



REPUBLIC OF KENYA



KENYA LAW
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**Ombaba v Kimanda (Environment and Land Appeal E024 of 2025)
[2026] KEELC 2434 (KLR) (29 April 2026) (Judgment)**

Neutral citation: [2026] KEELC 2434 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL E024 OF 2025**

**MAO ODENY, J
APRIL 29, 2026**

BETWEEN

SAMUEL MOBEGI OMBABA APPELLANT

AND

MARK KIMANDA RESPONDENT

*(Being an appeal from the judgment/decree delivered by Hon. Daisy Mosse
Principal Magistrate (PM) on 11th April, 2025 in Molo ELC Case No. 48 of 2019)*

JUDGMENT

1. This appeal arises from a judgment delivered on 11th April, 2025 in Molo CMELC No. 48 of 2019. The Appellant being aggrieved by the judgment, lodged a Memorandum of Appeal dated 2nd May, 2025, and listed the following grounds:
 1. That the learned Magistrate erred in fact and law by arriving at a conclusion that the Appellant had failed to prove ownership of the suit land despite acknowledging and having found that the appellant is the registered owner of property known as Nakuru/Ngongongeri/1123.
 2. That the learned Magistrate erred in fact and law by failing to appreciate the provisions of Section 26 of the [Land Registration Act](#) that title was prima facie proof of ownership hence arriving at a wrong conclusion in the circumstances.
 3. That the learned Magistrate erred both in Law and fact by disregarding the documentary evidence produced by the plaintiff/appellant.
 4. That the learned Magistrate erred in fact and law by failing to appreciate that the Appellant is the registered proprietor of land parcel Nakuru/Ngongongeri/1123.



5. That the learned Magistrate erred in fact and law by disregarding the Appellant's evidence and failing to appreciate that the Respondent had encroached on or trespassed into the plaintiff's land.
 6. That the learned Magistrate erred in fact and law by failing to appreciate that no ground has been adduced to defeat or challenge the Appellant's title.
 7. The learned trial Magistrate erred in law and fact by failing to evaluate the entire evidence on record and make a finding that the plaintiff cum appellant had proved his case against the respondent on a balance of probabilities and thereby arrived on wrong findings on the issues before the court.
 8. That the learned Magistrate misdirected herself by failing to determine with finality the dispute pitting the Appellant and the Respondent.
 9. That the learned Magistrate grossly misdirected herself when dismissing the Appellant's plaint thereby granting ownership indirectly to the Respondent.
 10. That the learned Magistrate erred in fact and law by relying on conjecture, supposition and on extraneous matters.
 11. That the court generally erred by failing to appreciate the facts of the case and weigh them against the correct legal position which would have yielded a just outcome.
2. A brief background to this appeal is that the Appellant had filed a plaint dated 12th June, 2019 seeking an order of eviction against the Respondent, his servants, employees and agents, from his land parcel L.R No. Nakuru/Ngongongeri/1123 measuring approximately 5 acres.
 3. The Respondent filed an Amended Statement of Defence and Counterclaim dated 17th March, 2023 where he denied the claim in the plaint, and sought orders that the court find that he was the lawful owner of the property L.R No. Nakuru/Ngongongeri/1123. He also sought an order of cancellation of the Appellant's title and a permanent injunction restraining the Appellant from dealing with the suit parcel.
 4. The matter was heard and the trial Magistrate in her judgment dated 11th April, 2025, dismissed both the Appellant and Respondent's case. The Appellant, being dissatisfied with the judgment, filed the current appeal.

Appellant's Submissions

5. Counsel for the Appellant filed submissions dated 27th February 2026, and identified two issues for determination:
 - a. Whether the placement or availability of the government over the Mau Forest Complex barred the Courts or the Learned Magistrate to determine the question of ownership.
 - b. Whether the learned Magistrate applied the correct principles of the law while arriving at the conclusion to dismiss the plaintiff's claim.
6. Counsel submitted that the trial Magistrate erred by acknowledging the Appellant's registration as the proprietor of the suit parcel while simultaneously concluding that ownership had not been proved. Counsel further submitted that the Appellant produced a copy of the title deed, a certified copy of the green card reflecting the history of proprietorship and the sale agreement showing the purchase of the suit property.



