



REPUBLIC OF KENYA



**Wakapata v Barasa & another (Environment and Land Appeal  
13 of 2020) [2025] KEELC 5667 (KLR) (24 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5667 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT AND LAND APPEAL 13 OF 2020**

**EC CHERONO, J**

**JULY 24, 2025**

**BETWEEN**

**VINCENT WEPHUKULU WAKAPATA ..... APPLICANT**

**AND**

**LORNA AMAI BARASA ..... 1<sup>ST</sup> RESPONDENT**

**TECKLA NEKESA WASWA ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. Vide an amended memorandum of appeal dated 05/11/2024, the Appellant herein who was the Defendant in Bungoma CM-ELC Case No.86 of 2018 (hereinafter referred to as ‘the former suit’) appeals to this Hon. Court challenging the judgment by Hon. S.O Mogute delivered on 30/09/2020 in which the plaintiff/Respondent’s claim was allowed and the Defendant/Appellant’s counter-claim dismissed with costs.
2. The brief background of the former suit is that the plaintiffs/Respondents herein vide an amended plaint dated 26/01/2020 averred that they were the registered owners of all that parcel of land known as Bokoli/Mukuyuni/448 (hereinafter referred to as “the suit land”), having been so registered on 08/10/1990. That they acquired the suit land through a public auction where they paid Kshs. 138,000/= in the 1980’s. That the said sale had been sanctioned by the court after one Dominiko Wakapata-ded who had reneged on a sale of the land lost a case against Eliud Masika and Wellere Ndiyo who were awarded proceeds of the sale. That despite knowledge of the abovementioned facts, the Appellant is said to have trespassed onto the suit land and put up structures and has been tilling the same to their detriment.
3. The plaintiffs/Respondents sought for the following orders against the Defendant/Appellant;
  - a. Orders as per Paragraph 9 of the plaint.



-The plaintiff's claim against the defendant is for his immediate eviction from land parcel no. Bokoili/Mukuyuni/448 and demolition of all building and structures erected thereon together with an order of permanent injunction restraining the defendant, his servants and or agents claiming under him from trespassing, occupying, tilling and or dealing with the suit land together with costs of the suit.

- b. Costs of the suit.
  - c. Any other order/relief or further this honourable court may deem fit and just to grant.
4. By way of a response, the Appellant filed a statement of defence dated 09/07/2020 in which he denied the Respondents' claim and averred that he is the son of the said Dominoko Wakapata and that together with his brothers, they inherited the suit land from their father upon his demise with each getting 2.25 acres. He averred that if at all the Respondents held title to the suit land, the same was acquired fraudulently and illegally. In his counter-claim the defendant/Appellant reiterated the averments as pleaded in his statement of defence and set out particulars of fraud against the plaintiffs/Respondents and sought the following prayers by way of counterclaim;
- a. As per paragraph 21 above.  
-By reason of the aforementioned illegal and fraudulent acts by the plaintiffs, the defendant has been out in unnecessary stress, expense and has suffered loss and shall continue to suffer loss and damage and thus counter-claim for an order for the title cancellation of the title number Bokoli/Mukuyuni/448 from the names of the plaintiffs and it be vested in the name of the original owner Dominiko Wakapata so as the defendant can carry out succession.
  - b. An order barring the plaintiffs from interfering with the suit property in any manner.
  - c. Costs.
  - d. Interests.

#### **Evidence by parties.**

5. The former suit before the trial court proceeded by way of viva voce evidence with the Appellants calling two witnesses while the Respondent called one witness.
6. PW1 Lonah Amai Barasa stated that the suit land was registered in her name jointly with her co-Respondent. She produced the title as P-Exhibit 1. She further adopted her witness statement dated 13/03/2018 as her evidence-in-chief. She stated that they purchased the suit land through a public auction. It was her evidence that the Appellant left the land only to return in the year 2020. She also produced a green card for the suit land as P-Exhibit 2. That the Appellant had placed a caution over the suit land but the same was lifted through a court order.
7. DW1 Vincent Wephekulu Vamagate testified that he was in occupation of the suit land. He adopted his witness statement dated 14/07/2019 as his evidence-in-chief. It was his testimony that his father did not inform him that he was selling the suit land. He produced into evidence the death certificate of his late father as D-Exhibit 1, minutes of a clan meeting as D-Exhibit 2, copy of funeral program as D-Exhibit 3 and copy of green card as D-Exhibit 4. He testified that he did not know how the Respondents obtained a title for the suit land in their name. He testified that he was occupying the entire land with his children and that he registered a caution over the suit land on 28/02/1991.
8. Upon rendering itself in the former suit, the trial court allowed the plaintiff/Respondents claim and dismissed the Appellants counter-claim with costs.



