

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT VOI**

**ELC APPEAL NO. E012 OF 2025**

**JOSEPH**

**NDUNGUJA**

**LENGUYANA**

-----**APPELLANT**

**VERSUS**

**PAUL**

**NDUNGE**

**LESELI**

-----**RESPONDENT**

**(Being an appeal from the Judgment and Decree of  
Hon. C.K. Kithinji (PM) delivered on 29/05/2025 in  
Taveta MCELC No. E007 of 2021)**

**JUDGMENT**

**Background**

- 1.** The Appellant, who was the Defendant at the trial court, had been sued by the Respondent who had sought various reliefs against him including orders of eviction, mesne profits and costs of the suit.
- 2.** The Respondent claimed that he was the bonafide owner of the land known as Taita Taveta/Lumi Timbwani/42. In

the diverse dates as from the year 2010 their existed a land dispute pertaining to the suit parcel. The Appellant colluded with the lands office and registered the Respondent's land No. 42 and made an illegal subdivision which the Respondent was given No. 437 curved from the same parcel without his knowledge yet the Appellant land is No. 45.

- 3.** It was stated that the Appellant had trespassed and invaded the property and due to the said actions, the Respondent filed the suit before the trial court seeking for several reliefs against the Appellant.
- 4.** The Appellant opposed the suit through a Statement of Defence and Counterclaim dated 31<sup>st</sup> July 2023. He denied the contents of the Complaint and averred that he has been in peaceful occupation of parcel No. 42 being the suit parcel, the Respondent is not related to the same in any way but has been using his resources and influence to forcefully deprive him of the suit property. He sought the following reliefs in his counterclaim; a permanent injunction restraining the Respondent from trespassing

constructing or dealing with the suit land in any way, a declaration that the Appellant is the legal and beneficial owner of the property number Taita Taveta/Lumi Timbwani/42, costs of the suit and any other relief that the court may deem fit to grant.

5. At the trial, **Paul Ndunge Lesili** the Respondent herein testified as **PW1**. He relied on a witness statement dated 3<sup>rd</sup> May 2021 as his evidence-in-chief. He produced all his documents as exhibits in his list and bundle of documents dated 3<sup>rd</sup> May 2021 and 23<sup>rd</sup> November 2021. It was his testimony that the Appellant encroached on his land, got registered and declined to vacate and thus he sought for the court's intervention to cancel the illegal registration and make an order that the land be registered in his name.
6. **Jacob Juma Lesili** testified as PW2. He relied and adopted his witness statement dated 22nd November 2021 in his evidence in chief. Briefly, he told the court that he is the uncle to the Respondent, the land is family land, the Respondent has his own land known as number

45, he was present when the land was being surveyed. The Appellant acquired the 0.2 acres belonging to the Respondent fraudulently and thus the Appellant's name should be cancelled and the land be registered in the name of the Respondent.

- 7. Joseph Ndunguja Lengayo**, the Appellant testified as DW1. He adopted and relief on his witness statement dated 13<sup>th</sup> June 2022 and produced his bundle of documents in his evidence in chief.
- 8.** It was his testimony that he is the owner of the suit parcel, the Respondent and his late father together with PW2 came to his land and subdivided the same without his consent. He built a house on the land and cultivated on the same for over 3 years.
- 9.** He also stated that sometimes in 1998 the Respondent's father leased the land from him and he was allowed to cultivate in the area but later refused to vacate. He also stated that the Respondent and PW2 had sold the land to two other persons and he is only occupying one portion of the land. He further stated that he is equally seeking

for the court's intervention to order the Respondent to vacate the land and compensate him for the damages undertaken.

- 10.** When cross examined he stated that the land belongs to him by virtue of inheritance. He was not present when the survey was done. He had not claimed any compensation for the trees.
- 11.** When re-examined he stated the land is ancestral land. The case had been heard by the elders in 1992, he was not present when survey was done. He reiterated that the Respondent grabbed his land.

