

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ELCA NO. E039 OF 2024

SIMON SIMIYU WEKESA.....1st
APPELLANT
ENOS WEKESA SIMIYU.....2nd
APPELLANT

VERSUS

FRIDA NAMAEMBA MILIMMO (Suing as the
Administrator Estate of Andrew Milimo Mufutu-DCD.....
RESPONDENT

(Being an appeal from the Judgment of Hon. Mark Olando SPM delivered on 15th August, 2024 in Bungoma CM-ELC NO. E010 of 2023)

JUDGMENT.

1. The Appellants herein were the Defendants in the subordinate court being Bungoma CM-ELC Case No. E010 of 2023 wherein they had been sued vide a plaint dated 27/01/2023. In her plaint referred herein, the Respondent’s main prayers were to have the Appellants evicted from land parcel no. E.Bukusu/S.Kanduyi/4473(hereinafter referred to as ‘**the suit land**’), an order for permanent injunction issued against them and their servants and or agents and for general damages for trespass.

2. It was the Respondents case that the suit property which measured 0.06ha is registered in the name of one Andrew Milimo Mufutu-DCD. That upon the demised of the deceased, the

1st Appellant without any colour of right or permission encroached into the suit land and erected temporary structures which he rented out to third party and settled the 2nd Appellant who is his son.

3. The Appellants filed a statement of defence and counter-claim dated 06/03/2023 wherein they denied the Respondents claim and averred that they have in no way trespassed on the suit land as claimed and that they lawfully occupy their rightful portion of land. They counter-claimed and averred that the 1st Appellant is the administrator of the estate of one Simiyu Kwatenge Wandabusi and that he was in charge of administering land parcel no.E.Bukusu/S.Kanduyi/2487. That the said land was sub-divided and formed amongst other parcels the suit land which was shared to him and other beneficiaries. That one of his brothers namely Ben Simiyu sold a portion measuring 25 x 100 Feet to the deceased. That he built in his portion measuring 33 x 100feet a permanent structure which he rented out as shops. He in the alternative pleaded adverse possession and sought to have the Respondent transfer the said portion to him.

Evidence.

4. The suit proceeded by way of viva voce evidence.

5. Frida Milimo testified as PW1 where she adopted her witness statement dated 27/1/2023 as her evidence in chief and produced into evidence her list of documents of an even dated as PExhibit no.1 to 9. She testified that her father purchased the

suit land in 1987 and that the Appellants encroached the land in 2009. She testified prior to the demise of her father, there was a dispute involving the suit land and the issue had been reported to the area chief.

6. PW2 Jackline Mufutu adopted her witness statement dated 03/04/2024 as her evidence in chief. It was her evidence that they occupied the land in the year 1989 and that she resides therein to date. She denied their being peaceful co-existence with the Appellants.

7. PW3 Cecilia Mukhwana adopted her witness statement dated 03/04/2024 as her evidence in chief and reiterated the evidence of the PW2.

8. DW1 Simion Wekesa Simiyu adopted his witness statement dated 20/09/2023. He testified that he inherited the suit land from his father. That the deceased purchased $\frac{1}{2}$ portion of the suit land. He further produced as documentary evidence DExhibit 1-5. He testified that the Respondents father is only entitled to a portion measuring 29 x 100 feet which is not equivalent to 0.06ha.

9. DW2 Benjamin Juma Simiyu testified that one of his brothers Bernard W. Simiyu sold his portion of land to the Respondents father. The said Bernard was bequeathed $\frac{1}{4}$ acre of the estate of their deceased father.

10. DW3 Sypriano Makokha Wakhuleko adopted his witness statement dated 20/09/2023 as his evidence in chief. He testified that he resides in the neighbourhood and that he also purchased a portion of land from Simon Simiyu.

11. DW4 David Soita Karandusi adopted his witness statement dated 20/09/2023. He testified that he resides in the neighbourhood as a tenant in the permanent structures in the suit land.

12. Upon evaluation of the matters in issue, the subordinate court arrived at the finding that the Respondent had discharged the burden of proof on a balance of probabilities and consequently granted the reliefs sought, together with an award of Kshs. 100,000/= as general damages, costs of the suit, and interest thereon.

The Appeal.

