



**Biketi v Njalae (Suing as the Legal Representative of the Estate of  
Jotham Simiyu Wambeye - Deceased) (Environment and Land Appeal  
E013 of 2024) [2025] KEELC 269 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 269 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT AND LAND APPEAL E013 OF 2024  
EC CHERONO, J  
JANUARY 30, 2025**

**BETWEEN**

**PROTUS KHAMAL BIKETI ..... APPELLANT**

**AND**

**NICHOLAS NJALAE (SUING AS THE LEGAL REPRESENTATIVE OF THE  
ESTATE OF JOTHAM SIMIYU WAMBEYE - DECEASED) ..... RESPONDENT**

*(Being an appeal arising from the Judgment and decree delivered by  
Hon W.K. Onkunya in Kimilili PM ELC No.11 of 2020 delivered on 13/3/2024)*

**JUDGMENT**

1. The Appellant herein was the defendant in the primary suit while the Respondent was the plaintiff therein.
2. In this appeal, the Appellant seeks to have the appeal allowed and the judgment/decree of the lower court set aside/reversed. He also seeks costs of the appeal.
3. In the impugned judgment, the trial magistrate issued a permanent injunction restraining the Defendant/Appellant, his relatives, agents or whomsoever from entering and/or trespassing upon the plaintiff's land parcel No. Bokoli/Mukuyuni/379 with costs.
4. Being aggrieved with the trial court's judgment, the Appellant herein preferred the present appeal. The Grounds of appeal as can be discerned from the Memorandum of Appeal can be summarized as follows;
  - a. The learned trial magistrate erred in law and in fact in holding that the respondent had proved his case on a balance of probabilities when the respondent transferred the appellant from LR No. Bokoli/Mukuyuni/454 and given to him 2 acres on LR No. Bokoli/Mukuyuni/454



which was separate and have was the sole proprietor but declined to transfer the same to the appellant.

- b. That the learned magistrate erred in law and in fact in holding the respondent had proved his case and abandoned the evidence given by the appellant that he bought further additional portion of land measuring 1 ¼ acres from Jestimore Wanjala which formed part of LR No. Bokoli/Mukuyuni/379.
  - c. That the learned trial magistrate erred in law and in fact in finding that the appellants occupation of land parcel no. LR No. Bokoli/Mukuyuni/379 for more than 49 years since the year 1975 when the respondent father was alive was unlawful, illegal and allowed the respondents claim.
  - d. That the learned trial magistrate erred in law and in fact by failure to consider that the appellant has been in occupation for 49 years, has developed the same by planting coffee and the appellant shall suffer irreparable loss.
  - e. That the learned trial magistrate erred in law and in fact for failure to appreciate that occupation and utilization of the said land LR No. Bokoli/Mukuyuni/379 by the appellant was with knowledge, express authority of the respondent.
  - f. That the learned trial magistrate erred in law and in fact when the respondent did not dispute that the appellant purchased land from his late father Wambeye Ndinyo which he caused the appellant to be transferred to his LR No. Bokoli/Mukuyuni/379 in the year 1987 and which land he has been in occupation up to date.
  - g. That the learned trial magistrate erred in law and fact for failure to consider the testimony of the appellant that when he entered and/or occupied LR No. Bokoli/Mukuyuni/379, already one Jestimore Wanjala was staying on LR No. Bokoli/Mukuyuni/379 in his name through underhand means to possess the whole parcel.
  - h. That the learned trial magistrate erred in law and in fact when she did not subject the entire evidence especially the replying affidavit filed and annexed thereto by the appellant to an exhaustive scrutiny and hence the entire judgment is against the weight of the evidence.
  - i. That the entire judgment of the learned trial magistrate is insupportable in law.
5. The Respondent/plaintiff commenced the former suit before the trial court by way of a plaint dated 11/03/2015 seeking the following orders;
- a. A permanent injunction restraining him, his agents, relatives or whomsoever from entering and/or trespassing upon the plaintiff's said land parcel.
  - b. Costs of this suit.
  - c. Any other remedy this honourable court deems fit and just to grant.
6. It was the Plaintiff/Respondent's contention was that he was the absolute registered owner and/or proprietor of land comprised in land parcel No. Bokoli/Mukuyuni/379 and that the Defendant/Appellant had, without any justifiable cause trespassed thereon and was utilizing the land. That there had been various suits involving the parties herein in other courts and despite the same terminating in his favour, the Defendant/Appellant had refused to vacate.
7. The Appellant filed a statement of defence and counter-claim dated 03/03/2016 seeking the dismissal of the Plaintiff's/Respondent's case and counterclaimed for the following orders;