**The Appeal.**

- 12.** After reviewing the evidence, the trial court rendered its judgment in favour of the Respondent. The Appellant being aggrieved by the said judgement filed a Memorandum of Appeal dated **11<sup>th</sup> June 2025**. The following grounds were raised in the Memorandum of Appeal:-

- i) The learned magistrate erred in law and fact in falling to determine the fact that**

**the documents provided by the Appellant to wit a copy of the title deed, a copy of the area map, a copy of the search of the land, a certified copy of the green card and a copy of the letter of offer dated 19<sup>th</sup> October 2007 did confer ownership and or proprietary rights to the Appellant in Taita/Lumi Timbwani/42.**

**ii) The learned magistrate grossly erred in law and fact in failing to consider the evidence brought forth by the Appellant to wit a copy of the title deed, a copy of the area map, a copy of the search of the land, a copy of the letter of offer dated 19<sup>th</sup> October 2007 while rendering the judgment.**

**iii) The learned magistrate grossly erred in law and fact in determining that the Appellant did not explain how he**

**acquired the land parcel of registration number Taita Taveta/Lumi Timbwani/42.**

**iv) The learned magistrate grossly erred in law and fact in determining that the Respondent was the proprietor and or legal owner of the land parcel of registration number Taita Taveta/Lumi Timbwani/42.**

**v) The learned magistrate erred in law and fact in conferring ownership of the land parcel of registration number Taita Taveta/Lumi Timbwani/42 to the Respondent without considering that the Respondent did not provide any documents and or evidence to show that the land parcel of registration number 42 belonged to him.**

**vi) The learned magistrate erred in law and fact by failing to consider that even the Respondent's list of documents dared**

**20<sup>th</sup> April 2021 had documents proving that the Appellant herein is the legal owner and or proprietor of the land parcel of registration number 42.**

**vii) The learned magistrate erred in law and fact by failing to apply the mandatory provisions of sections 24, 25 and 26 of the Land Registration Act as against the facts provided therein.**

**viii) The decision of the learned magistrate was plainly wrong in law and principle.**

**13.** The Appellant sought to have the appeal allowed, the judgment of the trial court be set aside and costs of the appeal.

**Directions of the Court**

**14.** The appeal was contested and pursuant to the directions issued by this court, the same was canvassed by way of written submissions. The Appellant filed submissions dated 24<sup>th</sup> October 2025 while the Respondent filed submissions dated 22<sup>nd</sup> November 2025.

## **Appellant's submissions**

- 15.** The Appellant submitted on the following issues; whether the trial court considered the evidence before it and whether suit parcel belongs to the Appellant.
- 16.** On his first issue it was submitted that the Respondent failed to prove to the required standard that the suit land belonged to him. It was contended that when the burden shifted on the Appellant to prove his claim to the land, he relied and produced his list of documents from his bundle dated 13<sup>th</sup> June 2022.
- 17.** Citing the case of **Oliech vs Oliech [2024] eKLR**, it was submitted that the Appellant produced a green card of the suit parcel which showered the entire history of the suit parcel. However, the learned magistrate did not consider the same.
- 18.** In respect to fraud which was pleaded by the Respondent, it was submitted that the tenets of fraud were not proven during trial by the Respondent.
- 19.** On whether the suit parcel belongs to the Appellant, it was submitted that pursuant to sections 24, 25 and 26 of

the Land Registration Act, the court is mandated to consider a certificate of title as prima facie evidence of ownership and the same can only be challenged on the grounds stipulated under the law and thus the Respondent had failed to challenge the same.

**20.** In response to the averment that the Appellant is the owner of property number 45, it was submitted that the same was false as no evidence of ownership was produced as evidence during trial and further that the said properties are not opposite each other.

