



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ELC LAND APPEAL NO. E021 OF 2024

FELISTER MDUKU MULE1ST
APPELLANT HOMEWARD AGENCIES LIMITED
.....2ND APPELLANT

VERSUS

ANGELINE AGWENY
RESPONDENT

JUDGMENT

[Appeal from the judgment of Hon. B. A. Ojoo CM,
delivered on 2/05/2024 in Mavoko CM's Court ELC Case No.
E038 of 2021 Felister Nduku Mule versus Angelina
Angweny and Homeward Agencies Limited as the 2nd
defendant to the counterclaim or interested party]

Background of the appeal

1. In the lower court, the 1st appellant instituted the primary suit in a plaint dated 27/05/2021 and revised by an amended plaint

dated 15/06/2021. It was her case that sometime in June 2018, she was desirous of buying land to build her home, and she approached a land-buying company, namely, the 2nd appellant. She was shown a subdivision map of the area where the property she was interested in was located, and she settled on **plot No. 270**.

2. She averred that after satisfying herself of the authenticity of the land, she entered into an agreement for sale with the 2nd appellant on 10/06/2018, whereby she purchased the portion of land measuring 1/8 acre, which was then **plot no. 270**.
3. She averred that at the time, the same was comprised in **Mavoko Town Block 3/7355** and registered in the 2nd appellant's name. She stated she then took possession and fenced the land. Subsequently, her title document was processed for this **plot no. 270** and was issued with a title deed no. **Mavoko Town Block 3/13025 (suit property)**. However, sometimes on 20/04/2021, she discovered that the respondent had entered into the suit property and commenced construction thereon, prompting her to institute suit. According to her, this act was tantamount to trespass, and she sought the following reliefs from the trial court: -

a) A permanent order of injunction restraining the respondent by herself, her servants, agents, workmen, licensees or any other person acting on her behalf from howsoever entering,

trespassing, constructing, erecting any structures, remaining thereon, disposing, alienating, dealing or otherwise howsoever from interfering with the 1st appellant's quiet enjoyment, possession and occupation of the parcel of land known as land reference number Mavoko Town Block 3/13095 situated within Mavoko Sub-county in Machakos County.

b) An order of vacant possession and/or eviction of the respondent.

c) General damages for trespass.

d) Costs of this suit.

e) Any other or further relief that the honourable court may deem fit to grant.

4. In opposition, the respondent filed a statement of defence and counter-claim dated 15/07/2021, which was later amended on 19/07/2022, whereby she joined the 2nd appellant to the proceedings as a defendant/interested party to the counterclaim. She gave a history of how she came into possession of the suit property. She claimed the initial parcel of land, which was 40 acres, was acquired in 1996 by Waswa Investment Co. Ltd. ("**Waswa**"), a welfare group of Nairobi City Council employees under the Water and Sewerage Department, then, on behalf of its over 2000 members, in phases.

5. She averred that it was through her membership with Waswa and the contributions/payments she made on a check-off basis that she was allotted **Waswa Estate Lukenya Ranch plot no. 516/177** in Machakos District (“**177**”) in 1996. To her, the suit property and her plot were the same parcels of land.
6. She asserted that after allotment, she took possession and has had the same to date. She denied all the averments of the 1st appellant and sought dismissal of her suit, and for judgment to be entered in her favour with costs as per the counterclaim. In the counterclaim, she maintained that her possession of the suit property created a constructive trust over it with an overriding equitable interest. She informed the court that she was a valid owner. According to her, her proprietary interest in the suit property ranked superior to those held by the appellants, and she termed their title documents as unlawfully and unprocedurally acquired.
7. Moreover, she stated the 2nd appellant’s title documents were illegal, suspect, a mistake, irregular, ought to be impeached, cancelled and new titles issued to her. She stated the 2nd appellant was not an innocent purchaser for value and acquired land without due process. She stated plot 177 crystallised upon allotment and has been in her possession since allotment. To her, the 1st appellant had no legal proprietary interest capable of protection by law. In consequence, she sought the following orders from the court: -