7. Mr. Maswari also stated that PW2, the previous registered owner testified that he lawfully transferred the suit property to the Appellant after a valid sale, and confirmed that at the time of the transfer, there were no structures on the land. Counsel also stated that the evidence established not merely registration, but the root of the Appellant's title.
8. Counsel relied on Section 26(1) of the *Land Registration Act* and the Court of Appeal case of Joseph Arap Ngok V Justice Moiyo ole Keiwua & 5 others, Civil Appeal No. Nai. 60 of 1997, and the case of Elijah Makeri Nyangw'ra V Stephen Mungai Njuguna & Another [2013] eKLR, and submitted that no fraud or illegality was pleaded or proved against the Appellant and therefore his title should be protected.
9. It was counsel's submission that the Appellant went beyond the mere instrument of title to demonstrate a lawful acquisition, whereas the Respondent failed to provide a credible chain of ownership. He submitted that in disputes with competing titles, the court must investigate the root of each title to determine its legality.
10. Mr. Maswari further submitted that the Respondent attempted to justify occupation of the suit property by alleging acquisition through exchange and later introduced a claim of adverse possession in an amended counterclaim. Counsel stated that the court delivered a specific ruling striking out and or dismissing the claim for adverse possession, which the Respondent never appealed, hence it could not be revived.
11. Counsel relied on the cases of Pop-In (Kenya) Ltd & 3 Others v Habib Bank AG Zurich [1990] KECA 62 (KLR) and Uhuru Highway Development Ltd V Central Bank of Kenya & 2 Others Civil Appeal No. 36 of 1996, where the court held that a court cannot reopen issues that have been conclusively determined. Further that determinations not appealed from remain binding and submitted that the trial Magistrate erred in entertaining considerations inconsistent with the earlier ruling on adverse possession.
12. According to counsel, the Respondent was left with only the claim of an alleged exchange transaction, however, he did not tender any cogent documentary evidence to demonstrate a lawful exchange, proper transfer instruments or compliance with statutory requirements such as land Control Board consent, where applicable. The Respondent did not establish a clear root of title capable of defeating the Appellant's registered interest. Counsel relied on the case Munyu Maina vs Hiram Gathiha Maina [2013] eKLR, where the Court of Appeal held that where a registered proprietor's root of title is under challenge, the proprietor must go beyond the mere instrument of title and demonstrate the legality of acquisition.
13. It was counsel's submission that the Appellant established the root of his title by producing the title documents and the process, and in the contrary the Respondent failed to demonstrate any lawful process of acquisition and relied on the case of Wreck Motors Enterprises vs The Commissioner of Lands and others Civil Appeal No. 71 of 1997, where the court held that where there are two competing titles, the one that is shown to have been lawfully and regularly issued prevails.
14. Mr. Maswari, further submitted that the trial Magistrate misdirected herself by placing reliance on the government caveat on the Mau Forest Complex as a reason to dismiss the suit instead of determining the underlying dispute. Counsel stated that the court has a duty to determine the dispute and issue appropriate orders subject to the caveat, and relied on the case of Sugut V Yatich & another; Jepkorir (Interested Party) [2022] KEELC 13313 (KLR).



15. In conclusion, counsel urged the court to allow the appeal as prayed, set aside the judgment of the lower court and substitute it with an order of eviction against the Respondent from land parcel No Nakuru/Ngongongeri/1123 with costs.

