

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT
KITALE
ELC APPEAL NO. E016 OF 2024

HENRY WENG'ANG'A OPICHO-----
APPELLANT

VERSUS

BOAZ MALESI-----1ST
RESPONDENT

GEORGE KIOMBE-----2ND
RESPONDENT

***(Being an Appeal arising out of the Judgment or
Decree of Hon. S.N. Makila (PM) delivered on
26/6/2024 in Kitale CMCC Land Case No. 20 of 2019)***

BETWEEN

HENRY **WENG'ANG'A**
OPICHO-----PLAINTIFF

VERSUS

PHIBOAZ MALESI-----
1ST DEFENDANT

GEORGE KIOMBE-----2ND
DEFENDANT

JUDGMENT

1. The appellant, who was the plaintiff at the trial court, had sought a permanent injunction against the respondents to restrain the respondents from entering, remaining, trespassing, planting, erecting any structures, wasting, damaging, alienating, charging, or in any way whatsoever, interfering with his quiet possession of title No. **Kiminini/Kiminini Block 8/191**.
2. The appellant contended that he was the sole registered owner of the suit land measuring **2.3068 Ha**, to which the respondent, on **9/3/2018**, without any colour of right or justification, had forcefully entered or trespassed into, planted maize, and had denied him his right to quiet enjoyment of his property.
3. The 1st respondent opposed the suit through a statement of defence and counterclaim dated **3/10/2019**, alleging to be the *bona fide* beneficial owner of the suit land after it was allocated to him in **1980**.
4. By way of a counterclaim, the 1st respondent averred that he was a member of Birunda Farmers Company, holding **5** shares since **1979**, as indicated in the area list as plot No. **99**, whereby he took possession in **1980**, erected a residential home, and has been in full possession to date.

5. The 1st respondent averred that the appellant being one of the officials of the Birunda Farmers Company, he capitalized on his position to fraudulently register the suit land under his name by altering the original area list, secretly presenting the altered area list to the Land Registrar, without disclosing the same to members to verify and or authenticate, and altering the register to register his names without any basis save for greed.
6. The 1st respondent averred that the appellant has been an immediate neighbour for close to **40** years, only to turn around against him, yet his homestead speaks volumes as to the years of existence for decades on the suit land, for him to allege trespass in **2018**.
7. Further, the 1st respondent termed the appellant as a pathological liar, since the suit land is his only source of livelihood and has been known as his sole owner by the appellant for decades, only that he had secretly altered the area list and presented it to mislead the Land Registrar, as to who was the *bona fide* owner, to fraudulently obtain the registration and issuance of title deed, which he demand to be cancelled and fresh one issued to him.
8. The 1st respondent averred that on **31/8/2002**, he disposed of **1.5 acres** of his parcel to one Sanford

Amugongo Matindu, who took actual possession to date in full glare of the appellant, whose farms are adjacent to each other, and that the appellant should be contented with his land by virtue of his age and integrity.

9. The 1st respondent counterclaimed for:
 - (a) **Declaration that the title deed to the suit land belongs to him.**
 - (b) **Cancellation of the appellant's title deed and in place another title to be issued to him, indicating 3 ½ acres in his favour and 1 acre in favour of Sanford Amugongo Matindu.**
10. From the appeal record, there is no evidence that the 2nd respondent was served with a summons to enter an appearance or the hearing notice. Similarly, the appeal record has no pleadings to show if the appellant filed a reply to the defence and defence to the counterclaim by the 1st respondent.
11. At the hearing, **Henry Wenganga Opicho** testified as **PW1**. He relied on a witness statement dated **10/4/2018** as his evidence -in-chief. PW1 told the court that he became the registered owner of the suit land measuring **1.62 Ha** as a shareholder of Birunda Farm, where he held **18 shares**, and was

allocated the land, took possession, and began to use it.

12. PW1 said that the 1st respondent, on the other hand, owns title No. **Kiminini/Kiminini Block 8/245** measuring **5 acres**, but without any colour of right, was illegally trespassed into his land, and forcefully started using it, and went to the extent of selling a portion of it to a third party, without his consent, knowledge, or authority.

13. PW1 said that despite the demand for the stoppage of acts of trespass, the 1st respondent had always threatened him with violence using crude weapons, leading to a police report. PW1 relied on a title deed as **P. Exhibit No. (1)**.

14. In cross-examination, PW1 said that he acquired a title deed in **2017** and was also among the directors of Birunda Farm. He said that the 1st respondent was never a member of Birunda Farm. PW1 could not tell the number of the shareholders since he had not produced either a share certificate or the area list. He denied owning plots No. **195** and **205** as per the area list.