13. Being dissatisfied by the subordinate court's judgment, the Appellant preferred this appeal on the following grounds;

- a) The learned trial magistrate erred in law and fact when he failed to consider analyse and weigh the evidence adduced before him leading to a monumental failure of justice.**
- b) The learned trial magistrate erred in law and in fact by choosing to ignore the entire evidence of the**

appellant adduced in the case before him and decided the case on extraneous considerations.

- c) The learned trial magistrate erred in law when he awarded orders of eviction and injunction notwithstanding evidence on record both by the plaintiff and the defendants that totally negates against such a verdict. The learned trial magistrate erred in law and fact when he awarded the plaintiff a sum of Kshs.1000,000/- in general damages in the absence of any evidence to support such an award.**
- d) The learned trial magistrate erred in law and in fact when he failed to appreciate that the parties were in confusion over the suit property more out of a mistake and possibly fraud and that the appellants were not pleading fraud as such.**
- e) The learned trial magistrate erred in law when he dismissed the counterclaim of the appellants while totally failing to accord due weight to the evidence in support thereof.**
- f) The learned trial magistrate failed to deliver justice and resolve the dispute between parties who had otherwise peacefully lived side by side for decades.**

14. The Appellant sought for the following orders; -

- a) Allow the appeal and set aside the entire judgement of the lower court.**
- b) Allow the Counter-Claim in the lower court.**

c) Award Costs of the Appeal and the Lower Court to the Appellants.

Submissions on the Appeal.

15. The Appellants filed submissions dated 19/09/2025 where they submitted that the subordinate court grossly misapprehended the evidence and distorted the facts of the case. It was argued that the trial court was wrong to find that the title held by the deceased could only be challenged by way of fraud. They relied in the case of **Zacharia Wambugu Gathimu v John Dungu Maina(2019)eKLR** arguing that their argument was that the said registration was as a result of a mistake/misrepresentation. In support for their adverse possession claim the Appellants quoted inter alia the cases of **Isaac Kiprotich Kiptoo v Edward Kibet Kimetto (2019) eKLR, Virginia Wanjiku Mwangi v David Mwangi Jotham Kamau (2013) eKLR.**

16. The Respondents filed their submissions dated 09/10/2025 where they submitted that the trial court was right in its determination that the Appellants could not claim adverse possession. Reliance was placed in the case of **Wambugu v Njuguna [1983] KLR 171.** It was argued that the Respondent could not be disposed from what he never possessed. It was further argued that the Respondent had proved the Appellants trespass which was admitted by the Appellants themselves. She quoted the case of **Wambugu & another v Muhamed & 3**

others [2023] eKLR and East African Court of Appeal in Sheik Muhammed Lubowa vs Kitara Enterprises Ltd CA no. 4 of 1997. Lastly, it was submitted that the orders issued were proper in circumstances.

Analysis and determination.

17. Having considered the record, the impugned judgment and decree, the grounds on which the appeal is anchored, the rival submissions, the cited authorities and the law, this court forms the view that the instant appeal stands or falls on the following questions;

- a) Whether or not the Respondent herein is the lawful and legitimate proprietor of the suit land.**
- b) Whether the counter-claim of adverse possession has been substantiated.**

18. The Respondent produced as PExhibit 6 a copy of official search which indicated that the suit land was registered in the name of Andrew Mulimo Mututu-Dcd on 13/12/1988. From PExhibit 3, it is apparent that the suit land was created after the subdivision of land parcel No. E.Bukusu/S.Kanduyi/2487 on 24/10/1988 by the 1st Appellant into various portions namely 4428-4449, 4455,4456,4457,4461,4470,4473 and 4474. From the evidence, it is not contended that Andrew Mulimo Mututu-Dcd purchased a portion of land from one Ben Simiyu who was the 1st Appellants brother and the 2nd Appellants uncle. What the Appellants contend is that the deceased purchased a portion

measuring 25 x 100 Feet while he (the 1st appellant) retained a portion measuring 33 x 100 feet of the suit land.

