



**Kavilili v Waswa & 2 others (Environment and Land Appeal
E009 of 2024) [2025] KEELC 5409 (KLR) (17 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5409 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E009 OF 2024**

EC CHERONO, J

JULY 17, 2025

BETWEEN

KHAMALA BARASA KAVILILI APPELLANT

AND

DIFAS WASWA 1ST RESPONDENT

SUSSANA KHALWILE 2ND RESPONDENT

JONES NASIPWONDI 3RD RESPONDENT

JUDGMENT

Introduction.

1. Vide a Memorandum of Appeal dated 01/03/2024, the Appellant who was the Plaintiff in Webuye SPM-ELC NO. 6 of 2019 (herein referred to as ‘the former suit’) preferred this appeal challenging the judgment delivered by Hon. Viola Yator (PM) on 09/02/2024 wherein the court dismissed the said suit with costs to the Respondents.

Background.

2. The Appellant instituted the former suit vide a plaint dated 05/02/2019 wherein he averred that he is the legal, bonfide, beneficial and/or equitable owner of Land Parcel No. Ndivisi/Ndivisi/896 measuring 6.0 acres which he is in actual occupation of, having assumed vacant possession upon purchase. That he has developed the said land by planting trees and ploughing. That without any colour of right or his consent, the Respondents encroached the suit land and unlawfully occupied the same and is threatening to displace him. He sought for the following orders;
 - a. An order for a permanent injunction restraining the Defendants by themselves, their servants and/or arguments from ever laying claim on the suit property, disrupting operations, interfering, subdividing, alienating, transferring, leasing, encumbering, intermeddling or



selling and/or in any other manner dealing with Land Parcel No. Ndivisi/Ndivisi/896 measuring 6.0 acres or thereabout situated within Bungoma County.

- b. Eviction order against the Defendants from Land Parcel No. Ndivisi/Ndivisi/896 measuring 6.0 acres or thereabout
 - c. Costs of the suit and interests thereon.
3. Upon being served with the plaint and Summons to Enter Appearance, the 2nd and 3rd Respondent filed a joint statement of defence dated 01/02/2022 where they denied that the Appellant was the legal owner of Land Parcel No. Ndivisi/Ndivisi/866 and that his acquisition of ownership, if any, was fraudulent. They denied encroaching on the suit land and averred that the matter has previously been litigated in Tribunal Case No. 6 of 2008. It was further averred that the 2nd Respondent has lived on the suit land from 1960 to date and that the land belonged to his father. They urged the court to dismiss the Appellant's suit.
 4. The suit before the trial court proceeded by way of viva voce evidence with the Appellant calling one witness and the Respondents calling three witnesses in total.
 5. PW1 Khamala Barasa Kavilili adopted his witness statement dated 05/02/2019 as his evidence-in-chief. He testified that he bought the land from Difas Waswa-the 1st Respondent for Kshs.1,400/= in the year 1963 whereinafter he entered the land and established his homestead. He denied obtaining the land fraudulently. In cross examination, he testified that the 1st Respondent was his brother while the 2nd and 3rd Respondents were his sisters-in-law and that they each had their own land but decided to come into his land and cut down his trees. In re-examination, he testified that he obtained his title in the year 2002.
 6. DW1 Difas Waswa adopted his witness statement dated 23/08/2021. He testified that the suit land is in the Appellant's name illegally. That the land belonged to his father Kabire Munjaro who died in the year 1956. That upon his demise, the suit land was shared among Susan Khalilwe-2acres, Jones Nasipondi-2 acres and 2 acres to himself He denied selling land to the Appellant who is his brother and stated that he was given the land by the clan.
 7. DW2 Susana Wafula Kiya adopted her witness statement as her evidence-in-chief. She stated that the Appellant is her brother-in law. That she resides in Land Parcel No. Ndivisi/Ndivisi/896. She testified that the Appellant was wrong by seeking to evict them from the suit land.
 8. DW3 Jones Nasipondi adopted her witness statement as her evidence-in-chief. He reiterated the evidence as presented by the other witnesses.
 9. Upon considering the evidence adduced by the parties and the applicable law, the trial court found the claim by the plaintiff/Appellant without merit and dismissed the same with costs to the Defendants/ Respondents.
 10. Aggrieved by the said decision, the Appellant preferred the current appeal on the following grounds;
 - a. That the learned trial magistrate erred in law and in fact by failing to properly evaluate and consider the entire evidence thereby arriving at an erroneous finding that the land in question is ancestral land.
 - b. That the trial magistrate erred in law and in fact to have dismissed the Appellants claim that had purchased his siblings share in the land without any evidence to the contrary.



11. The Appellant sought to have the judgment and decree of the trial court set aside and substituted with an order allowing his claim with costs.

Submissions by Parties.