15. PW1 said that the 1st respondent grabbed his plot No. **191** in **1979** and erected a residence thereon before he acquired the title deed. PW1 said that one must have a share certificate before acquiring a title

deed. PW1 said that all the shareholders of the Farm were required to pay survey fees to acquire the title deed. PW1 could not remember any meeting of **7/8/2022** in which it was established that he was one of the defaulters owing the company **Kshs.77,964/=**. PW1 denied using his position as a director to fraudulently obtain the title to the suit land.

16. Boaz Malesi Musi testified as **DW1**. He relied on a witness statement dated **3/10/2018** as his evidence-in-chief. He told the court that on **30/6/1979**, he bought shares in Birunda Farm and obtained a share certificate No. **80** after paying **Kshs. 10,000/=**, equivalent to **5 acres** of land as per the area list showing his membership No. **35**, produced as **D. Exhibit No. 19**.

17. DW1 said that the first survey of the land took place in **1988/1991**, and all the members were to pay survey fees of **Kshs.25/=** through Kiarie & Co. Advocates. DW1 said that in the second area list, his name appears as member No. **245**, where, according to the minutes of **7/8/1988**, he was member No. **45**, where he paid **Kshs. 10,000/=** for **5 acres**. DW1 also produced minutes for a meeting held on **7/8/1979**. He produced the area list as **D. Exhibit No. 2(a)**.

18. Further, DW1 relied on an area map for **1988/1991** as **D. Exhibit No. D. (3)**. DW1 said that another survey of the land was done in **2016** and in **2017**, in which his plot became No. **586**. He produced the two survey maps as **Exhibit No. D. (4)** and **(5)**. DW1 said that the plot on the ground where he has lived since **16/4/1980** has not changed. He produced photographs showing his building as **D. Exhibit No. 6(a)** and **(b)**.

19. DW1 said that on **13/4/2018**, the Farm was invaded by the appellant, after which he lodged a report with the area chief and the Land Registrar. DW1 said that the chairman of the Farm wrote a letter to the County Executive Member for Land Trans Nzoia County dated **14/5/2018**, produced as **D. Exhibit No. (7)**, DW1 said that his plot is fully developed with an orchard farm and has been connected with electricity since **2018**. He produced a letter dated **13/9/2008** applying for the electricity connection and water invoices and bills from Nzwasco as **D. Exhibit No. (8)** and **(9)**.

20. DW1 told the court that he had also sold **1.5 acres** of his land to Sanford Amugongo Matindu, as per the agreement dated **2002**, produced as **D. Exhibit No. (10)**. DW1 said that his name has been on all the documents of the Birunda Farm since **1979**, as

has been his occupation on the ground; hence, the appellant abused his directorship powers to alter the records and acquire title for his land.

- 21.** DW1 said that the appellant destroyed or vandalized his electricity line, water pipes, and the orchard farm. DW1 denied entering and remaining on the land in **1980** by force.
- 22.** After hearing the suit, the trial court dismissed the appellant's suit and allowed the 1st respondent's counterclaim.
- 23.** By a memorandum of appeal dated **11/7/2004**, the appellant, through **11** grounds of appeal, faulted the trial court:
 - (a) For relying on inadmissible evidence produced by the 1st respondent to find his defence and counterclaim proved.**
 - (b) For finding that his title was defeasible when the 1st respondent produced no evidence on fraud.**
 - (c) For shifting the burden of proof to him.**
 - (d) For allowing the 1st respondent counterclaim when he had no share certificate or sale agreement to sustain his claim.**
 - (e) For failing to fully analyze and evaluate the evidence on record on the proof of acquisition of land.**
 - (f) For giving a judgment that is against the law and the weight of evidence tendered.**

24. The appeal was to be canvassed by way of written submissions. The appellant relies on written submissions dated **6/2/2026**. On grounds 1, 2, and 13 of the appeal, he submits that the documents were unsupported and inadmissible since they were not produced as exhibits. Reliance is placed on *Nyaga Mwigie v Austin Kiguta*
25. On grounds **3,4, 5, 9,10,11** and **12**, the appellant submits that there was no evidence tendered to prove the facts. He relies on **Section 3(3)** of the Law of Contract Act and in **Odinga -vs- Independent Electoral and Boundaries Commission & 3 others(Petition 5 of 2013) [2013] KESC 2 (KLR).**
26. The applicants submit that on grounds **6, 7, 8, 14, and 15**, the trial court did not decide based on the evidence tendered as heard in **James Njambi -vs- James Kamau Waweru [2022] eKLR** and **RG Patel -vs- Lalji Makanji (1957) EA 314.**
27. The 1st respondent relies on written submissions dated **24/2/2026**. He submits that the appellant closed his case and the matter proceeded to the defence hearing, and did not object to the production of the said documents. Reliance is placed under **Munyu Maina -vs- Hiram Gathiha Maina (2013) eKL.** The 1st respondent further