- a) A declaratory order that the respondent is the lawful and legal allottee and lawful owner of all that property known as Mavoko Town Block 3/13095 and or Waswa Estate, Lukenya Ranch plot number 516/177, Machakos District.***
- b) An order for cancellation and rectification of the 1st appellant's title Mavoko Town Block 3/13095, and issuance of a new title in the respondent's name, and the executive officer be at liberty to execute the transfer documents if need be.***
- c) Permanent injunction restraining the appellants and or their agents, servants and or whomsoever from interfering, transferring, alienating, disposing or dealing whatsoever in any manner with the suit property Mavoko Town Block 3/13095 and or Waswa Estate Lukenya Ranch plot number 516/177 Machakos District.***
- d) Costs of the suit.***
8. The 2nd appellant filed a defence dated 22/08/2022 to the respondent's counterclaim. It was its case that it bought land measuring 15.98ha in size, registered as land no. **Mavoko Town Block 3/1976** from one Benjamin Wambua Kavoloto (Benjamin) sometime in 2005. It then subdivided it into two, resulting in **Mavoko Town Block 3/7355** and **Mavoko Town Block 3/7356 ("original parcels")** and whose titles were issued on 21/12/2007.

9. Thereafter, sometime in 2011, it amalgamated the said original parcels, resulting in **Mavoko Town Block 3/12914 (“mother parcel”)**, and this parcel was then subdivided into 204 portions, which were sold to third parties, among them, the 1st appellant, who bought plot no. 270 comprised in the suit property vide the agreement dated 16/06/2008 for a consideration of Kshs. 60,000/-.
10. Afterwards, the matter was heard, parties called their respective witnesses, and they placed reliance on witness statements, oral testimonies and produced documents. In the appellants’ cases, their evidence consisted of the 1st appellant and the 2nd appellant’s managing director, Andrew Mbaluto Musila, whereas the respondent’s evidence was composed of that of herself and Newton Kaguata Mkabue.
11. Upon closure of the cases and filing of submissions, the impugned judgment was rendered, whereby the learned trial magistrate framed four issues for determination. On the 1st issue of whether the appellant had proved her case and asserted the genesis of the suit property, it found the 2nd appellant intermeddled with Benjamin’s estate and thus concluded the 1st appellant’s title was acquired by illegality and fraud, On the 2nd issue of whether the 1st appellant’s title was indefeasible, it found in view of the finding on issue 1, the title could be impeached under **Section 80 (1)** of the **Land Registration Act**.

12. On the 3rd issue of whether the respondent was entitled to the reliefs sought in her counterclaim, it found she had proved her case in the counterclaim. On the last issue as to what reliefs and/or remedies should be granted, she dismissed the 1st appellant's claim and entered judgment for the respondent as follows: -

a) A permanent injunction is hereby issued in favour of the respondent against the appellants and or their servants, agents and or whomsoever claims through them from interfering, transferring, alienating, disposing or dealing in whatsoever manner with all that land parcel no. Mavoko Town Block 3/13095 and or Waswa Estate, Lukenya Ranch plot number 516/177, Machakos District.

b) The Land Registrar, Machakos County, is directed to rectify the register for Mavoko Town Block 3/13095 in which the name of the 1st appellant appears as proprietor and cancel the name and replace it with the name of the respondent on the register as the proprietor of the land.

c) The respondent is awarded the costs of the suit to be borne by the respondent.

Appeal to this court and the hearing

13. Dissatisfied, the appellants, in exercise of their right to appeal, invoked this court's jurisdiction by filing a memorandum of appeal dated 18/04/2024 and filed on 22/05/2024, questioning the judgment on 12 grounds that faulted the learned trial magistrate. Nevertheless, being aware of the shortcomings of the grounds as they were not concise and repetitive, in submissions dated 10/05/2025, filed by their law firm on record, **M/s King'oo & Associates** collapsed them into two grounds of **whether the learned trial magistrate erred in law and fact in finding the 1st appellant did not prove her case, and finding the respondent proved her case.**
14. In consequence of the appeal, they implored this court to allow the appeal, the impugned judgment be set aside and substituted with an order allowing the 1st appellant's claim and dismissing the respondent's counterclaim with costs, and the court be pleased to make such further and other appropriate orders as it may deem just in the circumstances of the case.
15. As directed by the court, the appeal was canvassed by the above-referenced appellants' submissions and also by the written submissions that were received from the law firm of **Ms Nyende & Co. Advocates** for the respondent, dated 1/06/2025, and this court is grateful to counsels for their illuminating submissions.

