass was 1.20 Ha. This is about the entire of the

suit land parcel number 564, yet the appellant alleged that he took possession of the suit land upon purchase of the same and that he resides thereon to date.

I find that the trial court erred in making findings on ownership of the suit land, a fact that was not in issue and in proceeding to direct for rectification / cancellation of the title to the suit land when there was no prayer or counterclaim for the same.

I further find that the trial court did not err when it found that the appellant had not proved his claim on a balance of probabilities.

For the foregoing reasons, the appeal succeeds.

The judgement of the trial court is hereby set aside and replaced with a judgement dismissing the suit with costs to the defendant.

For avoidance of doubt, the orders of the trial court directing the Land Registrar Vihiga to proceed to rectify the land register in respect of the suit land and revert the same to reflect that the defendant is the proprietor thereof, the order for cancellation of the title issued to the appellant, the order making entry of judgment in favour of the defendant being order numbers 2, 3 and 4 of the judgment are hereby set aside.

Costs of the appeal are awarded to the appellant.

Orders accordingly.

Judgement dated and signed at Vihiga and delivered this 16th day of October, 2025 virtually through Microsoft Teams Online Application.

E. ASATI,

JUDGE.

In the presence of:

James: Court Assistant.

Willie for the Appellant

Nanungi for the Respondents.