- a. An order of cancellation of title no. Bokoli/Mukuyunu/379 and 3 ¼ acres to be curved out of the said land parcel be transferred to the defendant.
  - b. Costs of the counter-claim
  - c. Any other relief that this honourable court may deem fit.
8. It was his claim that he exchanged his 1.2 acres of land forming part of LR No. Bokoli/Mukuyuni/454 with the plaintiff/Respondent's 2 acres which he had purchased forming part of LR No. Bokoli/Mukuyuni/379. That he took possession of the 2 acres while the Respondent took possession of the 1.2 acres. That he later purchased 1 ¼ acres from other parties who had an interest in LR No. Bokoli/Mukuyuni/379 making his land 3 ¼ acres in total. That he has been in possession and occupation of the said 3 1/2 acres since the year 1987.
  9. The Appellant alleged that the Respondent fraudulently acquired title over land parcel LR No. Bokoli/Mukuyuni/379 which land had been sold to him and to one Jestimore Wanjala and Selina Nasimiyu. The Defendant/Appellant set out particulars of fraud against the Plaintiff/Respondent to include failure to honour the exchange agreement and obtaining title for LR No. Bokoli/Mukuyuni/379 through misrepresentation despite knowing that he is only entitled to 2 acres.
  10. The Plaintiff/Respondent filed a reply to the statement of defence and a defence to the counter-claim dated 18/11/2016 where he denied the Defendant/Respondent's counter-claim in totality.
  11. During the hearing, both the Plaintiff/Respondent and the Defendant/Appellant testified but did not call witnesses.

#### **Plaintiff/Respondent's Case**

12. PW1 Nicholas Njalale adopted his witness statement dated 19/11/2019 as his testimony-in-chief and produced into evidence the documents contained in his list of documents dated 25/11/2021 and 20/10/2021. During cross examination, he reiterated that the Defendant/Appellant forcefully occupied the land preventing sub-division of the same.

#### **Defendant/Appellant's Case**

13. DW1 Protus Khamala Biketi testified that he bought land parcel No. bokoli/Mukuyuni/453 from one Wambeye Ndiyo in the year 1975. He stated that the said Wambeye Ndiyo died in the year 1982 before transferring the land to him. That upon his father's death, Jotham Wambeye proposed to exchange the land that he (the Appellant) had bought with LR No. Bokoli/Mukuyuni/379 which measured 2 acres initially purchased from one Selina Wanjala. That he later purchased a further 1 ¼ acres forming part of LR No. Bokoli/Mukuyuni/379 from one Jestimore Wanjala. In cross-examination, the witness testified that the land he bought from Jestimore Wanjala was plot no. 380 but he was shown plot no. 379. He confirmed that in all the agreements produced, the plot numbers have not been indicated.

#### **Legal Analysis and Determination.**

14. I have looked at the Memorandum of Appeal, the Record of Appeal, and the written submissions and the relevant law. This being a first appeal, it is my duty to re-evaluate, re-assess and reanalyze the evidence on record and then determine whether the conclusions reached by the trial magistrate should



hold. In the case of Kenya Ports Authority v Kuston (Kenya) Limited [2009] 2EA 212 the Court espoused that duty as follows: -