submits that the appellant has a title deed, but failed to explain how he got it, and that his registration cannot override the 1st respondent's prior proprietary interest. The 1st respondent submits that he established that the appellant's root of title was fraudulent, defective, and a nullity.

28. The role of this court sitting as an appellate court of 1 instance is donated by **Section 78** of the Civil Procedure Act.

29. In **Selle & Another -vs- Associated Motor Boat Co. Ltd & Others [1968] EA 123**, the court observed that as an appellate court ordinarily will not interfere with findings of fact by the trial court unless it is based on no evidence or there is a misapprehension of the evidence or the court acted on wrong principles.

30. As an appellate court of the first instance, this court is expected to subject the whole of the evidence tendered to a fresh and exhaustive scrutiny, and make its conclusion about its bearing, in mind that it did not have an opportunity, unlike the trial court, of seeing and hearing the witnesses testify.

31. In **Gitobu Imanyara and Others -vs- Hon Attorney General [2013] KEHC 6361 (KLR)**, the court said that it had the duty to exhaustively consider all the facts which were before the trial

court and come up with its independent findings. A party on appeal has a legitimate expectation that the appellant court proceed as if conducting a retrial, re-evaluate, and re-appraise the evidence below.

32. Having looked at the grounds of appeal and the lower court record, the issues calling for my determination are:

(1) If the appellant proves trespass and encroachment of his land by the respondents.

(2) If the 1st respondent was justified in entering, remaining, occupying, and developing the suit land.

(3) If the 1st respondent impeached the title held by the appellant on account of misrepresentation, illegality, fraud, overriding interests, prior occupation, use, and possession.

(4) If the 1st respondent was entitled to the reliefs sought in the counterclaim.

(5) Whether the appeal has merit.

33. It is a trite law that parties are bound by their pleadings, and issues for determination flow from the pleadings. See **Raila Odinga & Others -vs- IEBC & Others [2017] eKLR**. The purpose of pleadings is to lay out the facts and the issues for determination by the court and to give notice to the opposite party to prepare at the hearing. Facts and

issues are supported by the evidence available at the hearing by the parties. Any evidence at variance with the pleadings is to be disregarded. See **IEBC - vs- Stephen Mutinda Mule & Others [2014] EKLK**. Pleadings in law include a claim and counterclaim, but not the evidence.

34. In **Kemboi -vs- Macharia & Others Civil Appeal NO. 17 of 2020 [2025] KECA 1665 [KLR] (21st October 2025) (Judgment)**, the court cited **Dina Management Ltd vs County Government of Mombasa & Others [2023] KESC 30 [KLR]**, and **Munyu Maina vs Hiram Gathiha Maina (supra)** that where the registered proprietor's root title is under challenge, it is not enough to dangle the instrument of title as proof of ownership, and that a party must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrances including interests which will not be noted in the titles register.

35. The court said that where the initial acquisition of title is unlawful, all subsequent transfers to innocent purchasers are void. Further, the court said that where there are fundamental defects in the root of title, the appellant cannot claim protection under **Section 26** of the Land Registration Act.

36. The court in **Kemboi -vs- Macharia** (*supra*) said that:

“A certificate of title cannot cure an unlawful allocation process. A title is merely the end product of a process, and where the process is tainted, whether through procedural irregularity, fraud, or illegality, then the resultant title is void. No right can flow from nothing. A nullity at inception remains a nullity, no matter how many hands it passes through.”

37. In **Barmasai -vs- Rono & Others Civil Appeal No E068 of 2023 [2025] KECA 1489 [KLR] (19th September 2025) (Judgment)**, the court said that as a general rule, courts should determine a case based on the issues that flow from the pleadings. At the centre of the appellant’s case was trespass, encroachment, and occupation of his land by the respondents.

38. The 1st respondent filed a statement of defence and a counterclaim seeking the cancellation of the appellant’s title in account of the overriding interest of occupation since **1980**, superior interest or right, fraud, misrepresentation, and illegality in obtaining the title.

