



**Alfanzu v Walicha (Suing as Personal Representative and Administrator of the Estate of Edwin Walicha Austin) & another (Environment and Land Appeal E011 of 2025) [2026] KEELC 1121 (KLR) (Environment and Land) (26 February 2026) (Judgment)**

Neutral citation: [2026] KEELC 1121 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT VOI  
ENVIRONMENT AND LAND  
ENVIRONMENT AND LAND APPEAL E011 OF 2025  
EK WABWOTO, J  
FEBRUARY 26, 2026**

**BETWEEN**

**JARED NDIGILA ALFANZU ..... APPELLANT**

**AND**

**HENDRITA WUGANGA WALICHA (SUING AS PERSONAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF EDWIN WALICHA AUSTIN) ..... 1<sup>ST</sup> RESPONDENT**

**VINDO MULTIPURPOSE CO-OPERATIVE SOCIETY LIMITED .... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. This is an appeal against the judgment of the Learned Chief Magistrate Hon. A. M. Obura (Mrs.) wherein the trial court entered judgment in favour of the Plaintiff (now 1<sup>st</sup> Respondent) as follows:-
  - i. A permanent injunction is hereby issued restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants whether by themselves or through their agents, servants or workmen from trespassing, constructing, developing, leasing, charging, mortgaging, selling, transferring, disposing off or in any manner whatsoever interfering with the Plaintiff's right of ownership and exclusive possession and occupation of all that parcel of land known as Land Parcel No. Voi Municipality/Block 1/544.
  - ii. A declaration is hereby made that the 1<sup>st</sup> Defendant had no capacity and for good title to sell and/or transfer Land Parcel No. Voi Municipality Block 1/544 to the 2<sup>nd</sup> Defendant hence the sale and subsequent transfer to the 2<sup>nd</sup> Defendant was a nullity.



- iii. The Land Registrar in Charge is hereby directed to cancel the Title Deed held by the 2<sup>nd</sup> Defendant and forthwith rectify the Register relating to Land Parcel No. Voi Municipality Block 1/544 so as to reflect the Plaintiff as the duly registered proprietor.
  - iv. The Plaintiff is awarded costs of this suit to be borne by the 2<sup>nd</sup> Defendant.
2. The Appellant being aggrieved by the same filed the instant appeal vide a Memorandum of Appeal dated 26<sup>th</sup> May 2025 which raised several grounds as enumerated in the said Memorandum. The Appellant sought and prayed for the appeal to be allowed and the judgment delivered on 2<sup>nd</sup> May 2025 by the Learned Magistrate be set aside together with costs of the Appeal.
  3. The Court upon admission of this appeal, directed that the same be canvassed by way of written submissions. The Appellant filed written submissions dated 29<sup>th</sup> January 2026 while the 1<sup>st</sup> Respondent filed written submissions dated 20<sup>th</sup> December 2025.

### **The Appellant's submissions**

4. The Appellant on submitting on grounds 1, 2 and 3 of the Appeal argued that the Appellant and 1<sup>st</sup> Respondent were members of the 2<sup>nd</sup> Respondent and they were supposed to pay for their shares to the 2<sup>nd</sup> Respondent and all of them paid. The 2<sup>nd</sup> Respondent having received monies from the Appellant with the first payment being vide receipt dated 12<sup>th</sup> April 1986 for the entire amount of Kshs. 6,025. The said amount was paid at once and the only remaining money was Kshs. 14,900/= for a transfer of title which the Appellant paid on 8<sup>th</sup> July 2016.
5. It was submitted that despite paying the said amount, the Appellant's plot was allocated to another party and this showed a scheme between the Respondents to defraud the Appellant an issue which was not considered by the trial court and hence therefore the Appellant was entitled to the disputed plot. The trial court erred on this aspect.
6. In respect to ground 4 of the Memorandum of Appeal, it was argued that the Learned Magistrate erred in finding that the Appellant never paid Kshs. 14,900/= for their offer when the same had been paid in 2016. Title was issued and the same cannot be said to have been fraudulent.
7. In respect to grounds 5, 6 and 7 it was submitted that the Learned Magistrate erred in finding that the title issued was fraudulent and unprocedural. The Appellant paid for the transfer in time and cannot be faulted for any mistake.
8. The Court was urged to allow the appeal with costs.