**21.** The Appellant contended that the Learned Magistrate was wrong and the Court was urged to allow the Appeal.

**Respondent's submissions**

**22.** The Respondent submitted on six issues; whether the learned magistrate erred in law and fact in failing to determine that the documents produced by the Appellant during trial did confer ownership and or proprietary rights to the Appellant in respect to property number 42, whether the learned magistrate grossly erred in failing to consider the evidence brought forth by the Appellant

while rendering her judgment, whether the learned magistrate grossly erred in law and fact in determining that the Respondent was the proprietor of property number 42 the suit parcel, whether the learned magistrate erred in law and fact in by failing to consider that even the Respondent's list of documents dated 20<sup>th</sup> April 2021 had documents proving that the Appellant is the legal owner and proprietor of the suit parcel, whether the learned magistrate erred in law by failing to apply the mandatory provisions of section 24, 25 and 26 of the Land Registration Act against the facts provided herein and what orders should issue as to costs.

**23.** The Respondent while citing several authorities argued that the trial court did not err when it awarded the sum of Ksh 600,000/= and a challenge on such decision must be based on the basis that the trial Court misapprehended the evidence on record or that the trial court proceeded on wrong principles.

**24.** Citing the Supreme Court case of **Dina Management Limited vs County Government of Mombasa [2023]**

**eKLR** It was further submitted that during trial, the Appellant's title was successfully impeached.

**25.** It was also submitted that it was the Respondent's testimony that on adverse dates from the year 2010 their existed a land dispute pertaining Land Title deed number Taita Taveta/Lumi Twibwani/42 measuring approximately 0.2 Ha. The Respondent further told Court that the land in dispute was allocated to his father by his Grandfather. The Respondent's Uncle one Jacob Juma witnessed and supervised the subdivision of the land. The Respondent produced a copy of title deed, area map, letter to DALSO dated 24/1/2019 and 11/9/2013, letter from DALSO to the parties dated 16/9/2020 and that of the Defendant dated 5/7/2021, survey report, Title deed Lumi/Tibwana/89 and 448 and proceedings in ELC Case No.7 of 2019, Sketch map and Defendant's Uncle ID card.

**26.** It was further submitted that It was clear from the Respondent's evidence that the Appellant colluded with the land officers to register the Land Registration

Number Taita Taveta/Lumi Twibwani/42 under his name and further made an illegal sub-division of parcel Number 437 to the Respondent.

- 27.** The Respondent submitted that the Appellant's title was successfully impeached since its registration "was irregular, unlawful and therefore null and void ab initio as it was procured through fraud and misrepresentation". Its acquisition went against the basic procedures set out in land law. The decision of the learned magistrate was well founded and the Appellant's title deed should therefore be revoked and legally registered to the Respondent.
- 28.** On whether the learned magistrate grossly erred in law and fact in failing to consider the evidence brought forth by the Appellant to wit a copy of the title deed, a copy of the area map, a copy of the search of the land, a certified copy of the green card and a copy of the letter of offer dated 19th October, 2007 while rendering her judgment, it was submitted that the Appellant was issued with a title deed in respect to land registration number

Taita Taveta/Lumi Twibwani/42 however he did not prove to the trial court that the right procedure was followed that led the said certificate of title to be registered in his name. When the Respondent testified in court, the Appellant was not present to cross-examine him and this left the Respondent's evidence unchallenged.

**29.** In respect to the determination that the Respondent is the proprietor of the suit parcel, it was submitted that the Respondent tabled enough and sufficient evidence to confirm that the suit property belonged to him. The conduct of the Appellant in the matter is a clear indication that he was in a mission to frustrate the Respondent in the matter until he gives up. There was overwhelming evidence that was tabled by the Respondent which made the court to be persuaded that the land belonged to the him and declared as such.

**30.** On whether the learned magistrate erred in law and fact by failing to consider that even the Respondent's list of documents dated 20th April, 2021 had documents proving that the Appellant herein is the legal owner

and/or proprietor of the suit parcel, it was argued that trial court did not err when it gave judgement in favour of the Respondent by stating that he is the bonifade owner of the suit parcel even though the Respondent provided to court documents that showed that the Appellant is now the registered owner. That does not validate the fact that the Appellant used fraud in obtaining the said documents therefore according to the law the certificate of title ought to be revoked and registered in the name of the Respondent.