12. When this appeal came for directions, the parties agreed that the same be canvassed by way of written submissions.
13. The Appellant filed submissions dated 15/04/2025 where he submitted that he obtained registration of land Parcel No. Ndivisi/Ndivisi/896 on 03/04/2002 and that any allegation of fraud made after filing of the suit in 2019 could only be time barred and the lower court ought to have so found. In addition, it was submitted that the Respondents did not bring themselves within any of the overriding interests under Section 28 of the *Land Registration Act*. On the issue of fraud, he argued that the Respondents were required to provide evidence to prove the same. Reliance was placed in the case of *Gathua Versus Wainana* (Environment and Land Case No, E011 Of 2023) KEELC 408 (KLR).
14. It was further submitted that the 1st Respondent did not file any pleadings and therefore, the court could not have framed the issues for its determination. Further, it was the Appellant's contention that the 2nd and 3rd Respondent's defence was full of mere denials. He cited the case of *Mwavula v Waweru t/a Antique Auctioneers Agencies & another (Civil Appeal E374 of 2023)* [2024] KEHC 5988 (KLR) (24 May 2024) (Ruling)
15. The 2nd and 3rd Respondents filed submissions dated 03/06/2025 wherein they submitted that the Appellant did not sufficiently prove his case and that the trial court was correct in declining to grant the orders sought.

Analysis and Determination.

16. I have considered the record of appeal, memorandum of appeal, rival written submissions by the parties and the applicable Law. This being a first appeal, it is the duty of this court to review the evidence adduced before the trial court and satisfy itself that the decision was well-founded. The jurisdiction of a first appeal was discussed in the case of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, which was cited in the case of *Barnabas Biwott v Thomas Kipkorir Bundotich* [2018] eKLR where the court held:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

17. As a first appeal court, this court will rarely interfere with findings of fact by a trial court unless it can be demonstrated that the trial court misdirected himself or acted on matters which he ought not have acted upon or failed to take into consideration matters which he should have taken into consideration and in doing so, arrived at a wrong conclusion. I will now proceed to consider the grounds of appeal as framed.
18. It is not in dispute that the parties herein are family members, with the Appellant being the 1st Respondent's step-brother and the 2nd and 3rd Respondents' brother-in-law. The Appellant claims that he purchased the suit land from the 1st Respondent and that he is entitled to enjoy the rights



and privileges arising therefrom to the exclusion of others, particularly the Respondents, whom he alleges are occupying the land without his consent, hence the orders sought. The 1st Respondent denies having sold the land to the Appellant and the Respondents jointly contend that the registration of the Appellant as the proprietor of the suit land was fraudulent and unlawful. They averred that the land was allocated to them by the clan, having originally belonged to their father and father-in-law.

19. Section 24 (a) the [Land Registration Act](#) provides thus;

“the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”

20. The Appellant has a title deed registered in his name and consequently, the provisions of Section 24 (a) of the [Land Registration Act](#) applied to him.

21. The provisions of Section 26 of the [Land Registration Act](#), provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

22. Upon careful evaluation of the evidence placed before the trial Court, it is evident that although the Appellant has produced a certificate of title in his name, he has not provided any documentation or satisfactory explanation as to how he acquired the said title. The Appellant who claims to have purchased the suit land from the 1st Respondent did not produce a sale agreement, consent from the Land Control Board as required under Section 6 of the [Land Control Act](#), or any transfer instruments to establish the process through which the land was conveyed to him by the 1st Respondent. In the absence of such foundational documents, this Court is unable to ascertain whether the registration was done procedurally, legally, or in good faith.

23. While Section 26(1) of the [Land Registration Act](#) confers upon a registered proprietor a presumption of indefeasibility of title, that protection does not extend to titles acquired illegally, unprocedurally, or through a corrupt scheme. The burden rested with the Appellant to demonstrate that his registration as proprietor was done in accordance with the law, particularly in light of the respondents’ allegations that the suit land was ancestral in nature and not wholly owned by the 2nd Respondent.

24. This Court is guided by the decision in *Arthi Highway Developers Ltd v West End Butchery & 6 Others* [2015] eKLR, where the Court of Appeal emphasized that a title can be impeached even where fraud is not proved, if the process leading to registration was fundamentally flawed. Consequently, the Appellant’s mere reliance on the certificate of title without more is insufficient to displace the serious concerns raised regarding the root of his title.



25. In support of the foregoing observation, I adopt and restate the position of the law as underscored in the case of *Munyua Maina vs Hiram Gathiha Maina* [2013] eKLR, where the Court of Appeal held as hereunder,

‘We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.’

26. In view of the foregoing, I am satisfied that the Learned Magistrate directed herself properly on the law and took into account all relevant factors in arriving at her decision. It is therefore not open for this court to interfere with the same. Consequently, this appeal fails and the same is hereby dismissed.

27. On the issue of costs, it is trite that costs follow the event, unless the Court, for good reasons decides otherwise. In this case, the dispute involves members of the same family and in the circumstances, I order each party to bear their own cost of this appeal.

28. Orders accordingly.

DATED SIGNED AND DELIVERED AT BUNGOMA THIS 17TH DAY OF JULY, 2025.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. M/S Lichuma H/B for Katama Ngeiywa for the Appellant.
2. 3rd Respondent-present.
3. Bett C/A.

