

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT
BUNGOMA
ELC APPEAL NO. E024 OF 2025

PAULINE NABALAYO SIRENGO.....
.....APPELLANT

VERSUS

COUNTY GOVERNMENT OF BUNGOMA.....1ST
RESPONDENT

JOSEPH SIMIYU MUNYENYE.....2ND
RESPONDENT

JUDGMENT

1. The Appellant brought this appeal following her dissatisfaction with the judgment of Honourable Marcella A. Onyango, Senior Resident Magistrate (SRM) delivered in Bungoma CM ELC Case No. E005 of 2021 on 26/5/2025. The Appellant filed the amended plaint dated 19/3/2024 seeking a permanent injunction to restrain the Respondents from demolishing or interfering with her use of the land known as West Bukusu/North Muyanga/4565 (the suit land). She also sought general damages and special damages of Kshs. 780,000/=. The Appellant pleaded that she was the registered owner of the suit land, which she purchased from the 2nd Respondent on 11/1/2017. The suit land was curved out of West Bukusu/North Muyanga/3431, which was registered in the 2nd Respondent's name prior to its subdivision.

2. The Appellant's claim was that after the sale of the suit land and before West Bukusu/North Muyanga/3431 was subdivided and transferred to her, the 2nd Respondent opened an access road across parcel number 3431 which reduced her portion by 0.872 hectares (ha). She pleaded that that act occasioned damage to her in terms of building materials of Kshs. 240,000/=, a modern gate worth Kshs. 160,000/=, fencing posts valued at Kshs. 250,000/=, land portion equivalent to Kshs. 30,000/= and other essentials amounting to Kshs. 100,000/=. The Appellant claimed that through his agents, the 1st Respondent entered the suit land on 25/1/2021 and maliciously destroyed her structures on the land, pulled down the fence using a bulldozer and cut down mature trees.
3. After hearing the case, the trial court found that the Appellant failed to prove that her property was destroyed as she claimed. The court found that she failed to prove her case on a balance of probabilities and dismissed it with costs to the Respondent. Aggrieved by that decision, the Appellant set out 9 grounds of appeal. The Appellant faulted the Learned Magistrate for failing to appreciate the weight of her evidence including the surveyor's report and pictorial evidence, which according to her, proved that her property was destroyed.
4. The Learned Magistrate was also faulted for failing to find that the Appellant had already acquired an equitable and beneficial interest in the land by the time she filed suit having entered into a sale agreement with the 2nd Respondent. Additionally, that the trial court failed to analyze her evidence and the surveyor's report which would have led to a finding that the

suit land was substantially affected by the access road constructed by the 1st Respondent.

5. The trial court was also faulted for failing to allow the Appellant's second witness to testify and for failing to order a government surveyor to access the land and provide an independent expert report based on the disputed boundary and impact of the access road. It was also contended that the Learned Magistrate failed to apply the correct legal standards on the burden and standard of proof in civil claims and that the entire judgment was contrary to the tenets of justice and the veracity of the evidence tendered.
6. The appeal was canvassed through written submissions. The Appellant submitted that the trial court erred by dismissing her claim on the basis that she was not registered as the owner of the suit land at the time of the alleged trespass despite her having purchased the suit land, occupied it and constructed on it. The Appellant relied on **Ngaita v County government of Meru [2024] KEELC 5732 (KLR)** on the point that a purchaser who has paid the purchase price and taken possession acquires a valid equitable interest enforceable against third parties. She added that her equitable ownership was evidenced by the sale agreement, possession, fencing, installation of the gate and the surveyor's measurements. She urged that the construction of the access road on the main land affected her rights as a buyer by reducing her allocated portion and destroying her property.
7. The Appellant submitted that she tendered the surveyor's report and pictorial evidence, which the trial court wrongly discounted on grounds that the surveyor was not called to

testify. The Appellant urged that under Sections 35, 36 and 48 of the Evidence Act, documentary and expert evidence is admissible if the maker had personal knowledge of the fact and the statutory conditions were met where requiring the maker to testify would cause unreasonable delay or expense. The Appellant cited **Obonyo v Hongo and Another [2024] KE ELC 43770(KLR)** where the court held that a surveyor's report could guide the court in determining boundaries even without the surveyor's physical attendance. The Appellant faulted the Learned Magistrate for failing to consider the surveyor's report and the pictorial evidence.

8. The Appellant submitted that the trial court ignored the contradiction between the Respondent's claim of merely improving an existing road and the creation of a new road. She contended that the maps introduced before the court showed that although the access road existed previously, the 1st Respondent's actions widened and expanded it thereby encroaching on her property.
9. Furthermore, that the trial court disregarded the evidence of damage including photographs of the demolished gate and fence when it failed to award damages of Kshs. 780,000/= pleaded for the loss. The Appellant cited **Mbuthia v Chimba Credit Finance Corporation and Another [1988] KLR 1 and Ngaita v County Government of Meru [2024] KE ELC 5732 (KLR)** in which it was held that the destruction of private property during unlawful road expansion constituted compensable trespass.
10. The Appellant argued that it was settled law that trespass to land is actionable *per se* and that no proof of actual or

quantifiable loss is required for the award of damages. The Appellant faulted the trial court for dismissing her claim due to lack of proof of special damages and for failing to award general damages, which in her view she was legally entitled to once trespass was established. The Appellant invited the court to set aside the judgment of the trial court and allow her claim pleaded in the amended plaint in its entirety together with the costs of the suit.