- 31.** In respect to the application of the provisions of Section 24 to 26 of the Land Registration Act, it was submitted that the learned magistrate used the above sections of the Land Registration Act and her conclusion that the Respondent is the bonifade owner was in accordance to the said provisions. The analysis by the learned magistrate was anchored on law.
- 32.** The Court was urged to dismiss the Appeal with costs of the Respondent.

### **Analysis and Determination**

33. In **Ciero & Another -vs- Njanja & Others Civil Appeal 111 of 2022 [2025] KECA 1541 KLR] (3<sup>rd</sup> October 2025) (Judgment)**, the court stated that the mandate of the appellate court of first instance is to analyze and re-assess the evidence on record and reach its own conclusion also noting the holding in the case of **Gitobu Imanyara -vs- Attorney General [2006] eKLR**, that it has to give credit to the trial court, which saw and heard the witnesses testify.

34. Having looked at the lower court record, the grounds raised in support of the Appeal and the written submissions of the parties, the issues calling for my determination are as follows:-

**(1) Whether the trial court failed to consider the evidence tendered by the Appellant before it.**

**(2) Whether the Appellant's counterclaim and or case had been proven to the required standard before the trial court.**

**(3) Whether the Respondent's case was proven to the required standard before the trial court.**

**(4) What are the appropriate reliefs.**

**35.** The said issues shall be addressed sequentially.

**Issue no. i**

**Whether the trial court failed to consider the Appellant's evidence before it.**

**36.** In his memorandum of appeal, the trial court was faulted for failing to consider the documentary evidence that he was the proprietor of the suit parcel. It was his submission that in proving linkage to the suit property he produced a title deed of the suit property, the area map, certificate of official search, certified copy of the green card, his letter dated 22<sup>nd</sup> September 2022 responding to the Respondent's letter and a letter of offer dated 19<sup>th</sup> October 2007.

**37.** It was submitted that learned magistrate did not consider the above documentary evidence that was placed before her yet the said documents were crucial as they explained the nexus between the Appellant and the suit property.

**38.** In submitting on the said issue, the Respondent argued that the learned magistrate considered the weight of the evidence tendered and that the same was overwhelming to the effect that the Respondent was the proprietor of the suit parcel.

**39.** From the record of appeal file herein, it is evident from the proceedings of the trial court that the Appellant who testified as DW1 on 18<sup>th</sup> July 2024 produced several documents in his bundle dated 13<sup>th</sup> June 2022 during his evidence in chief. The learned magistrate in her judgment delivered on 29<sup>th</sup> May 2025 stated at paragraph 8 as follows;

***“... he tendered in evidence a copy of the title deed, area map, his letter dated 22<sup>nd</sup> September 2010 and offer dated 19<sup>th</sup> October 2007”***

**40.** At paragraph 13 of her judgment, she stated that;

***“The defendant’s title was issued in 2013. The Defendant confirms he did not apply for the same. There is an offer letter to him on record***

***but does not demonstrate compliance and there is another indicating he would lose the property if he did not comply.”***

**41.** In view of the foregoing and having carefully perused the entire record, it is evident that the learned magistrate carefully considered the Appellant’s documentary and oral evidence in rendering her judgment and as such the contention that the same was not considered fails.

**Issue No. ii**

**Whether the Appellant’s counterclaim and or case had been proven to the required standard before the trial court.**

**42.** The Appellant filed a statement of defence and counterclaim dated 31<sup>st</sup> July 2023. It was contended that the Appellant has been in peaceful occupation and possession of the suit parcel and that he is the owner of the same. He sought for several reliefs that were enumerated in his counterclaim.

**43.** A counterclaim just like a suit ought to be proved to the required standard and it is trite law that whoever alleges

must prove and equally any party desiring and or seeking any relief before the court must prove that he is entitled to the same.

- 44.** During the proceedings before the trial court, the Appellant testified as DW1 but did not call any witness to support his case. While the Appellant had averred that he had a title deed to the suit parcel number 42, the same having been challenged he had an obligation to prove the root of its acquisition.