“On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

15. In addition to the above parameters, we are alive to the fact that this Court should only interfere with the findings of the trial court where the decision is based on no evidence or on a misapprehension of the evidence or where the trial court is demonstrably shown to have acted on wrong principles in reaching its findings. See *Mwanasokoni v Kenya Bus Services* [1985] KLR 931.
16. From the memorandum of appeal and documents filed and produced by the parties and the proceedings of the trial court generally, the following are the issues that emerge for determination:
  - a. Whether the respondents title is lawfully, regularly and procedurally obtained and whether he was deserving of the orders granted by the trial court.
  - b. Whether the appellant established his counterclaim.
  - c. Who bears the costs of the appeal?
17. From the pleadings and the evidence as presented by both parties, it is clear that the Respondent claims registered owners’ rights over L.R. No. Bokoli/Mukuyuni/379 while the Appellant alleges that he purchased 1.2acres forming part of L.R No. Bokoli/mukuyun/454 which he later exchanged for 2acres forming part of L.R. No. Bokoli/Mukuyuni/379 and later bought an additional 1 ¼ acres of the said L.R. No. Bokoli/Mukuyuni/379 making an aggregate of 3 ¼ acres. His claim is that he is entitled to 3 ¼ acres out of L.R. No. Bokoli/Mukuyuni/379 and that the Respondent obtained the title for the entire L.R. No. Bokoli/Mukuyuni/379 fraudulently knowing that he was only entitled to 2 acres thereof.
18. It is not contested that the Respondent is the registered owner of L.R. No. Bokoli/Mukuyuni/379. Section 26 of the *Land Registration Act* is categorical that a Certificate of Title is a prima facie evidence that the person named therein is the proprietor of the land but the same can be challenged where the Certificate of title has been acquired fraudulently, unprocedurally or through a corrupt scheme. Indeed the court held as much in the case of *Embakasi Properties Limited & another v Commissioner of Lands & anor* [2019] eKLR as follows:

“Although it has been held time without end that the certificate of title is: “. conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof”, it is equally true that ownership can only be challenged on the ground of fraud or misrepresentation to which the proprietor named is proved to be a party. See section 23 of the repealed Registration of Titles Act. Section 26 of the *Land Registration Act*, 2012 though not as emphatic as section 23 aforesaid on the conclusive nature of ownership, confirms that the certificate is prima facie evidence that the person named as proprietor is the absolute and indefeasible owner. It adds that apart from encumbrances, easements, restrictions to which the title is subject, there is no guarantee of the title if it is acquired by fraud or misrepresentation or where it has been acquired “illegally, unprocedurally or through a corrupt scheme”.



19. According to the Defendant/Appellant, the Plaintiff/Respondent obtained the title fraudulently and sought to have the same cancelled. Fraud has been defined in Black's Law Dictionary 11<sup>th</sup> Edition as "A knowing misrepresentation or knowing concealment of material facts made to induce another to act to his or her detriment." It is an established principle of law that a claim based on fraud must be specifically pleaded and strictly proved. The Court of Appeal in *Vijay Morjaria vs Nansingh, Madhusingh Darbar & another* [2000] eKLR held that:

"It is well established that fraud must be specifically pleaded and the particulars of fraud alleged must be stated on the face of the pleading. The act alleged to be fraudulent must of course be set out and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from the facts."

20. On the standard of proof required for claims based on fraud, Superior courts have held that the standard of proof is higher than in the ordinary civil cases. In *Koinange & 13 others vs Charles Karuga Koinange* 1986 KLR the court held that:

"... Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond a reasonable doubt, something more than a balance of probabilities is required."

21. From the evidence on record, there is a green card, a copy of certificate of title and copy of certificate of official search which was produced showing that Jotham Simiyu Wambeye who the Respondent herein is the legal representative (having obtained limited letters of administration ad-litem) got registered as the proprietor of LR No. Bokoli/Mukuyuni/379 measuring 1.62Ha on 25/05/1977 and subsequently issued with a certificate of title. There was also produced on behalf of the Appellant an agreement dated 15/04/1975 for the sale of 1/5 acres forming part of LR No. Bokoli/Mukuyuni/454 between the Appellant and Jotham Wambeye as the seller. Another agreement dated 15/10/1988 between Chestmoa Wanjala(seller) and Jotham Wambeye(buyer) for 1 acre forming part of LR No. Bokoli/Mukuyuni/380. There are also other agreements between Chestmoa Wanjala and Jesen Wekesa as sellers and Protus Khamala as buyer, for an undisclosed parcel of land.