Respondent's Submissions

16. Counsel for the Respondent filed submissions dated 22nd March 2026 and identified the following issues for determination:
 - a. Whether the Appellant proved ownership of the suit property
 - b. Whether the Appellant's title is absolute and indefeasible.
 - c. Whether the Appellant proved trespass or encroachment.
 - d. Whether the learned Trial Magistrate erred in dismissing the suit.
17. On the first issue, as to whether the Appellant proved ownership of the suit property, counsel submitted that the Appellant failed to demonstrate how he acquired the property, failed to reconcile a glaring discrepancy in acreage (claiming 2.02 hectares against an official 1.7 hectares) and failed to controvert the Respondent's evidence of prior occupation.
18. Mr. Ogola further submitted that registration alone was not conclusive proof of ownership when the root of a title is challenged, and in order to establish ownership in such cases, a party must go beyond the title document and demonstrate the legality of the acquisition. He relied on the cases of *Munyu Maina v Hiram Gathiha Maina* KECA 94 (KLR) and *Dina Management Ltd V County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR), and submitted that the Appellant did not discharge the evidentiary burden of proof.
19. On the second issue, as to whether the Appellant's title is absolute and indefeasible, counsel relied on Section 26 of the *Land Registration Act* and submitted that the inconsistency in the Appellant's acreage with that of the survey records went to the root of the title. He submitted that with such inconsistencies, one cannot conclude that the Appellant's title is absolute and indefeasible.
20. Mr. Ogola further submitted that the Respondent's title having been issued in 2000 while that of the Appellant in 2005, the Respondent's having been issued first in time prevails, and relied on the case of *Wreck Motors Enterprises V Commissioner of Lands & Others* [1997] eKLR. He further submitted that the Respondent has been in open and continuous occupation of the suit parcel a fact admitted by the Appellant.
21. On the third issue, as to whether the Appellant has proved trespass, counsel submitted that the Appellant failed to provide any credible evidence, such as a survey report or expert verification in support of the allegation of trespass and cited the case of *Haji & Another V Pamba & 4 Others* [2025] KEELC 3321 (KLR). He submitted that the trial Magistrate correctly declined to grant orders based on speculation, as the Appellant did not provide proof of the alleged entry or encroachment.
22. On the issue as to whether the Appellant conducted due diligence, it was counsel's submission that the Appellant admitted that he never visited the land or verified its occupation status prior to purchase. He added that had the Appellant conducted due diligence, he would have discovered that the Respondent was in occupation and the discrepancies. Counsel relied on the case of *Arthi Highway Developers Limited V West End Butchery Limited & 6 Others*, Court of Appeal at Nairobi, Civil Appeal No. 246 of 2013 (2015) eKLR.



23. On the final issue, Mr. Ogola submitted that the trial court properly evaluated the facts and law, and that this court should be reluctant to interfere with the finding and relied on the cases of *Shah Vs Mbogo* (1979) EA 116 and *Imanyara & 2 Others V Attorney General* [2016] eKLR. In conclusion, he submitted that the Appellant failed to prove ownership, relied on a defective title and failed to prove trespass. He urged the court to dismiss the appeal with costs.

Analysis And Determination

24. This court will condense the grounds of appeal into two issues for determination:
- a. Whether the Appellant proved ownership of the suit land and whether the Trial Magistrate erred in dismissing the Appellant's case.
 - b. Whether the Trial Magistrate erred by failing to determine the dispute between the Appellant and the Respondent with finality.
 - c. Who should bear the costs of the appeal?
25. This being a first appeal, the court is cognizant of its duty and role as was laid down in the case of *Okeno v Republic* [1972] EA 32 at 36, where the East Africa Court of Appeal stated the duty of the Court on a first appeal as follows:
- “An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R.*, [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R.*, [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post*, [1958] E. A. 424.”
26. Similarly, in the case of *Mwangi V Wambugu* [1984] KLR 453, the court held that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence.
27. Counsel enumerated the background of this case and the court has looked at the proceedings in the Record of Appeal. The Appellant entered into a sale agreement with Samson Kibilo Ole Salimu sometime in 2005, for the purchase of L.R Nakuru/Ngongonger/1123, at a consideration of Kshs. 300,000, which was paid in full, and subsequently got a title deed in his name. The Appellant produced a copy of the title deed, a certified copy of the green card, and a certificate of official search. The Appellant faulted the Respondent's evidence who claimed that he had purchased/exchanged the suit property with one Ronald Kimutai Kirui (a Minor), and on the other had he stated that he had a letter of allotment dated 15th February 1996.
28. Counsel for the Appellant submitted that the trial Magistrate erred, when she acknowledged the Appellant's registration as the proprietor of the suit parcel while on the other hand found that he had not proved ownership.



