

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT VOI

ELCLA NO. E007 OF 2025

WILLIAMSON

MBARARIA

-----**APPELLANT**

VERSUS

ELIUD WACHIRA WAMAHIU -----

RESPONDENT

**(Being an appeal from the Judgment of Hon. C.K.
Kithinji (PM) delivered on 26/01/2025 in Voi PMC ELC
No. E001 of 2023)**

JUDGMENT

Background

- 1.** The Appellant, who was the Defendant at the trial court, had been sued by the Appellant vide a Plaint dated **17th January 2023**. The Respondent had sought the following reliefs:-

(a) A Declaration that the Plaintiff is entitled to exclusive and unimpeded right of

possession and occupation of parcel of land known as TAITA TAVETA/VOI BOMANI PHASE 1/554.

(b) A declaration that the Defendant whether by himself or agents and/or otherwise howsoever are trespassers and wrongfully in occupation of the parcel of land known as TAITA TAVETA/VOI BOMANI PHASE 1/554.

(c) An order that the Defendant and all other trespassers do forthwith vacate the parcel of land known as TAITA TAVETA/VOI BOMANI PHASE1/554 and deliver vacant possession thereof to the Plaintiff.

(d) In default of (c) above the Plaintiff be at liberty to so evict or cause the Defendant his servants or agents and or otherwise howsoever to be evicted from the suit

property and remove all the buildings and structures thereon.

- (e) A permanent injunction restraining the Defendant from remaining, cultivating, interfering with or doing any other act which is prejudicial the Plaintiff's quite enjoyment and occupation of parcel of land known as TAITA TAVETA/VOI BOMANI PHASE 1/554**
- (f) General damages for trespass to the land.**
- (g) Costs of the suit and interest.**
- (h) Any such other relief as this Court may deem appropriate.**

2. The Respondent claimed that he was the registered owner of the land and had a title deed of the same issued on 8th August 2013. Sometimes in 2019 he visited the property accompanied by a surveyor in order to identify the beacons but they were met by a hostile group of people who prevented them from reaching the

land and the surveyor was only able to point out the land to the Plaintiff from a distance. The incident was reported to the police station and later on 14th and 25th September 2020 he proceeded to the suit land and began fencing however the process was stopped when a group of individuals threatened his workers and he equally reported the said incident to the police.

3. It was averred that the Appellant entered into and has remained in occupation of the land thereby trespassing on the same.
4. The Appellant opposed the suit through a statement of defence dated 21st June 2023. He denied the contents of the Plaint and averred that there is pending litigation between the parties vide Criminal Case No. E097 of 2020 and he thus sought for dismissal of the suit and a declaration that he is entitled to peaceful and quiet possession of the land.
5. At the trial, **Eliud Wachira Wamahiu** the Respondent testified as **PW1**. He relied on a witness statement dated 17th March 2023 as his evidence-in-chief. He produced all

his documents as exhibits in his list and bundle of documents dated 17th August 2023.

6. When cross examined he stated that he had not lived on the land after acquiring it and had not interacted with the neighbours. He also stated that the beacons were shown to him before he was issued with a title.
7. **Williamson Mbararia** the Appellant testified as **DW1**. It was his testimony that he is still in occupation of the suit parcel having acquired it in 2008. He stated that the said property was bushy and vacant when he moved in and he cleared the bush and constructed on the same only to be told later in 2020 that he had constructed on someone else land. He also stated that there are confusing plot numbers being No. 556 and 557 but he is not in either of the same.
8. When cross examined he conceded that he does not have any ownership documents because according to him the land is in a settlement scheme. He also stated that he has been on the land without the Respondent's permission and was only informed in 2020 that the land

belonged to the Respondent. He also stated that he had paid Ksh 4,350 to the scheme and Ksh 3,500 to the committee in respect to the land. He further stated that he has lived on the land with his family from the year 2008. His construction extends to the Respondent's parcel and he is willing to vacate from the said portion.

The Appeal.

9. After reviewing the evidence, the trial court rendered its judgment in favour of the Respondent. The Appellant, by a Memorandum of Appeal dated **11th February 2025**, faulted the decision of the trial court. The grounds raised in the said appeal were as follows:-

i) The Learned Magistrate erred in law and fact in failing to recognise that the Appellant has a valid interest in Plot No. Taita Taveta/Voi Bomani Phase 1/554.

ii) The Learned Magistrate erred in law and fact in not finding that the Appellant had proven his case.