Issues for determination, Analysis and Determination

16. As rightfully submitted by both counsels and as held in **Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR**, as a 1st appellate court, this court is not necessarily bound to accept the findings of fact by the lower court but it conducts a retrial and its guiding principles are *inter alia* reconsider the evidence, evaluate it and draw its independent conclusions and bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.
17. Regarding the matter at hand, this court has gone through the memorandum of appeal, the record of appeal, the counsels' rival submissions, the provisions of the law relied upon, and the authorities cited therein. In this court's humble view, this appeal will be determined by answering the two collapsed grounds of appeal as contained in the appellants' submissions, which are **whether the learned trial magistrate erred in law and fact in finding the 1st appellant did not prove her case, and finding the respondent proved her case**. Since the finding of one has a bearing on the outcome of the other, this court proposes to deal with the latter first before delving into the former.

a) Whether the learned trial magistrate erred in law and fact in finding respondent proved her case

18. In her defence to the claim of trespass, the respondent stated she was the owner by allotment and her ownership

ranked first in time, and she was in possession. In her counterclaim, she pleaded several claims; the suit property created a constructive trust and an overriding equitable interest and the appellants' titles were acquired unlawfully, unprocedurally, illegally, irregularly and by mistake. This court will look at her defence and/or counterclaims.

i. Whose documents ranked higher between the 1st appellant's and the respondent

19. It was undisputed that both parties held certain documents relating to the suit property, with the 1st appellant waving a certificate of title over the suit property that was issued to her on 28/04/2021, with the respondent holding an allotment letter issued to her by **Waswa Development Society** on 24/06/1996. On considering this issue, the learned trial magistrate found that since the latter was acquired earlier in time, it ranked in priority.
20. In arguing this issue, the respondent's counsel agrees with the learned trial magistrate and contends that the respondent's allotment was acquired under **Section 7** of the **Registered Land Act (repealed)** and ranked higher. The appellants' counsel gave contrarian arguments and maintained that the 1st appellant, as the registered proprietor, is protected by the doctrine of indefeasibility of title as established under the Torrens system of registration anchored on **Section 26** of the **Land Registration Act**.

21. On this issue and having considered the law, the court agrees with the appellants' counsel that our laws adequately govern the legitimacy of title documents. **Article 40 (1) and (6)** of the **Constitution of Kenya** limit legal protection to cover only lawfully acquired and owned property. By this **Article**, every person has the right, either individually or in association with others, to acquire and own property within Kenya; however, this protection is not extended to any property that has been found to have been unlawfully acquired.

22. Moreover, this **Article** was breathed into life by the statutory provisions of **Sections 24, 25 and 26** of the **Land Registration Act**. **Section 24(a)** specifically provides as follows;

“The registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”.

23. This absolute right is limited by **Section 25**, which provides that land shall be held by the registered proprietor together with all other privileges appurtenant thereto, but subject to charges, leases, encumbrances, restrictions, liabilities, rights and interests as stipulated in **Section 28**.

24. **Section 26** states that courts shall *prima facie* deem the registered owner as the proprietor. However, this right is not absolute and a title can be challenged on grounds of fraud, misrepresentation or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
25. Having considered these provisions of the law and the evidence presented before the trial court, the legal doctrine of equality of equities, which provides that where there are equal equities, the first in time prevails, could not suffice in the instant case. This is so as the 1st appellant and respondent did not have two competing equitable interests over the suit property, as the 1st appellant had registered a proprietary interest over the suit property, which the respondent did not. Therefore, her title could only be defeated on the grounds set out in **Section 26** of the **Land Registration Act** and those of overriding interests under **Section 28** thereof. In consequence, this court finds the learned trial magistrate erred.
26. As this court concludes, it is necessary to mention that it has been unable to decipher the relevance of **Section 7** of the **Registered Land Act (repealed)** to this case as submitted by the respondent's counsel. Moreover, the decision of **Wanjiku Njuguna Gachui & 5 others v Frank Logistics & 2 others [2017] KEELC 1285 (KLR)**, which counsel also relied upon, is distinguishable from this case as it dealt with

allotments by the government entity of the National Land Commission and not by private entities as in the case herein.

ii. Appellants' titles were acquired unlawfully, unprocedurally, illegally, irregularly or by mistake

27. It is now settled law and as held in the Supreme Court of Kenya decision of **Muthuri & 4 others v Attorney General & 2 others [2023] KESC 52 (KLR)** that parties are bound by their pleadings, and it is not allowable for the parties or the court to go beyond them. It is for this reason that it is well established in our jurisdiction that the court will not grant a remedy which has not been applied for, and that it will not determine issues which the parties have not pleaded.