9. Being aggrieved by the trial court's judgment, the Appellant preferred the current appeal on the following grounds;
- a. Suit as framed, and prosecuted and determined in the trial court was statute barred by Section 7 of the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya.
  - b. Suit in the trial court as founded on contract of purchase of land in 1980 in a public auction was subject to and did not pass the statutory test in section 3(3) of the *Law of Contract Act*, Chapter 23, Laws of Kenya that provides that
    - i. No suit shall be brought upon a contract for disposition of interest in land unless.
    - ii. It is in writing.
    - iii. Is signed by all the parties
    - iv. Attested by a witness who was present when the contract was signed by such party.
  - c. The Trial Court occasioned a miscarriage of justice as it did not consider or make any findings on the defendant's counterclaim of fraud, illegality and legitimacy as pleaded in paragraph 8 of the Statement of Defence and Counterclaim more particularly failed to resolve the evidential contradiction between the assertions in Paragraph 6 of the Plaint, paragraph 4 of the witness statement by Lornah Barasa as regards the purchase price of shillings 12,000 alleged therein and the sum of shillings 138,000 appearing as the alleged consideration in the Register of Title (entry No 6 in the proprietorship section thereof.)
  - d. The Honourable trial magistrate failed to afford the defendant the opportunity to call the defendant's witness Boniface Sangura to testify in support of the defence and counterclaim.
  - e. The Trial Court erred in law in wrongfully permitting the introduction of a new cause of action in the amended plaint, consent of parties does not validate an illegality.
  - f. The Trial court erred in fact and law in finding without any evidence that the plaintiff purchased the suit land in a public auction, obtained a Certificate of Sale signed by an Auctioneer, or paid valuable consideration for the alleged purchase of the suit land.
  - g. The Trial Court erred in Law in permitting trial of a suit regarding property of a deceased person without first requiring as the law directs the issue of a Citation to persons appearing to be beneficiaries in the estate of the deceased.
  - h. The Trial Court erred in holding that the defendant did not have locus to defend a claim for his eviction and demolition of homestead, as well as prosecute a counterclaim against the respondent plaintiff.
  - i. The Trial Court erred in transferring the burden of proof from the plaintiff to the defendant as regards the existence of the alleged Court Order directing sale of the deceased's property, Certificate of Sale signed by an Auctioneers Receipt for purchase price issued by the Auctioneers to the plaintiff, and production of a Register of title reflecting the entry of an item relating to the Court Order for sale of the deceased's property, or a Prohibitory Order in respect thereof.
10. Notably, the Appellant did not set out any prayers in his amended memorandum of appeal.