39. Order 7 Rule 3 of the Civil Procedure Rules provides that a defendant, other than filing a statement of defence, may set up by way of a counterclaim against the claim of the plaintiff in

order for the court to pronounce a final judgment in the same suit both on the original and on the counterclaim.

40. In **County Government of Kilifi -vs- Mombasa Cement [2017] KECA 633 [KLR]**, the court said that the rationale of **Order 7 Rule 3** of the Civil Procedure Rules is to avoid multiplicity of suits.

41. In this appeal, the appellant failed to file a defence to the counterclaim within **15** days upon service or at all, under **Order 7 Rule 11** of the Civil Procedure Rules. A counterclaim is an independent cause of action. Failure to file a defence to the counterclaim leaves the court with an option of finding the counterclaim undefended. See *Halsbury's Law of England Vol. 42* and **Kiprotich -vs- Gathua & Others Civil Appeal No. 19 of 1976.**

42. In his appeal, the appellant relied solely on a title deed to claim ownership of the suit land, yet there was a counterclaim challenging legality of his title deed and the manner in which he acquired it in **2017**, while the 1st respondent who is his immediate neighbour has been in exclusive control, possession, occupation, and development of the suit land since **1980** to the present, with no rival claim by the appellant.

43. In **General & Another -vs- Hussein & Others Civil Appeal No. 100 of 2018 Eldoret [2025]**

KECA 1022 [KLR] (5th June 2025) (Judgment),

the court said that when faced with conflicting claim on one disputed land, it must scrutinize the root of the title and follow all the process and procedures that brought forth the two titles at hand. The court further held that parties in such a litigation must demonstrate how they got their title, starting with its root. The court cited with approval, **Presbyterian Foundation -vs- Kibera Siranga Self Help Group Nursery School [2025] eKLR**,

that the elements of a good title include:

- (a)** *It must deal with or show the original of the ownership of the whole legal and equitable interest in the land in question.*
- (b)** *It must contain a recognizable description of the property.*
- (c)** *It must not contain anything that casts any doubt on the title.* The court said that a title documents not sufficient proof of ownership of property where the origin of that title has been challenged.

44. In this suit, the appellant had the burden of proof to prove trespass to his land. Trespass is defined in **Section 3(1)** of the Trespass Act as entry into private land and the commission of acts of

destruction without consent and authority of the owner or justification. See **Kenya Power & Lighting Company Ltd v Ringera & 2 others (Civil Appeal E247 & E248 of 2020 (Consolidated)) [2022] KECA 104 (KLR), Paul Wanyama & Others -vs- Johnson Mwongera Nyuki & Others, Mombasa Civil Appeal No. E111 of 2023.**

45. In **Warrakah (Suing as the Administrator and Legal Representative of the Estate of Gakweli Mohamed Warrakah - Deceased) -vs- Mwatsami [2024] KECA 579 (KLR)**, trespass was said to occur when a person enters upon land in possession of another without permission and remains there, places or project and object upon the land. The court said that the tort of trespass is aimed at enforcing possession rights, rather than proprietary rights, from unlawful interference.

46. In **Muthiora -vs- Marion Muthama [2022] KECA 28 [KLR]**, the court said trespass is unauthorized entry, whether present or continuous. To prove trespass, one has to show that one had immediate exclusive possession whose rights have been violated by the intruder. See **M'ikiara M'Makunya & Another -vs- M'Mbijiwe [1984] KLR.**

47. In *Margaret Iminza Luyayi -vs- Moses Opudo Mudaka [2019] eKLR*, the court observed that there was no wrongful entry or violation of the plaintiff's right of possession since it was the plaintiff who had invited the defendant to the suit property as a manfriend. Further, in *Ochako Obinchu -vs- Zachary Oyoti Nyamongo [2018] eKLR*, the court said that the onus is on the plaintiff to prove that he was the owner of the suit property and that the defendant had invaded and occupied the same without any justifiable cause.

48. In *Bandi -vs- Dzomo & Others [2022] KECA 584 [KL]R (24th June 2022) (Judgment)*, the issue was trespass. The respondent had a counterclaim on an alleged ownership right and long occupation of the land for **80** years as an ancestral home. The respondent had termed the appellant's title as fraudulently obtained. On appeal, the court emphasized that the appellant had the evidential burden to show that he acquired the title to the land in a regular, law-compliant fashion, and not in an opaque fashion.