29. This is a case of two competing titles, and in such cases the a claimant must establish the root of the title as was held in the case of *Gathondu (As Administrator of the Estate of the Late Thumbi Kariuki) & 3 others v Registrar & 7 others (Civil Appeal E505 & E519 of 2020 (Consolidated))* [2024] KECA 668 (KLR) where the Court of Appeal held on the issue of competing titles as follows:

“Once upon a time, the holding of a title deed, that treasured document that declared the person named therein as the indisputable owner of the landed property, was a ticket to peace and proprietary security. That it was before a vile mix of greed, rapacity and fraud on one hand and corruption mischief, and tampering of records on the other, increasingly rendered many a title deed worthless papers the holding of which, without more, provided neither certitude nor assurance of safety as courts have had to step in to decipher and determine which among two contending instruments of title is genuine and efficacious. The puzzle of competing title deeds over the same property on the ground in contemporaneous existence is now becoming a contest not of dualities of claims, but, as this case shows, one of multiple contestations, each backed by a title deed.”

30. Similarly, in the case of *Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others* [2016] eKLR, the court held that:

“Of course, the issuance of two titles is not contemplated in the law and strictly speaking should not happen... A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. 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 other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.”

31. The Appellant and the Respondent claim the same parcel of land, and both have produced titles and green cards to show how they got their titles. However, the Respondent produced a list of beneficiaries, to show how the parcels were allocated. The Respondent also produced an allotment letter for the land in Eldama Ravine, which he entered into an exchange agreement with the seller. He also produced the exchange agreement dated 17th February 2000 and further produced photographs showing the buildings and the crops on the land.
32. The Appellant's witness who sold him the suit land, stated that they entered into an agreement while the suit land was in the name of another proprietor known as Richard Kinuthia Githua. He further stated that he could not take the Appellant to the site but sent his son to show him the parcel of land. The Appellant also stated that he was shown the land, which he believed, was erroneous, and had never settled on the same. It was his evidence in the lower court that when he got the title he proceeded to the ground and found that the respondent was in occupation. This led to him visiting the survey office but they could not visit the land as there were restrictions dealing with land in the Mau Complex.
33. This is a case where if the Appellant had done proper due diligence, he could have established the status of occupation of the suit land and who the registered owner was. He entered into a sale agreement



with a person who was not the registered owner of the suit land. Due diligence must be done prior to payment of the purchase price as was held in the Supreme Court of Kenya case of Dina Management Limited Case (2023) (Supra). A “bona fide purchaser” cannot rely solely on a registered title if it was acquired illegally or through corruption. The Appellant was under an obligation to investigate physical possession.

34. The issue of a caveat/restriction of any dealings on the Mau Complex also limited the Appellant’s ability to carry out a ground survey, and why did he enter into a land sale agreement while there were such limitations? The burden of proof was on the Appellant to prove how he acquired the suit property. I notice that the sale agreement produced is dated 3rd May, 2006 whereas the Appellant’s title was issued on 21st July, 2005. This indicates that the Appellant was issued with a title before he entered into a sale agreement.
35. Similarly, the green card shows that the seller (PW2) was issued with the title on 21st July, 2005, and that the Appellant was also issued with his title the same day. Does it mean the transfer was done without following the procedure of procuring the consent of the land Control Board?
36. The inconsistencies in the root of title by the Appellant and the testimonies raise questions that the trial Magistrate indicated that she was not able to answer and that is why the court dismissed both the Appellant’s and the Respondent’s cases.
37. I agree with the Appellant that the trial Magistrate erred in not determining the issue of ownership from the evidence that was placed before her. The trial Magistrate ought to have interrogated the issue of ownership of the title to the suit property as opposed to just dismissing the Appellant’s case based on the absence of evidence by the survey department or investigations by the police.
38. However, I find that the error by the trial Magistrate does not alter the outcome of the appeal with regard to proof of ownership of the suit parcel by the Appellant. Consequently, I find that the appeal lacks merit and is hereby dismissed with each party bearing their own costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 29TH DAY OF APRIL 2026.

M. A. ODENY

JUDGE