- iii) The Learned Magistrate erred in law and fact in not finding that the Appellant had proven his case.***
- iv) The Learned Magistrate erred in law and fact by falling to consider that the Appellant has stayed in the said suit property for long without interference from anyone.***
- v) The Learned Magistrate erred in law and fact falling to consider the evidence sufficiently produced by the Appellant to prove his case beyond reasonable doubt.***

10. Based on the said Memorandum of Appeal, he sought to have the Appeal allowed and the judgment of the trial court be set aside.

Directions of the court

11. Pursuant to the directions issued by the Court on 8th October 2025, It was directed that the Appeal be canvassed by way of written submissions. The Appellant was granted 21 days to file and serve his written

submissions and the Respondent was granted similar duration of time to comply.

Submissions of the parties

- 12.** Despite the parties herein being granted adequate time to file their written submissions, the court notes that there was no compliance from either party as at the time the court retired to write its judgment in respect to this appeal. That notwithstanding, this court is still obligated to consider the entire record of appeal and the memorandum of appeal outlining the grounds of appeal in rendering its judgment.

Analysis and Determination

- 13.** In **Ciero & Another -vs- Njanja & Others Civil Appeal 111 of 2022 [2025] KECA 1541 KLR] (3rd October 2025) (Judgment)**, the court said the mandate of the appellate court of first instance is to analyze and re-assess the evidence on record and reach its own conclusion, but, as held in **Gitobu Imanyara - vs- Attorney General [2006] eKLR**, it has to give

credit to the lower court, which saw and heard the witnesses testify.

14. Having considered the entire record of appeal and the grounds of appeal filed herein, the issues calling for my determination are:

(1) Whether the trial court was justified based on the facts, evidence and the law in arriving at the decision to grant the Respondent the reliefs that were sought.

(2) If the Appellant has a meritorious appeal.

(3) What is the order as to costs?

15. In this appeal, the Appellant faulted the trial magistrate for failing to consider that he had stayed in the suit property for long and had a valid stake in the suit parcel.

16. During his cross examination he stated that he had no documents in respect to property and that he became aware of the Respondent's interest to the property in 2020.

17. From the evidence that was tendered during trial, it was evident that the Appellant had no title or ownership

documents linking him to the land. The Appellant equally conceded in cross examination that he had not engaged any surveyor prior to undertaking any construction on the land.

- 18.** The evidence on record which the court has analyzed demonstrated that the Respondent is the registered owner of the property having acquired it in the year 2004 through the then Settlement Fund Trustees, upon which he paid a consideration of Ksh 5,765 vide a receipt dated 19th October 2004 and was subsequently issued with a title deed on 8th August 2013. This evidence was not contested by the Appellant.
- 19.** From the evidence that was tendered before the trial court, the Respondent demonstrated that he is currently the registered proprietor of the suit property, having lawfully acquired the same. It is worth pointing out that the transfer and registration of the suit property in the name of the Respondent has not been denied.
- 20.** Owing to the fact that the Respondent is the registered owner of the suit property and coupled with the issuance

of the certificate of title in his favour, there is no gainsaying and as rightfully held by the trial court that the Respondent herein is the lawful proprietor of the suit property. For good measure, the certificate of title in the name of the Respondent has neither been challenged and/or impeached.

- 21.** By virtue of being the lawful owner of the suit property, the Respondent was indeed entitled to the statutory rights and privileges conferred by dint of Sections 24 and 25 of the Land Registration Act, 2012. The Appellant's contention on occupation of the land cannot override the Appellant's right to the same.
- 22.** Additionally, it is important to underscore that by virtue of being the lawful owner of the suit property, the Respondent is therefore entitled to exclusive possession and occupation. For coherence, the exclusivity of possession and occupation of the designated land, constitute the fundamental features that inhere in the registered owner of the land, the Respondent not excepted.