- 11.** The Appellant contended that the trial court failed to find that she had acquired an equitable or beneficial interest through the sale agreement with the 2nd Respondent which she pleaded in the plaint. The Appellant admitted that the title was in the 2nd Respondent's name and did not tender any evidence of a transfer.
- 12.** The Respondents submitted that the existence of a sale agreement alone did not automatically confer proprietary rights capable of enforcement against third parties particularly if there was no compliance with statutory requirements. Further, that any equitable interest through a sale agreement did not override the 1st Respondent's right to develop public infrastructure on land where the 2nd Respondent had already consented to an access road. They urged that the trial court properly held that the Appellant failed to demonstrate a legally protectable interest sufficient to sustain a claim of encroachment.
- 13.** The Respondents submitted that the Appellant pleaded in the amended plaint that there was an encroachment of 0.872 ha through an access road on the suit land and destruction of structures and trees caused by the 1st Respondent during the

road construction. The Respondent pointed out that the access road was created in January 2021 before the Appellant was registered as the owner of the suit land.

- 14.** The Respondent conceded that the Appellant produced a surveyor's report, but pointed out that it was not supported by oral testimony and that the trial court was therefore justified to reject untested expert evidence especially where the boundaries of land and public road were in issue. The Respondent cited **Christopher Ndaru Kagina v Esther Mbandi Kagina & Another [2016] KEHC 31** where the court stated that expert testimony must be subjected to vigorous cross-examination and weighed alongside other evidence.
- 15.** The Respondents pointed out that in the amended plaint, the Appellant claimed ownership of West Bukusu/North Muyanga/4565 while the alleged access road was on West Bukusu/North Muyanga/3431. Further, that she claimed that the 1st Respondent entered West Bukusu/North Muyanga/3431 and destroyed the Appellant's structures yet this land belonged to the 2nd Respondent. The Respondent contended that there were contradictions in the Appellant's case and that she failed to connect the alleged land to her registered land.
- 16.** The Respondents reiterated that where expert evidence is contested, it must be tested through cross-examination. Further, that it was not the duty of the court to fill evidentiary gaps in the Appellant's case by calling witnesses or ordering investigations.
- 17.** On special damages, the Respondents submitted that these must be specifically pleaded and proved which the Appellant

failed to do. They urged that the Appellant failed to establish a nexus between alleged destruction, items claimed and the Respondent's actions.

- 18.** The Respondents submitted that the court record did not show any denial of the Appellant's right to be heard and pointed out that her advocate closed the Appellant's case without making any application to call any additional witness to testify.
- 19.** The issue for determination is whether the appeal has merit and the court should interfere with the findings of the trial court and enter judgment in favour of the Appellant as pleaded in the Amended Plaint dated 19/3/2024. The gravamen of the Appellant's claim is that the trial court erred when it failed to find that there was encroachment onto the suit land when the 2nd Respondent opened an access road across parcel number 3431 which reduced her portion by 0.872 ha.
- 20.** It is the registration of a person as proprietor of land that vests in the person the absolute ownership of that land alongside the rights and privileges over the land pursuant to Section 24 of the Land Registration Act. Section 26 expounds that a certificate of title issued by the Registrar to a purchaser upon registration is prima facie evidence of ownership of the land in question. A sale agreement does not afford a purchaser of land the same protection as registration of proprietorship of land.
- 21.** The Appellant claimed that she bought the suit land in 2017. The mutation form which the Appellant tendered in evidence shows that parcel number 3431 was subdivided on 19/10/2020. The title for the suit land was issued on

23/8/2023. The trial court did not fall into error when it held that the Appellant failed to prove that the 1st Respondent created an access road on part of her land.

- 22.** Going back to the mutation, the court notes that parcel B reflected on the field diagram which became parcel no. 4565 does not have a road on it. The road is on parcel no. 4565, The mutation gives the size of parcel no. 4565 as 0.1 ha which corresponds with the size on the title deed. The sale agreement gave the land size as 50 x 100 ft. Clause 4 of the agreement confirms that the land being sold was yet to be subdivided.
- 23.** The court agrees with the Learned Magistrate that the Appellant failed to prove that the land she bought from the 2nd Respondent was smaller on the ground than what she had purchased or that the road was excised from her land. The Appellant failed to prove the special damages in respect of building materials, modern gate and fencing posts. It is not clear whether this claim related to the whole land because it was the Appellant's claim that the access road had encroached on her land measuring 72m².
- 24.** No evidence was led by the Appellant to prove that the structures she claims were demolished by the 1st Respondent's bulldozer were on the strip of land measuring 3 x24m. The Appellant failed to prove that the access road was expanded as she claimed. The Appellant failed to demonstrate a legally protectable interest that could sustain a claim of encroachment.
- 25.** The appeal fails and is dismissed. Each party will bear its costs.

Delivered virtually at Bungoma this 27th day of April 2026.

**K. BOR
JUDGE**

In the Presence of:-

Mr. D. Were holding brief for Mr. J. Sichangi for the Appellant
Ms. A.Oduor holding brief for Mr. N. Ndalila for the
Respondents
Court Assistant -Josephat Bett

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