### **The 1<sup>st</sup> Respondent's submissions**

9. The 1<sup>st</sup> Respondent submitted on the following issues:-
  - i. Whether the Learned trial Magistrate erred in law and in fact in finding that the 1<sup>st</sup> Respondent had proved her case on a balance of probabilities.
  - ii. Whether the Learned trial Magistrate erred in law and fact in failing to find that the Appellant was the lawful owner of parcel of land known as Voi Municipality Block 1/544.
  - iii. Whether the Learned Magistrate erred in law and fact in failing to consider totalling the evidence of the Appellant.



- iv. Whether the Learned trial Magistrate erred in law and fact in finding that the Appellant had not paid the requisite fees of Kshs. 14,900/= yet the same was paid through the 2<sup>nd</sup> Respondent Advocates.
  - v. Whether the Learned Magistrate erred in law and fact in finding that the title issued to the Appellant was unprocedural and fraudulent without any evidence at all.
  - vi. Whether the Learned trial Magistrate erred in law and fact in finding that the 2<sup>nd</sup> Respondent had no capacity and or good title to sale or transfer Land Parcel No. Voi Municipality Block 1/544 and transfer to the Appellant was a nullity.
  - vii. Costs.
10. It was argued that the Appellant failed to furnish any additional evidentiary support to conclusively establish that ownership of the suit property to him. The Appellant failed to prove that the land belonged to him. He only provided evidence of payment of Kshs. 15,000/= to Mwakireti & Company Advocates.
  11. It was also argued that the Learned Magistrate did not err when she found in favour the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent had tendered evidence illustrating that the Appellant trespassed onto the suit land by depositing construction materials.
  12. In respect to the fees of Kshs. 14,900/= it was argued that the same was paid by the Appellant when the land had already been allocated to the 1<sup>st</sup> Respondent's husband and the 2<sup>nd</sup> Respondent had admitted during trial that the 1<sup>st</sup> Respondent is the beneficial owner of the suit property registration number 1/554 previously known as Plot Number 1084. The same had been wrongly registered to the Appellant and no fraud happened since the registration to the Appellant was by mistake.
  13. Citing the cases of *Dina Management Limited =Versus= County Government of Mombasa & 2 Others (2023) KEEC 30 (KLR)*, *Munyu Maina =Versus= Hiram Gathiha Maina (2013) eKLR* and *Kuria Kiarie & 2 Others =Versus= Sammy Magera (2018) eKLR*, it was argued that a registered proprietor only acquires an absolute and indefeasible title if the allocation was legal, proper and regular which was not the case in this matter in respect to the Appellant's title that had been impeached.
  14. As to whether the Learned Magistrate erred in law and fact in finding that the 2<sup>nd</sup> Respondent had no capacity and or good title to sale or transfer land Parcel No. Voi Municipality Block 1/544 and the transfer to the Appellant was a nullity, it was argued that title to an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. Thus the Learned Magistrate was right when she find that the 2<sup>nd</sup> Respondent lacked a good title to transfer to the Appellant.
  15. The court was urged to dismiss the Appeal with costs.

### **Analysis and Determination**

16. Having perused the entire record of appeal together with the parties submissions, this appeal turns on two issues for determination;
  - i. Whether the Appellant acquired good title in respect to Voi Municipality Block 1/544.
  - ii. Whether the Learned trial Magistrate erred in law and fact in arriving at her decision.
17. Section 78 of the *Civil Procedure Act* grants this court powers to hear and determine appeals arising out of the decisions of the lower court. This being an appellate court of the first instance in the matter,



it has to analyze, re-evaluate and come up with its own findings and a conclusion as it was stated in the case of *Ciero & Another =Versus= Njanja & Others Civil Appeal No. 111 of 2022 (2025) KECA 1541 (KLR)*.

18. The Appellant faulted the Learned Magistrate for finding that he had proved his ownership to the suit land and ordering the cancellation of his title.
19. From the proceedings before the trial court both the Appellant and the 1<sup>st</sup> Respondent laid claim to the suit property. Interestingly they both claim on the basis of purchase at one point or the other from the 2<sup>nd</sup> Respondent. Where a court is faced with competing interests over the same suit property, it must look into the root of ownership of the suit land. This approach was well appreciated in the case of *Hubert L. Martin & 2 Others vs Margaret J. Kamar & 5 Others [2016] eKLR*.
20. It is trite law that It is trite law that he who alleges must prove. This is set out under Section 107(1)(2) of the *Evidence Act*, which provides as follows:
  - “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
  - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

Sections 109 and 112 of the same Act states;

- “109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
- “112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

21. In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in *Mumbi M’Nabea vs David M. Wachira [2016] eKLR* stated as follows:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.