### Submissions by parties.

11. When this appeal came up for directions, the parties agreed that the same be disposed of by way of written submissions.
12. The Appellant filed written submissions dated 29/02/2023 and submitted that Order 42 Rule 3 of the Civil Procedure Rules 2010 allows the amendment of a Memorandum of appeal. He argued that the amendment introduced new grounds of appeal and this is permissible in law. Reliance was placed in the cases of Kenya Hotels Limited v Oriental Commercial Bank Limited [2018] eKLR and Uhuru Highway Development Ltd vs Central Bank of Kenya (2002) 1 EA 314.
13. On ground 1, it was submitted that the trial court had no jurisdiction to entertain a cause of action that was statute barred under Section 7 of the *Limitation of Actions Act* and the amendment, even by consent of the parties' advocate could not confer jurisdiction on the trial magistrate. It was argued that a suit for recovery of possession of land ought to have been filed within 12 years from 8.10.90 when the Respondents claim to have purchased the suit land, that is by the 7<sup>th</sup> day of October 2002. He argued that in the case appealed from, suit for recovery of possession, eviction and demolition of the Appellant's structures averred in a plaint dated 13/03/2015 was done, at least 13 years after the expiry of the Respondents' right to bring and prosecute such a claim. Reliance was placed in the case of Embu Misc. Civil Application No 3 of 2020 – Virginia Kairigo Runji v Christopher Nthia Gacuthe 4 & 17 others [2020] eKLR
14. On ground 2, 6 and 9, the Appellant submitted that Section 3(3) of the *Law of Contract Act* bars any claim based on a contract for the disposition of interest in land that is not in writing, signed by all parties, and attested by a witness who was present when the contract was executed. It was argued that this being a first Appeal, this Court has an obligation to review the facts and come up with its own conclusion. He stated that from the record, the plaintiff stated that he purchased the suit land at an auction following a court order and paid a sum of Kshs. 12,000. He also argued that at paragraph 4C of the Amended plaint, the Plaintiff/Appellant averred that they obtained registration through purchase by way of public auction after emerging the highest bidders at Ksh. 138,000. However, the Plaintiff/ Respondents' evidence and testimony does not rise to the statutory threshold as no evidence of monies paid or certificate of sale made in writing and signed by the Auctioneer witnessed by a person who was present at the auction was produced. It was submitted that this allegation was uncertain, bare and not backed by any single document at the Auction, Receipt issued by an auctioneer, or some record probative of the Court record that decreed sale of the suit land by public auction. He argued that the Respondents testimony was weak and improbable and not probative of the claim that she purchased the suit land at all or even paid for it. It was argued that the court fell into error in concluding that the balance of probability favored the plaintiff's lightweight claim.
15. It was further submitted that there existed a significant evidential contradiction in two aspects of the Plaintiff's case. First, as to the reason for the order of auction of Dominico's land. That is not clear whether it was as a result of a court order after he lost a case against Eliud Masika and Wellere Ndinyi as alleged in Paragraph 4C of the Amended Plaint or whether it was because the said Dominico Wakapata had defaulted in repaying a teacher's loan. Secondly, how much money was paid for the purchase. The Appellant argued that the Respondent had not met the standard of proof. Reliance was placed in the case of Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2004] KECA 65 (KLR).
16. Ground 3 was not argued while grounds 5,6 & 8 were submitted as they appear in the amended memorandum of appeal. Lastly, the Appellant submitted that he is not a representative of the estate



of Dominico Wakapata and that he lacked the locus standi to be sued. Reliance was placed in the case of Matemvu vs Trusted Society of Human Rights & 5 others.

17. At the time the court withdrew to prepare this judgment, the Respondent had not filed his submissions for consideration.

### **Analysis and determination.**

18. This being a first appeal, this court is obligated to re-evaluate the evidence and re-consider arguments by parties and apply the relevant law in making its own conclusion of the issues in controversy. See the case of Mbogo and Another vs. Shah [1968] EA 93.
19. Before, I proceed further, this court's attention is drawn to the fact alluded to elsewhere in this judgment that the Appellant in his Amended Memorandum of Appeal did not make any prayers in this appeal. The prayers seem to have been sneaked in his submissions.
20. It is trite that a party is bound by his/her pleadings and the Appellant cannot expect this court to grant what they did not ask/pray for. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, Justice A C Mrima stated as follows;

“Pleadings are the bedrock upon which all the proceedings derive from.”

Further in the case of Malawi Railways Ltd vs Nyasulu [1998] MWSC 3, Malawi Supreme Court of Appeal stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled “The Present Importance of Pleadings” published in [1960] Current Legal Problems at p 174 whereof the learned author posited that: -

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings...for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

21. Justice Kizito Magare in the case of Mwavula v *Waweru t/a Antique Auctioneers Agencies & another (Civil Appeal E374 of 2023)* [2024] KEHC 5988 (KLR) had this to say...“Submissions are neither pleading nor evidence. Beautiful pleadings are akin to watching warm fire in television. It will not remove any morning chilly weather.”
22. Even Article 159(2) of *the Constitution* will not cure such an anomaly. It would set a bad precedent to consider/deem unperformed or incomplete procedure as fully performed. See the case of Daniel



Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR. Submissions only highlight what has been given in evidence and prayers in a pleading. This Court cannot descend into the arena and grant prayers that have not been prayed for/sought in the pleadings. Again, this Court cannot put itself in the shoes of a party and frame what it thinks the claimant ought to have prayed for/sought in his/her statement of claim.

23. For the foregoing reasons, I find that the Amended memorandum of appeal dated 04/10/2024 defective and the same is hereby struck out with costs to the Respondents.

24. It is so ordered.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 24<sup>TH</sup> DAY OF JULY, 2025.**

.....

**HON.E.C CHERONO**

**ELC JUDGE**

In the presence of;

1. Mr. Wasilwa Makhakara for the Appellant.
2. Mr. Anwar for the Respondents.
3. Bett C/A.