22. From the court record, it emerges that the Appellant herein has not produced in his evidence documents or called any witness to support his assertion that he exchanged his land for 2 acres in LR No. Bokoli/Mukuyuni/379 and that he indeed purchased a further portion as alleged to make his claim a total of 3 ¼ acre. It is trite that anyone who wishes the Court to believe in the existence of any fact, or who would fail if no evidence were adduced by either side, has the burden to prove its existence.

23. Under the provisions of sections 107 to 109 of the *Evidence Act*, the burden of proof was on the Defendant/Appellant to prove that the transactions were fraudulent. From the evidence on record, it is clear that the Appellant's claim is based on alleged oral agreements of sale entered into in the year 1982 or thereabouts as can be deciphered from the pleadings and material placed before the court. Without placing reliance on that oral agreement, the Appellant would be without any cause of action against the Plaintiff/Respondent.

24. The repealed Section 3 of the *Law of Contract Act*, Cap 23 Laws of Kenya provided as follows:-

"No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof is in



writing and is signed by the party to be charged or by some person authorized by him to sign it.

Provided that such suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of the contract:-

- (i) Has in part performance of the contract taken possession of the property or any part thereof; or
- (ii) Being already in possession continues in possession in part performance of the contract and has done some other act in furtherance of the contract.”

25. From the evidence on record, the Appellant/Defendant’s claim that he has been in possession of 3 ¼ acres of the suit land since the year 1985 has not been controverted by the Plaintiff/Respondent. Further, it is important to note that the surveyors report produced by the Appellant that was ordered by the trial court reveals that indeed the Appellant had actual and or constructive possession of 1.20Ha (3 acres) which has an existing boundary with the remainder 0.51ha(1.25acres) of the suit land is under possession and occupation of the Plaintiff/Respondent and one Felistus Mulongo. The Respondent’s argument is that the Appellant is a trespasser who had been leasing, tilling and/or ploughing the land and is now claiming ownership. In my considered view, the Plaintiff/Respondent did not controvert or sufficiently explain the alleged prolonged occupation of his land by the Appellant despite holding title to the land.
26. The court of appeal in the case of *Bandi v Dzomo & 76 others* (Civil Appeal 16 of 2020) [2022] KECA 584 (KLR) reiterated its previous position in *Benja Properties Limited vs. Syedna Mohammed Burhannudin Sahed & 4 others* [2015] eKLR, that:

“It is trite law that all titles to land are ultimately based upon possession in the sense that the title of the man seised prevails against all who can show no better right to seisin. Seisin is a root of title. The 1st, 2nd and 3rd respondents being in possession of the suit land have a better right to the same as against the appellant. The maxim is that possession is nine-tenths ownership. As was stated by the Privy Council in *Ghana of Wuta-Ofei -v-Danquah* [1961] All ER 596 at 600, the slightest amount of possession would be sufficient.”
27. For all the reasons stated in my analysis, I find that the trial court fell into error both in law and fact by allowing the Plaintiff/Respondents claim. I find the explanation by the defendant in his testimony and the documents produced in evidence are more probable than not that he bought the 3 acres he has been occupation from 1987 to date.
28. It is against the foregoing that I find this appeal merited. Consequently, this appeal is therefore allowed in the following terms;
  - a. The Judgment of the trial Magistrate (Hon. W.K. Onkunya) in *Kimilili PM-ELC No.11 of 2020* delivered on 13/3/2024 allowing the plaintiff/Respondent’s claim/suit is hereby set aside and substituted with an order allowing the Defendant’s/Appellant’s counterclaim for 3 acres to be curved out from land parcel No. Bokoli/Mukuyuni/379
  - b. The Plaintiff/Respondent to sign the transfer forms to facilitate the transfer of 3 acres from the suit land No. Bokoli/Mukuyuni/379 to the Defendant/Appellant failing which the Deputy Register of this Court to sign.



- c. The costs of this appeal and the former suit before the trial court to be borne by the Plaintiff/ Respondent.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 30<sup>TH</sup> DAY OF JANUARY, 2025.**

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**HON.E.C CHERONO**

**ELC JUDGE**

In the presence of;

1. Mr. Wamalwa Simiyu for the Respondent.
2. Appellant in person
3. Bett C/A