49. The court cited *Embakasi Properties Ltd & Another -vs- Commissioner of Lands & Another [2019] eKLR*, that although a certificate of title is conclusive evidence that the person

named there is the absolute owner, there is no guarantee of the same if acquired corruptly, fraudulently, illegally, or unprocedurally. Fraud, illegality, and unprocedural must be specifically pleaded and proved. See **Vijay Morjaria -vs- Nansingh Madhusingh Darbar [2000] eKLR.**

50. In this appeal, the 1st respondent provided all the paper trail to show how he was allocated the land, as a shareholder of Birunda Farm, and how he has been in use, occupation, and possession of the suit land. The documents were not challenged by the appellant during their production before the trial court. The appellant, on the other hand, other than the title deed, did not provide or avail as part of his evidence documents to show the process by which he obtained the share certificate, and paid for the suit land to acquire its title deed in **2017**.

51. In **James Henry Mundia t/a Kabarak Development Services -vs- Tradewheel (K) Ltd [1987] eKLR**, the court said a suit is won on the strength of one's evidence and not the attack on the relative weakness of the defendant's title. In this appeal, three-quarters of the grounds of appeal by the appellant repeat the alleged weakness of the 1st respondent's evidence or pleadings.

- 52.** The appellant failed to plead to the counterclaim by way of a defence as to the illegality, unprocedural manner, misrepresentation of facts, breach of fiduciary duties as a director to alter the register and the area list, and to register himself as owner of the land belonging to his immediate neighbour, who has been in actual and exclusive occupation since **1980**, to present.
- 53.** The appellant blames the 1st respondent for trespass into the land in **2018**, yet evidence on record shows that the 1st respondent had superior, exclusive possessory and occupation interest preceding the registration of title in **2017**. The appellant did not find it necessary to produce a share certificate, receipts, area list, transfer form, Land Control Board Consent, application for Land Control Board Consent, stamp duty, and registration fee payments as a way of showing that he obtained the title in a regular, procedural, and law-compliant manner.
- 54.** A party that fails to plead and tender evidence in support of its defence cannot turn around and blame the trial court for misconstruing the facts, the evidence, and the law, when, though given a chance he failed to plead those facts by way of a

reply to the defence and defence to the counterclaim.

55. An appeal is confined to issues that arose at the trial. A party may not introduce new issues, evidence, or grounds on new elements or a defence on appeal without leave of court. The burden of proof at the lower court was on the appellant to prove his primary claim and also offer a substantial defence to the impeachment of his title. The appellant called no independent witnesses or any other demonstration other than the title deed to show the root of his title.

56. In **Torino Enterprises Limited -vs- Attorney General [2023] KESC 79 (KLR)**, the court said that the fact that the land was occupied must have sounded a warning to the buyer to be aware of what it was purchasing. The appellant herein must have known that the 1st respondent, who is his neighbour, had been in occupation of the land long before **2017**. There is no evidence of eviction attempts or notice to vacate the land before **2017**.

57. The appellant failed to call any of the neighbours to substantiate his claim that entry or trespass occurred in **2018**, in view of the photographs by the 1st respondent showing long occupation and development on the land by the 1st respondent.

- 58.** Trust is a right enforceable solely in equity. In **Shah & Others -vs- Mombasa Bricks & Tiles Ltd & 5 Others [2023] KESC 106[KLR] 28**, the court said constructive trust may be imposed on a sale agreement or to acquisition of land where there is unconscionable conduct or the part of a title holder or where there is an attempt for unjust enrichment or abuse of a position of trustee.
- 59.** The 1st respondent had tendered evidence that the appellant, as a neighbour and a one-time director of the Birunda Farmers Company, abused his position to unjustly obtain title for the suit land while privy to or aware of his occupation. The 1st respondent, therefore, pleaded in his counterclaim and tendered evidence to support his claim that the title held by the appellant was subject to his overriding interests. That such evidence was not rebutted by the appellant.
- 60.** It was not enough for the appellant to produce a title deed without explaining how he obtained the same, while the occupant of the land on the ground was the 1st respondent. Further, it is not clear why, after obtaining the title deed, the appellant did not seek to eject the respondents from the suit land.


61. In view of the foregoing gaps, I find no fault in the decision of the trial court. This appeal must fail. It is hereby dismissed with costs for lack of merit.

62. Orders accordingly.

Judgment dated, signed, and delivered via **Microsoft Teams/Open Court** at **Kitale** on this **4th** day of **March 2026**.

In the presence of:

Court Assistant - Dennis
No appearance.

A handwritten signature in blue ink, appearing to read 'W. Nzili', is written over a large, light grey watermark that says 'COPY'.

**HON. C.K. NZILI
JUDGE, ELC KITALE.**