

REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT NAIROBI
ELCLA. NO. E204 OF 2024

JOSEPH KARIAH WANJUE.....
.....APPELLANT

VERSUS

ALEX KAGAI GITHITU.....1ST
RESPONDENT

EMBAKASI RANCHING
COMPANY LIMITED.....2ND
RESPONDENT

JUDGMENT

1. The appellant being aggrieved by the judgment of the Chief Magistrate Court in MCELC-1 of 2022 delivered by Hon. Lucy Njora (SPM) on 27th November, 2024 filed the memorandum of appeal dated 29th November, 2024 challenging the said judgment on the following grounds:-

1. That the learned trial magistrate erred in law and in facts in basing her findings on irrelevant issues not supported by evidence adduced or applicable law.

2. That the learned trial magistrate erred in law and in fact in dismissing the plaintiff's amended plaint despite overwhelming evidence to the contrary.

3. That the learned trial magistrate erred in law and in fact by considering extraneous circumstances not before court.

- 4. That the learned trial magistrate erred in law and in fact by failing to consider the appellant's submissions and evidence on record which was not even challenged and/or disputed.**
 - 5. Other grounds as may be adduced with leave of this honourable court.**
2. The appellant prays for the following orders:-
- a. That the finding of the trial magistrate on dismissing the appellant's suit and/or amended plaint be set aside, be reviewed and/or revised and/or be substituted with a judgment as per the appellant's prayers in the amended plaint.**
 - b. That this honourable court do make such further orders as it may deem fit.**
 - c. That this appeal be allowed with costs to the appellant.**
3. The grounds of appeal were canvassed through written submissions. The appellant filed his written submissions dated 15th November, 2024 where he raised five issues for determination as listed below:-

- a. *Whether the appellant proved ownership of parcel no. 136/11096 on a balance of probabilities.*
 - b. *Whether the learned trial magistrate exceeded her judicial mandate by taking up the role of defence.*
 - c. *Whether the appellant is a bona fide purchaser for value and entitled to the property in equitable interest.*
 - d. *Whether the appellant was entitled to the declaratory and injunctive reliefs sought.*
 - e. *Who should bear the costs of the appeal.*
4. On the first issue, the appellant submitted that pursuant to **Sections 107 to 109** of the **Evidence Act** on the burden of proof, and once a party adduces documentary evidence of ownership as he did, the evidential burden shifted to the respondents to disprove those facts. He relied on the cases of **Wangui & 2 Others v Wangui & Another [2022] KEELC 3755 (KLR)**, and **Mohamed v Duba & Another (Civil Appeal (Application) 83 of 2019) [2022] KECA 1384(KLR) (16 December 2022)**. The appellant submitted that he produced the documents contained in the record of appeal such as the sale agreement, allotment letters, plot cards, leases, and receipts. He submitted that he demonstrated an unbroken

chain of the suit property from 1988 to 2018 which was corroborated by company issued records.

5. The appellant further submitted that the bundle of documents traced allocation to subsequent internal confirmations linking the suit property. Further, that the trial court erred in discounting the documents as not proof of ownership without assessing the probative value in the 2nd respondent's allocation framework in the context of unregistered land.
6. On the second issue, the appellant submitted that in the absence of the respondents' pleadings, the trial court ought to adjudicate the matter on the evidence available. That by introducing extraneous doubts and questioning the authenticity of his documents, the court improperly took up the role of defence counsel and filled evidentiary gaps that the respondents had abandoned. Further reliance was placed in the cases of **Galaxy Paints Co. Ltd v Falcon Guards Ltd [2000] KECA 215 (KLR)**.
7. On the third issue, the appellant submitted that having paid consideration for the suit property, he is a bona fide purchaser for value without notice. To buttress on this issue, reliance was placed on the case of **Weston Gitonga & 10 Others v Peter Rugu**

Gikanga & Another [2017] eKLR, Dina Management Ltd v County Government of Mombasa & Others [2023] KESC 30 (KLR) and Funzi Development Ltd & 2 Others v County Council of Kwale & 2 Others [2014] eKLR.

8. On the fourth and fifth issues, the appellant submitted that he is entitled to the orders as sought in the plaint and costs of the suit.
9. The 1st respondent filed his written submissions dated 5th January, 2026 where he raised two issues for determination as follows:-
 1. ***Whether the honourable judge erred in law and fact in dismissing the amended plaint.***
 2. ***Whether the appellant has presented a compelling case regarding his status as an alleged proprietor.***
10. On the first issue, and while relying on the cases of **Rosaline Mary Kahumbu v National Bank of Kenya Ltd [2014] eKLR, Samson Maitai & Another v African Safari Club Ltd & Another [2010] eKLR, and Gichinga Kibutha v Caroline Nduku [2018] KEELC 3981 (KLR)**, the 1st respondent submitted that the trial court was guided by the principles enunciated in these authorities and proceeded to strike out the amended plaint in accordance with the law.