...The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M’airanyi & Others v Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280* where it was held that:

“Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”



22. With respect to the burden of proof, the learned Judges of Appeal in the case of Palace Investments Limited vs Geoffrey Kariuki Mwenda & another [2015] eKLR, posited thus:

“Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say; -

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

23. In General & Another =Versus= Hussein & Others Civil Appeal Eldoret No. 32 of 2018 (2025) KECA 1022 (KLR) 5<sup>th</sup> June 2025 (Judgement) the Court cited Presbyterian Foundation =Versus= Kibera Savage Self Help Group Nursery School (2025) eKLR, that a good root of title must show its origin, must have a recognizable description of the property and it must not contain anything that casts any doubt on the title. (Emphasis added).
24. Equally in Williams & Kennedy Limited & 3 Others =Versus= Gilham & 10 Others (2026) KECA 130 (KLR), the Court of Appeal was emphatic that where two parties assert competing proprietary interest over one parcel of land, each must produce evidence in support of his claim.
25. During trial before the Lower court, the Appellant who testified as DW2 stated that he was a member of the 2<sup>nd</sup> Respondent since 1986 having paid the entrance fees and shares totalling to Kshs. 6025. It was also his testimony that his wife Velice Ndigila who testified as DW3 paid Kshs. 15,000/= and was issued with a receipt and later obtained a title since DW2 was ailing and could not follow up on the same. He produced the following documents in support of his case, copy of title, official search, certificate of search, letter dated 3<sup>rd</sup> December 2021, Receipt dated 12<sup>th</sup> April 1986 and transfer filed on 2<sup>nd</sup> August 2023.
26. When cross-examined about the receipt and as to whether he acquired the title lawfully, he merely stated that his wife would be better placed to explain the same.
27. Benedict Mranda, the Chairman of the 2<sup>nd</sup> Respondent who testified as DW1 stated that the suit plot belonged to Edwin Walicha Austin the husband of the 1<sup>st</sup> Respondent and that he never saw any receipt from the Appellant for Kshs. 14,900/= which was required to acquire the property. He also stated that Edwin Walicha Austin had paid the necessary fees and the property belonged to him. When asked as to how the same was registered in the names of the Appellant, he stated that there was an error made by the treasurer who who to blame for the same and that was the only error that arose, an issue which had already been reported to police. He also stated that the said treasurer resigned after the said incident.
28. From the analysis of the evidence tendered, it remained clear that the 2<sup>nd</sup> Respondent did not receive any payment of Kshs. 14,900/= from the Appellant. It was not clear also whether the law firm of Mwakireti & Company Advocates had authority to receive payment of Kshs. 14,900/= on behalf of the 2<sup>nd</sup> Respondent and whether indeed the same was transferred to the 2<sup>nd</sup> Respondent. Hence therefore considering that the root of the title can be traced from the 2<sup>nd</sup> Respondent and the 2<sup>nd</sup> Respondent denied ever receiving any payment of the sum of Kshs. 14,900/= from the Appellant and further having



confirmed that the lawful owner was Edwin Walicha Austin and not the Appellant, the Appellant had failed to discharge that burden as it relates to his acquisition of the property.

29. In view of the foregoing, the Learned Magistrate did not err when she made a finding that the 1<sup>st</sup> Respondent had proved her ownership of the property.
30. Having considered the aforesaid issue and further having considered the weight and totality of the evidence tendered, the Learned Magistrate cannot be faulted for arriving at her decision in favour of the 1<sup>st</sup> Respondent and consequently the Appeal filed herein fails.
31. In respect to costs of the Appeal, while it is settled that costs follow the event unless otherwise ordered by the Court. It is worth noting that when perusing the record of appeal and the judgment of the Learned Magistrate, it was evident that the registration of the suit property to the names of the Appellant was not fraudulent but merely done in error which error was acknowledged by the 2<sup>nd</sup> Respondent's witness who testified before the trial court.
32. In the circumstances, it would not be for the best interests of justice to condemn the Appellant to bear the costs of the Appeal. Consequently, each party is directed to bear own costs of the Appeal.

### **Final Orders**

33. In conclusion, the final orders that commend themselves to this Court are as follows: -
  - i. The Appeal be and is hereby dismissed.
  - ii. Each party to bear own costs of the Appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 26<sup>TH</sup> DAY OF FEBRUARY 2026.**

**E. K. WABWOTO**

**JUDGE**

In the presence of:-

Mr. Mwanyuma h/b for Mr. Muthami for the Appellant.

Mr. Mwazighe for the 1<sup>st</sup> Respondent.

N/A for the 2<sup>nd</sup> Respondent.

Court Assistant: Mary Ngoira.

