

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ELC APPEAL NO E069 OF 2024

NELSON NDUNGU WAINAINA..... APPELLANT
VERSUS
SAMWEL RATINO NAOI.....1ST RESPONDENT
AKWORI AKWAMU ANGILANI.....2ND
RESPONDENT
SAMOU SAMBUL OMAR.....3RD RESPONDENT
DANIEL WAMBUA MUTUA.....4TH RESPONDENT
JOHN EWOI LOJAU.....5TH RESPONDENT
SAMMUEL KAMAIS LOJAU.....6TH RESPONDENT
PETER MUSYOKA MUTUA.....7TH
RESPONDENT

*(Being an Appeal from the judgment delivered on 10th December, 2024 by Hon
Emmanuel Soita (SRM) in Nakuru CMELC CASE NO E050 OF 2024)*

BETWEEN

NELSON NDUNGU WAINAINA.....
PLAINTIFF

VERSUS

SAMWEL RATINO NAOI.....1ST DEFENDANT
AKWORI AKWAMU ANGILANI.....2ND DEFENDANT
SAMOU SAMBUL OMAR.....3RD DEFENDANT
DANIEL WAMBUA MUTUA.....4TH
DEFENDANT
JOHN EWOI LOJAU.....5TH
DEFENDANT
SAMMUEL KAMAIS LOJAU.....6TH
DEFENDANT
PETER MUSYOKA MUTUA.....7TH DEFENDANT

JUDGMENT

1. This appeal arises from the Judgment delivered by Hon. E. S. Soita on 10th December, 2024, in Nakuru CMELC Case No E050 of 2024. The Appellant being aggrieved by the entire judgment lodged a

Memorandum of Appeal dated 18th December, 2024, and listed the following grounds of Appeal:

- 1) *THAT the Learned Trial Magistrate erred in law and fact in disregarding the appellants evidence and putting the plaintiff to prove his case beyond reasonable doubt as if it were a criminal case.*
- 2) *THAT the Learned Trial Magistrate erred in law and fact in failing to take into account the fact that the appellants case was undefended and uncontroverted when making his judgment.*
- 3) *THAT the Learned Trial Magistrate erred in ignoring the evidence tendered, the written submissions submitted and authorities cited by the appellant herein in support of his case.*
- 4) *THAT the Learned Trial Magistrate erred in law and fact in taking into account irrelevant factors and facts in making his judgment and in fact instead being the abiter became the defendant to cast doubt on a title contrary to Section 26 of the Land Registration Act.*
- 5) *THAT the Learned Trial Magistrate erred in law and fact by relying on extraneous findings and ignoring the oral and written submissions of the Appellant.*

2. The Appellant prayed that:

- a) ***THAT this appeal be allowed and the judgment dated 10th of December, 2024, of the trial court be set aside in its entirety.***
- b) ***THAT the prayers sought in the plaint dated the 5th of March, 2024, be allowed.***
- c) ***THAT costs of the appeal be borne by the Respondent.***
- d) ***Such further orders that the honourable court may deem just and expedient.***

3. The Appellant had sued the Respondents in the lower court vide a plaint dated 5th March, 2024, seeking the following orders:

- a) ***An eviction order to issue against the Defendants by themselves, their agents, servants and or anybody purporting to act under them in respect to parcel of land known as SUBUKIA/SUBUKIA BLOCK 14/85.***
- b) ***A permanent injunction do issue restraining the Defendants, their agents, servants and or anybody purporting to act under them from entering, remaining, occupying, possessing or in any manner whatsoever interfering with the Plaintiff's peaceful occupation and use of parcel of land known as SUBUKIA/SUBUKIA BLOCK 14/85.***
- c) ***Costs of the suit.***

4. The suit was heard and the Trial Magistrate in his judgment dated 10th December, 2024, dismissed the suit with no orders as to costs.

APPELLANT'S SUBMISSIONS

5. Ms. Gathecha, counsel for the Appellant, filed submissions dated 23rd July, 2025, and identified the following issues for determination:
 - a) *Whether the trial court erred in dismissing the Appellant's claim despite production of a valid, unchallenged certificate of title?*
 - b) *Whether a sale agreement or testimony from the Land Registrar was necessary in light of the provisions of the law on indefeasibility of title?*
6. Counsel submitted that the Learned Trial Magistrate erred in introducing extraneous requirements such as the production of the sale agreement or calling the Land Registrar in a case where the only issue was the proprietor's right to possession against trespassers. It was counsel's submission that the Appellant's case was for eviction, which is premised on the tort of trespass to land.
7. Ms. Gathecha submitted that once ownership is proved, and the Defendant is shown to be in unlawful occupation, the remedy of eviction flows naturally. Counsel relied on Section 116 of the Evidence Act, Section 26 (1) of the Land Registration Act, 2012 and the cases of **Embakasi Properties Limited & another vs Commissioner of Lands & Another [2019] eKLR**, **Elizabeth Wambui Githinji & 29 others vs Kenya Urban Roads Authority & 4 others [2019] eKLR**, **Chemei Investments Limited vs The Attorney General & Others Nairobi Petition No 94 of 2005** and **Kweyu vs Omuto [1990] eKLR**.