11. On the second issue, the 1st respondent submitted that the petitioners did not present proof of ownership of the suit property either, a title deed, a certificate of title, an allotment letter or a copy of search and thus failed to demonstrate how he could possibly be the proprietor of the suit property. He submitted that being a shareholder and obtaining a share certificate are distinct statuses, and do not mean the same thing.
12. In conclusion, the 1st respondent submitted that in the absence of ownership documents, the prayers sought are outrageous and the appeal ought to be dismissed with costs.
13. I have considered the grounds of appeal and the written submissions filed by the appellant and the 1st respondent. The issue for determination is *whether the appeal has merit*.
14. This is a first appeal and the law is that this court is entitled to revisit the evidence on record, evaluate it and arrive at its own conclusion. Often times, an appellate court will not interfere with the findings of fact by the trial court unless they were based on no evidence at all, or were arrived at on a misapprehension of it or the trial court is shown to have acted on wrong principles in arriving at

those findings as it was held in **Mwanasokoni versus Kenya Bus Service Ltd 1982 - 88 I KAR 278.**

15. The appellant filed the amended plaint dated 27th April, 2022 seeking the following orders:-

i. A declaration that the plaintiff is the bona fide owner of parcel number 136/11096, Embakasi Ranching with effect from 18th April, 1988.

ii. A permanent injunction restraining the 1st defendant by himself, his servants, agents, clients, employees or any developers from in any way dealing or interfering with the plaintiff's rights in the property by trespassing, disposing off, wasting damaging, alienating, dealing selling, transferring, constructing or in any other way encumbering the parcel of land known as parcel no. 136/11096, Embakasi Ranching.

iii. The foresaid activities especially the demolition of the structure(toilet) already built be enforced and supervised by the Officer Commanding Police Division (OCPD) and/or OCS Officer in Charge of Station, Ruai Police Station.

iv. Costs of the suit.

v. *And any other or further relief or order that meets the ends of justice be made as this honourable court may deem fit to grant.*

- 16.** In the amended plaint, the appellant pleaded that jointly with the late Anna Muteti, they are the bona fide purchasers of the parcel of land known as 136/11096 Embakasi Ranching as from 18th April, 1988 having purchased the same from the 2nd respondent and issued with an ownership certificate dated 6th December, 1990. Further, he pleaded that he proceeded to acquire the title deed, and he was shocked to discover that the same property was being claimed by the 1st respondent.
- 17.** The appellant pleaded that the parcel of land remained bare without any improvements until 2021 when he realized that there was a structure that was constructed by the 1st respondent. He pleaded that the 2nd respondent enabled the 1st respondent to claim ownership hence erecting the illegal structure.
- 18.** The respondents did not enter appearance and neither did they file their defence. This matter proceeded for formal proof hearing on 7th August, 2024. The appellant testified that he had been a member of the 2nd respondent from 18th April, 1988 and that he was issued with a share certificate which is issued upon purchase of shares. He stated that he was in the process of acquiring the title

deed but he did not have any documentation from the land's registry. He stated that he knew the 1st respondent after he went to the land's office in the year 2021 after the presidential directive. The appellant stated that in the year 2018, the toilet was not there and the same was constructed between the years 2020 and 2021. He stated that parcel number 3287 was given by the 2nd respondent and the surveyor changed the same to 2507.

19. The court considered the pleadings before it and considered three issues for determination as follows:-

a. Whether the plaintiff is the lawful owner of parcel number 136/11096.

b. Whether the plaintiff is entitled to the remedies sought.

c. Who should bear the costs of the suit.

20. Indeed, it is trite law that he who alleges must prove. This court having analyzed the record herein, it is evident that the facts of the case were not contested as no defence was filed. The trial court needed to satisfy itself that the appellant had proved his case on a balance of probabilities. In doing so, the court would be guided to carefully and critically analyze the documentary evidence presented vide the documents produced and the law. In this case,

the appellant produced the documents contained in his list of documents.

- 21.** I have looked at the documents produced in the list of documents dated 28th February, 2022 and the further list of documents dated 27th April, 2022. It is worthy to note that the impugned judgment does not refer the particular documents produced and the court would thus assume that the documents contained in both list of documents were produced. The appellant produced copies of receipts which referred to share certificate numbers 11926 being payments for the civil engineering fees, survey fees, and a share certificate dated 18th April, 1988 with the block no. 136/11096 written by hand. The signatures are also by hand as well as part of some writings on the top of the page which appears to be struck across. There is also a copy of provisional letter of allocation of plot number C2507 which appears to be dated 28-11-82, and a blank paper reading "allocated 8/2/96" with a signature appended thereon. The dates in my view are contradictory i.e. as it appears on the provisional certificate and the blank page. The diverse dates were not explained either in the pleadings or in the submissions. It also appears that there was a site visit conducted wherein a map c indicated that P3287=C2507=136/11096, the same said to have been entered in the register as P3287 and signed by the vice chair of the 2nd respondent on 13th August, 2019.

22. Having looked at the evidence tendered, I draw similar observations to that of the trial court to the extent that the appellant did not call the necessary witnesses to confirm the handwritten documents which he contended were made by the surveyor. The authorities cited by the trial court were indeed relevant and applicable to the case to the extent that the appellant needed to demonstrate a solid chain of ownership which he failed to do.
23. It is necessary to note that while the suit was undefended, the court needed to be satisfied that the appellant had met the threshold, and it was not obvious for him to obtain the orders as intimated. There is need to prosecute matters proceeding for formal proof with the same zeal and seriousness as defended suits, because in both instances, the evidence tendered is tested against the relevant provision of law and more so the **Evidence Act** as it is the case here.
24. In my view, the trial court did not assume the role of the defence, as submitted by the appellant. I find no reason to disturb the findings of the trial court. The memorandum of appeal dated 29th November, 2024 lacks merit, and it is hereby dismissed. Each party to bear its own costs.

It is so ordered.

**DATED, SIGNED & DELIVERED VIRTUALLY
THIS 22ND DAY OF JANUARY, 2026.**

**HON. MBOGO C.G.
JUDGE
22/01/2026.**

In the presence of:

Ms. Vena Aron - Court assistant

Mr. Kariah for the Appellant

Ms. Omondi for the 1st Respondent

ORIGINAL