28. In the circumstances of this case, the respondent challenged the appellants' title documents on the grounds envisaged by **Section 26** of the **Land Registration Act**. However, it was not sufficient for the respondent to merely assert them; she had to go over and above this by particularising them as required to do so by **Order 2 Rule 10 (1) (a)** of the **Civil Procedure Act**.

29. Accordingly, having failed to particularise her claim on these grounds and no matter how tempting it was in light of some of the pieces of evidence presented to her, this court finds it was gravely erroneous for the learned trial magistrate to travel beyond the parties' pleadings and infer from the facts that

there was a contravention of **Section 45** of the **Law of Succession Act** or there were gaps in acquisition of title documents by the appellants. ***See the Court of Appeal decision of Bruce Joseph Bockle v Coquero Limited (Civil Appeal 94 of 2016) [2017] KECA 265 (KLR) (21 September 2017).***

iii. Constructive trust and an overriding equitable interest

30. The trial court did not deal with the issue of constructive trust, and it has not been addressed in the parties' submissions. This was proper as this doctrine, which guards against unjust enrichment, could not arise in this case, and it therefore follows that the respondent did not have an overriding interest over the suit property. Further as observed in the proceedings, though the respondent contended she had occupied the suit property since 1996 and built a pit latrine, the site visit told a different story, there was no pit latrine and the building materials on the compound showed her developments were recent which corroborates the 1st appellant's evidence that the respondent invaded the suit property in the recent and had not been in possession. In light of the above findings and conclusion on **issue (a)**, this court finds the learned trial magistrate erred in finding the respondent proved her case to the required standards.

b) Whether the learned trial magistrate erred in law and fact in finding that the 1st appellant did not prove her case

31. It follows from the findings of **issue (a)** that the 1st appellant is the *prima facie* owner of the suit property and the respondent is in occupation without her permission and is thus a trespasser, which is defined in the text of **Clerk & Lindsell on Torts, Sweet & Maxwell, 18th Edition, at page 923**, as follows: -

“Trespass to land consists of any unjustifiable intrusion by one person upon land in the possession of another.”

32. It emerged from undisputed evidence that the respondent has put up structures on the suit property without the 1st appellant’s permission. It is trite that trespass is actionable *per se* without proof of actual damage. In the circumstances of this case, bearing in mind the size and location of the disputed portion, the court hereby awards the 1st appellant kshs 400,000/= for general damages.

33. In the end and for reasons and findings stated herein above, this court finds the 1st appellant’s suit was for allowing with costs and the respondent’s counterclaim for dismissal with costs to the appellants. Hence, the appeal succeeds with costs to the appellants, and the judgment dated 2/05/2024 is set aside and substituted with an order allowing the appellants’

reliefs. In the end, this court grants the following final disposal orders: -

- a. A permanent order of injunction is hereby issued restraining the respondent by herself, her servants, agents, workmen, licensees or any other person acting on her own behalf from howsoever entering, trespassing, constructing, erecting any structures, remaining thereon, disposing, alienating, dealing or otherwise howsoever from interfering with the 1st appellant's quiet enjoyment, possession and occupation of the parcel of land known as land reference number Mavoko Town Block 3/13095 situated within Mavoko Sub-county in Machakos County.***
- b. General damages for trespass are ordered in the sum of kshs. 400,000/- payable by the respondent to the 1st appellant.***
- c. The respondent is hereby granted 90 days from the date of service of the orders of this court to remove herself and her developments from land reference number Mavoko Town Block 3/13095 and give the 1st appellant vacant possession, and in default, the 1st appellant shall forcefully evict the respondent together with her servants or agents.***

d. The respondent's counterclaim in the lower court is hereby dismissed with costs to the appellants.

e. The costs of the lower court suit are awarded to the 1st appellant, which shall be borne by the respondent.

f. The costs of the appeal are awarded to the appellants.

Judgment accordingly.

Delivered and Dated at Machakos this 21st day of October, 2025.

**HON. A. Y. KOROSS
JUDGE
21.10.2025**

**Judgment delivered virtually through Microsoft Teams
Video Conferencing Platform**

In the presence of;

Ms Kanja Court Assistant

Mr. Nyende for respondent.

N/A for appellant.

ORIGINAL