19. From the evidence, it is clear that the deceased obtained a title over the suit land in the year 1988 after the 1st Appellant transferred it to him on the instructions of his brother Ben Simiyu after the succession proceedings of their father. In the case of **Embakasi Properties Limited & Another versus The Commissioner of Lands & Another (2019)eKLR**, the Court of Appeal stated that;

Although it has been held time without end that the certificate of title is; "...conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof", it is equally true that ownership can only be challenged on the ground of fraud or misrepresentation to which the proprietor named is proved to be a party. See section 23 of the repealed Registration of Titles Act. Section 26 of the Land Registration Act, 2012 though not as emphatic as section 23 aforesaid on the conclusive nature of ownership, confirms that the certificate is prima facie evidence that the person named as proprietor is the absolute and indefeasible owner. It adds that apart from encumbrances, easements, restrictions to which the title is subject, there is no guarantee of the title if it is acquired by fraud or misrepresentation or where it has been acquired

“illegally, unprocedurally or through a corrupt scheme”.

20. Turning to the contention advanced by the Appellant and upon the examination of the evidence before this court, I find the same wholly unsubstantiated. Their assertion that the deceased had only purchased a portion of the suit property but was erroneously registered as proprietor of the entire parcel is not supported by any credible or documentary evidence. From the record, it is manifest that the Appellant failed to tender any material capable of displacing the presumption of regularity that attaches to the process of registration under the land laws.

21. It is a cardinal principle of evidence, codified under **Sections 107, 108 and 109 of the Evidence Act (Cap 80, Laws of Kenya)**, that ***he who alleges must prove***. The burden squarely lay upon the Appellants to establish, on a balance of probabilities, that the registration of the deceased as proprietor of the entire parcel was obtained through mistake as they claimed. Mere allegations, however emphatic, do not constitute proof in law. It is imperative to note that courts are guided by evidence, not conjecture or suspicion.

22. Further, the doctrine of **indefeasibility of title**, as enshrined in **Section 26(1) of the Land Registration Act, 2012**, accords sanctity and finality to registered proprietorship. A certificate of title is, in the absence of evidence to the

contrary, *prima facie* proof that the person named therein is the absolute and indefeasible owner of the property. Such title may only be impeached upon strict proof of fraud, misrepresentation to which the proprietor is proved to have been a party.

23. The Appellant, having failed to discharge this burden, cannot successfully impeach the deceased's title. This court must therefore uphold the presumption of indefeasibility and the integrity of the land registration system, which underpins the Torrens framework in Kenya. To hold otherwise in the absence of cogent evidence would amount to undermining the very foundation upon which certainty of land ownership rests.

24. Having said that, and taking into account the Appellants' own admission that they are in occupation of a portion of the suit property, it follows that such occupation is unlawful and constitutes **trespass**. Under **Section 3(1) of the Trespass Act, Cap 294, Laws of Kenya**, trespass is defined as "*any unjustifiable intrusion by any person upon private land without the consent of the owner or occupier thereof.*" See the case of **Wambugu v. Njuguna [1983] KLR 172.**

25. This Court now proceeds to examine the Appellants' claim that they have acquired title to the suit land through adverse possession. The Appellants' assertion, however misconceived, that they were rightfully in occupation of land they believed to be their own, and that the Respondents were erroneously

registered as proprietors of the suit property, cannot in law sustain a claim for adverse possession. One of the essential elements of adverse possession is that the possession must be adverse to the interests of the true owner, and not based on a mistaken belief of ownership or entitlement.

26. As stated in **Wambugu v Njuguna [1983] (Supra)**, possession becomes adverse when a person takes exclusive possession of land, asserting rights inconsistent with those of the registered owner, and the owner, with knowledge of that possession, fails to take steps to assert his title for the statutory period. Where occupation is under a mistaken impression of ownership, such possession lacks the requisite *animus possidendi* which is the clear intention to dispossess the true owner and to hold the land as one's own, to the exclusion of all others. Thus, the Appellants occupation, founded on an erroneous assumption of ownership rather than a deliberate assertion adverse to the Respondents' title, cannot amount to adverse possession. Their possession, if any, was not hostile to the Respondents' interest but merely reflective of a mistaken belief, which in law cannot extinguish a registered proprietor's title under **Section 7 of the Limitation of Actions Act, Cap 22**.

27. In the end, this court comes to the inescapable conclusion that this appeal fails and is hereby dismissed with costs to the Respondent. Orders accordingly.

DATED SIGNED and **DELIVERED** at **BUNGOMA** this 04th day of December, 2025.

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HON.E.C CHERONO
ELC JUDGE

In the presence of;

1. Mr. Omagwa Angima for the Appellants.
2. Mr. Wamalwa Simiyu for the Respondent.
3. Bett C/A.