8. Counsel submitted that the Appellant at the formal proof proceedings discharged the burden of proof of his claim on a balance of probabilities. Counsel submitted that there was no rebuttal evidence from the Respondents and cited the cases of **Mbarak vs Freedom Limited (Civil Appeal E028 of 2022) KECA**], **Njoroge vs Karuku (Civil Appeal E069 of 2022) [KECA]**, **Mohamed vs Mwabwika (Civil Appeal E002 of 2021) [KEELC]** and **Mbogo vs Muigai & Ager (Env & Land Case 694 of 2017) [KEELC]**. Counsel asked the court to grant the prayers sought.

ANALYSIS AND DETERMINATION

9. Counsel for the Appellant gave a background to this Appeal and listed the grounds of appeal in the Memorandum of Appeal together with submissions in support of the Appeal. The issue for determination is whether the Learned Trial Magistrate erred in dismissing the Appellant's case despite the production of a certificate of title as proof of ownership, the root having not been challenged.
10. This being the first appeal, it is this court's duty under Section 78 of the Civil Procedure Act to re-evaluate the evidence tendered before the trial court and come to its own independent conclusion taking into account the fact that it did not have the advantage of seeing and hearing the witnesses as they testified.

11. The above principle of law was well settled in the case of **Selle v Associated Motor Boat Co. Ltd [1968] EA 123**, where Sir Clement De Lestang (V.P) stated that:

“An appeal to this Court from a trial by the High Court is by way of 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. 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 or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally”.

12. Similarly, the Court of Appeal for East Africa in the case of **Peters v Sunday Post Limited [1958] EA 424** Sir Kenneth O’Connor stated as follows:

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and

hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.”

13. The Respondents in the lower court were served with summons to enter appearance but neither filed a memorandum of Appearance nor a defence to the suit. The matter therefore proceeded by way of formal proof. The Appellant gave evidence and produced a copy of the title to the suit land in his name to prove ownership. The Respondents did not participate in the proceedings despite being served with summons.

14. The court is also cognizant of the fact that even if a case is undefended, it is incumbent upon the plaintiff/claimant to prove his/her case as was held in the case of **Propwa Company Limited v Justus Nyamo Gatondo & another [2020] eKLR** , as follows:

“The fact that the evidence is not challenged does not entirely mean that the Court will not interrogate the evidence tendered by the Plaintiff. The Court still has an obligation to interrogate the Plaintiff’s evidence and determine whether the same is merited to enable the Court come up with logical conclusion as ex parte evidence is not automatic prove of a case on the required standard. The Plaintiff has to discharge the burden of proof.

15. It was also held in the case of **Gichinga Kibutha...Vs...Caroline Nduku (2018) eKLR,** as follows:

“It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest.”

16. From the evidence on record, there was no challenge to the root of the Appellant’s title. The Magistrate went ahead and challenged the root of the title by introducing extraneous issues, namely that the Appellant did not show how he acquired the suit land, either through purchase from a vendor or how he came into possession. The learned Trial Magistrate also faulted the Appellant for not calling the Land Registrar to come and adduce evidence of the Appellant’s proprietorship.

17. Section 24 of the Land Registration Act provides that subject thereto:

a) 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; and

b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and

subject to all implied or expressed agreements, liabilities or incidents of lease.

18. Section 25 of the Land Registration Act states as follows:

“(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an Order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject:—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same

and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee”.

19. Section 26 states as follows:

“(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”.

20. In a suit where the root of a title to a suit land, is in question, the party alleging ownership must prove that the same was acquired legally and procedurally. This is a suit where the acquisition of the title by the Appellant was not in question. The Appellant had sought the eviction of the defendants who had trespassed on his land and an order of a permanent injunction to stop the defendants from further trespassing on the suit land.
21. The Supreme Court in the case of **Dina Management Ltd Vs County Government of Mombasa & 5 others (Petition 8 (E010) OF 2021 KESC 30 (KLR)** held that where the registered proprietor’s root title is under challenge, it is not enough for as proprietor to dangle the instrument of title as proof of ownership. It was the instrument that was

in challenge and therefore the registered proprietor must go beyond the instrument, prove the legality of the title, and prove the acquisition was legal, formal and free from any encumbrance including interests, which would not be noted in the register.

22. It is trite law that merely producing a title is insufficient where the acquisition is under scrutiny as indefeasibility protects lawful registered proprietors, but courts retain the duty to drill deeper where acquisition is questionable as was held in the case of **Mbarak v Freedom Limited (Civil Appeal E028 of 2022) [2024] KECA 160 (KLR) (23 February 2024) (Judgment)**.

23. Having re-evaluated the evidence on record, the submissions by counsel, I find that the Learned Trial Magistrate considered extraneous issues therefore coming to the wrong conclusion. This Appeal is therefore allowed in favour of the Appellant, the judgment of the trial court is hereby set aside and substituted with the following orders:

- a) The Appeal is hereby allowed and the Judgment of the Trial Court is set aside.*
- b) Judgment is hereby entered in favour of the Appellant as prayed in the Complaint plus costs of the Appeal.*

DATED, SIGNED AND DELIVERED AT NAKURU THIS 16TH DAY OF OCTOBER 2025.

M. A. ODENY
JUDGE