23. The scope of the rights of a registered owner of landed property were highlighted and elaborated upon in the case of **Mohansons (Kenya) Limited v Registrar of Titles & 2 others [2017] eKLR**; where the court stated and observed thus;

“ [18] As held by the Court of Appeal for East Africa held in *Moya Drift Farm Ltd. v. Theuri* (1973) EA 114 a registered proprietor of land is the absolute and indefeasible owner of land and is entitled to take proceedings for trespass and eviction of a trespasser even if he did not have possession of the property. Spry, V-P at 116, considered the effect of section 23 of the Registration of Titles Act and held:-

“I cannot see how a person could possibly be described as “the absolute and indefeasible owner” of

land if he could not cause a trespasser to be evicted. The Act gives a registered proprietor his title on registration and, unless there is any other person lawfully in possession, such as a tenant, I think that title carries with it legal possession: there is nothing in the Act to say or even suggest that his title is imperfect until he has physical possession.”

**Sir William Duffus, P. *ibid* at p.117
agreed with Spry, JA as follows:**

“In any even I agree with the Vice-President that the fact that the appellant was the registered proprietor as owner in fee simple under the Registration of Titles Act, and as such vested with the

absolute and indefeasible ownership of the land, was sufficient to vest legal possession of the land in the appellant and that this possession would be sufficient to support the action of trespass against a trespasser wrongly on the land.”

The third member of the Court, Lutta, JA agreed with the judgment prepared by the Spry, V-P.

25. Furthermore, the nature of the rights that belong to the registered owner of land were also elaborated in the case of **Waas Enterprises Limited v City Council Of Nairobi & another [2014] eKLR**, where the court stated as hereunder;

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“To my understanding since the 2nd defendant has been in the suit property illegally, she is a trespasser. As a

registered proprietor, the plaintiff is entitled to enjoy all proprietary rights to the exclusion of all others. This includes the right to exclusive possession of the suit land. The rights of a proprietor of land are set out in Sections 24 and 25 of the Land Registration Act which provide as follows :-

“24. Subject to this Act—

(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 the lease.

25. (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—

1. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

2. 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."

It therefore follows from the above that only the plaintiff is entitled to enjoy proprietary rights over the suit land.

The 2nd defendant had no right to the suit land.

Other than the foregoing, the Court of Appeal in the case of **Embakasi Properties Limited & another v Commissioner of Lands & another [2019] eKLR**, highlighted the scope of the rights in the following manner;-

“The three main principles of the Torrens system were aptly summarized by the Canadian Court of Appeal in the case of Regal Constellation Hotel Ltd Re 2004 Can LII 2006 Ontario C.A.) Page 13 para 42 as follows:

“42. The philosophy of land titles system embodies three principles, namely, the mirror principle, where the register is a perfect mirror of the state of title; the curtain principle, which holds that a purchaser need not

investigate the history of past dealings with the land, or search behind the title as depicted on the register; and the insurance principle, where the state guarantees the accuracy of the register and compensates any person who suffers loss as the result of an inaccuracy.”

We reiterate that under the insurance principle the State guarantees the accuracy of all registered titles through the register; and that there would be indemnity in case a registered proprietor is deprived of his title or is prejudiced by a correction of any mistake in the register. The mirror principle is a guarantee that the register is a perfect mirror of the state of title while the curtain principle holds that a purchaser need not worry about

the history of the title so long as from the register it is clear that whoever is transferring the property to him has the capacity.

26. By virtue of being the registered owner of the suit property, the Respondent is bestowed with certain statutory rights and privileges which attach to ownership of land. Such rights are underpinned by the provisions of Sections 24 and 25 of the Lands Registration Act, 2012.

27. In this regard, the Respondent is entitled to the suit property to the exclusion of all and sundry. In any event, such rights exist until the Respondent is legally divested of the rights thereto. This is the import and tenor of Article 40 (3) of the Constitution, 2010.

28. Judgments are based on the credibility; weight and probative value of the evidence. [**See the decision of the Court of Appeal in the case of County Government of Bungoma and 2 Others versus JOO and 2 Others [2024]KECA 1377**].

29. 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 learned magistrate was solid; sound and well grounded.

30. Having analysed the issues that were highlighted in the body of the Judgment; and upon considering the totality of the evidence, I come to the conclusion that the subject appeal is devoid of merit.

Final orders

31. 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. Each party to bear own costs of this Appeal.

Dated, Signed and Delivered Virtually at Voi this 16th day of December 2025.

**E. K. WABWOTO
JUDGE**