It is not automatic that simply accepting titles as conclusive, incontestable and indefeasible or the concomitant argument that in the face of two or more competing titles, the first in time automatically prevails.

It is not enough to wave an instrument of title or rest easy on the former rock of chronological primacy. What must now be established by he who would prevail is the solidity of the root of title. No flowery foliage, absent a sturdy and settled root speaking to a regular and legal process preceding the product that is the title, will avail the holder. That much is now the law pronounced in a

lengthening line of authorities such as **Munyu Maina vs Hiram Gathiha Maina (Supra) And Funzi Development Ltd & Others vs Country Council Of Kwale [2014] eKLR**, and by the Supreme Court in its authoritative and all-binding decision of **Dina Management Limited vs County Government of Mombasa & 5 Others [2023] eKLR**

This approach was well appreciated in the case of **Hubert L. Martin & 2 Others vs Margaret J. Kamar & 5 Others [2016] eKLR**. Equally in the case of **Nairobi High Court Civil Suit No. 1024 of 2005(O.S), Milankumar Shah & 2 others v The City Council of Nairobi & another**, the court stated as follows:

***“We hold that the registration of title to land is absolute and indefeasible to the extent firstly that the creation of such title was in accord with the applicable law and secondly where it is demonstrated to a degree higher than the balance of probability that such***

***registration was not procured through fraud and misrepresentation to which the person or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law, and the public interest”.***

This investigation must start at the root of the title and follow all processes and procedures that brought forth the interests of each party to the land. 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 Court of Appeal in the case of **Jacob Wekesa Bokoko Balongo vs. Kincho Olokio Adeya &**

**another [2020] eKLR** held as follows on the importance of deciphering the historical acquisition of title:

***“The historical background to the acquisition of the title is as good as the title itself. How else, for example, can a person seeking to impugn or impeach the title on the grounds of fraud, misrepresentation or it having been obtained unprocedurally or through corrupt means do so without placing the title in its historical context? On the ground of indefeasibility of title, it was urged that the trial judge erred in failing to find that the appellant’s title to the suit land was indefeasible... In the persuasive case of Fahiye & 2 others - v- Omar & 4 others [201] 2KLR, 224, it was held that indefeasibility of title is not absolute particularly where the whole transaction was void. In Milankumar Shah and 2 Others vs. City Council of Nairobi & Attorney General (Nairobi HCC Suit No.***

**1024 of 2005 (05), it was correctly pointed out that: “The concept of absolute and indefeasible ownership of land cannot be clothed with legal and constitutional protection if the interest was acquired through fraud, misrepresentation, illegality, unprocedural ways or corrupt schemes. This concept cannot be used to sanitize the commissioner if it allocates or issues title in such manner. In the case of Champaklal Ramji Shah & 3 Anors -v- AG & Anor, HCCC No. 145 of 1997, it was held that the court has a duty to examine the process of acquisition of such title and if it determines that there is an illegality, should nullify the titles as required.”**

The apex court also shed light on the relevance of a historical background analysis insofar as acquisition of title is concerned restating that the ownership of land whose title was not acquired regularly is not protected

under Article 40 of the Constitution on the protection of right to property. It held as follows in **Dina Management Limited vs. County Government of Mombasa & 5 others (supra)**:

***“Where the registered proprietor’s root title was under challenge, it was not enough 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 and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register.”***

**Section 26 of the Land Registration Act, Act No. 3 of 2012**, provides that a title which was acquired by way of fraud or misrepresentation, where a person is proved to be a party can be attacked. So too a title which was acquired illegally, procedurally or through a corrupt scheme. The said Section is drawn as follows:

***“26. (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.”***

- 45.** Being guided by the above, the court then has to consider the evidence adduced during trial. From the analysis of the proceedings before the trial court, the Appellant failed to demonstrate how he acquired the certificate of title and subsequently how the same was registered in his name.
- 46.** While the Appellant’s title was issued in 2013, there was no evidence that he ever applied for the same. There was an offer letter to him on record but it did not demonstrate compliance and as such the Appellant failed to explain to the satisfaction of the trial court how he acquired the title.
- 47.** As such the Appellant’s counterclaim had not been proven to the satisfaction of the court and hence could not be entitled to the reliefs sought in his counterclaim.

**Issue no. iii**

**Whether the Respondent’s case was proven to the required standard before the trial court.**

- 48.** The Respondent's case before the trial court was that he was the bonafide owner of the land known as Taita Taveta/Lumi Timbwani/42. In the diverse dates as from the year 2010 there existed a land dispute pertaining to the suit parcel. The Appellant colluded with the lands office and registered the Respondent's land No. 42 and made an illegal subdivision which the Respondent was given No. 437 carved from the same parcel without his knowledge yet the Appellant land is No. 45.
- 49.** Two witnesses were called to support his case. From the analysis of the evidence that was tendered, the land was illegally registered to the Appellant and title issued. The issue was raised with the land registrar but remained unresolved. The Respondent's testimony was corroborated with that of PW2 who was present when the land was surveyed where it was required that one had to produce an ID card to be registered. During the said process, PW2 produced the Respondent's ID card as the Respondent was away. The name of the Respondent was recorded. However, the Respondent was given 0.5 Ha

and the Appellant was given 0.2 Ha whereas the two-parcel used to be the same parcel belonging to the Respondent. 0.2 Ha was fraudulently and wrongly registered in the names of the Appellant. The Respondent was thus able to prove fraud which was had been pleaded.

- 50.** It therefore follows that the Respondent's case was proven to the satisfaction of the trial court and was deserving the grant of the reliefs sought in his Plaint.

**Issue No. iv**

**What are the appropriate reliefs**

- 51.** In his memorandum of appeal dated 11<sup>th</sup> June 2025, the Appellant prayed for the appeal herein to be allowed and the judgement of the trial court be set aside together with costs of the Appeal.
- 52.** Whatever the sentiments, beliefs and position held by the Appellant, it is imperative to reiterate that the burden of proof laid on the Appellant. Unfortunately, the Appellant failed to discharge the burden before the trial court.

- 53.** Flowing from the foregoing; and having taken into account the guiding principles espoused in the decisions in **Mwanasokoni vs Kenya Bus Service Ltd [1985]eKLR; and Jabane vs Olenja [1986]eKLR**, I come to the conclusion that the decision of the trial court was solid; sound and well grounded.
- 54.** Simply put, I come to the same conclusion as the trial court, namely; the Appellant did not prove his claim.
- 55.** In respect to costs, the principles for awarding costs are governed by section 27(1) of the Civil Procedure Act, which grants the court full discretion, with the proviso that costs shall follow the event unless the court, for good reason orders otherwise. Having found that the appeal lacks merit, it therefore follows that the Respondent being the successful party is entitled to costs of defending the Appeal.
- 56.** From the analysis of the issues outlined herein in line with the grounds raised in the memorandum of appeal, this court can only arrive to the conclusion that the appeal is devoid of merit. In view of the foregoing, it is

the finding of this court that the trial magistrate did not commit any error of principle of law. It is therefore not open for this court to interfere with the same.

- 57.** The upshot is that after careful review and analysis of all the grounds of appeal and the entire record, I find no fault with the decision of the learned magistrate. Consequently, the appeal fails and is hereby dismissed.

### **Final orders**

- 58.** In the premises, and for the reasons alluded to; the final orders that commend themselves to the court are as hereunder;

- i. The Appeal be and is hereby dismissed.***
- ii. The Judgment of the trial court; and the consequential decree arising therefrom be and is hereby affirmed.***
- iii. The costs of the Appeal are awarded to the Respondent and assessed at Kshs 40,000/=***

**Dated, Signed and Delivered Virtually at Voi this 16<sup>th</sup>  
day of December 2025.**

**E. K. WABWOTO  
JUDGE**

ORIGINAL