



REPUBLIC OF KENYA



KENYA LAW
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**Namisio v Juma (Environment and Land Appeal E043 of 2024)
[2025] KEELC 946 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 946 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E043 OF 2024
EC CHERONO, J
FEBRUARY 27, 2025**

BETWEEN

KNIGHT NAMISIO APPELLANT

AND

MAELO JOHN JUMA RESPONDENT

*(Being an appeal from the judgment by Hon. P.Y.Kulecho (PM)
in Webuye MCELC No. E010 OF 2023 delivered on 27/08/2024.)*

JUDGMENT

1. This appeal arises from the Judgment of the trial Magistrate in WebuyeSPM-ELC NO.010 of 2023 where Maelo John Juma-the Respondent herein was the plaintiff while Knight Namisio-the Appellant was the Defendant.
2. The Respondent/plaintiff had commenced the former suit by way of a plaint dated 11/04/2023 seeking for judgment against the Appellant/Defendant for;
 - a. Orders in paragraph 8 of the plaint.

The plaintiff prays for an order of the eviction of the defendant from the suit and a permanent injunction restraining the defendants, her assigns and/or any other persons whomsoever acting through her or on her behalf from trespassing, remaining upon or occupying, utilizing or claiming any part of the suit land.
 - b. Mesne profits as per paragraph 9 of the plaint.

The plaintiff also claims for mesne profits from the year 2015 until the date of eviction of the defendants from the suit land.
 - c. Costs of this suit.



- d. Any other and further relief that this honourable court might deem just and fit to grant.
3. It was the Respondent/Plaintiff's case that he is the absolute registered proprietor of land parcel No. Ndivisi/Makuselwa/2647.(hereinafter referred to as 'the suit land'). That in the year 2009 when he was away, he learnt that a stranger had invaded the said land and erected structures without any colour of right or his consent. That he reported the incidence to the police and the said trespassers retreated. That the defendant moved into the suit land in 2015 purporting to have purchased the land from a person unknown to him.
 4. The Appellant/Defendant filed his statement of defence dated 28/09/2023 where he denied the Respondent's claim and averred that on a without prejudice basis, she entered the suit land with the knowledge of the Respondent on 02/10/2017 entered the suit land with the knowledge of the Respondent and his wife namely Alice Naliaka Wanyama. That her husband John Namisiku Sila bought the suit land from one Petronila Ayuma Yaura who had bought the same from the Respondent's wife with his knowledge. She sought to have the suit dismissed with costs.
 5. The parties agreed to proceed with hearing of the case by way of viva voce evidence where the Defendant/Appellant called two (2) witnesses while the Plaintiff/Respondent called one (1) witness.
 6. PW1 Maelo Juma adopted his witness statement dated 14/4/2023 as his evidence in chief. His evidence was that he acquired land parcel no. Ndivisi/ Makusela/2647 from his fathers' estate after a succession cause and that he has been utilizing the said land since 1988 until the year 2012 when he moved to a different piece of land. He produced into evidence a copy of certificate of search as PExhibit 1 and a copy of title deed as PExhibit 2. In cross-examination he denied having entered into a sale agreement with the appellant. In re-examination he stated that the appellant was in occupation of the suit land.
 7. DW1 Knight Linda Namisiko testified that she and her husband one, John Namisiko purchased the suit land jointly from one Petronila Auma Yaura who had bought it from Alice who is the respondent's wife. In support of her evidence she produced a sale agreement dated 03/04/2013 as DExhibit 1 and another agreement dated 02/10/2017 and DExhibit 2. In cross examination she reiterated the above evidence.
 8. DW2 Petronila Ayuma Yaura adopted her witness statement dated 28/09/2023 as her evidence in chief. She testified that she purchased a piece of land measuring ½ acre on 03/04/2013 from Alice Naliaka Wanyama and later sold it to the appellant. In cross-examination she testified that the vendor did not show her the tittle deed of the subject land and had told her that she had the authority of her husband to sell the land.
 9. In its Judgment, the trial court partially allowed the Plaintiff/Respondent's claim entered judgment in his favour and issued an order of eviction against the Appellant within 45 days of the date of the said judgment.

Legal Analysis And Decision.

10. I have perused the record of appeal and the grounds of appeal. I have also considered the submissions made and the authorities cited. This being a first appeal, I am obliged to evaluate, re-assess and re-analyze the evidence on record afresh to determine whether the conclusions reached by the learned trial magistrate were justified on the basis of the evidence presented and the law. This was settled in the case of *Selle & another Vs Associated Motor Boat Co. Ltd (1968) EA 123*.
11. From the record of appeal, I find that there are only two issues that emerge for determination as follows-;



- (a) Whether the learned magistrate properly determine the issue of ownership before making an order for eviction against the appellant and
- (b) whether the learned trial magistrate decided the entire suit against the weight of evidence.
12. From the materials before the trial court, the Plaintiff/Respondent's claim was that he was the registered owner of land parcel no. Ndivisi/Makusela/2647 Measuring approximately 0.39ha having been so registered as such on 11/07/2016 and issued with a title on 18/05/2021. He averred that the suit land is indicated to be a sub-division of land parcel no. Ndivisi/Makusela/767.
13. The Appellant/Defendant on her part claimed to be in occupation of approximately 0.2ha forming part of land parcel no. Ndivisi/Makusela/767 as a result of a sale agreement dated 02/10/2017 between her husband namely John Namisiko and one Petronilla Auma Yaura who is said to have purchased the land from one Alice Naliaka. It is claimed that the said Alice Naliaka is the wife of the Respondent.
14. Section 26 of the [Land Registration Act](#) 2012 provides-;
- (1) 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.
15. The courts are therefore required by statute to take judicial notice of a title document as prima facie evidence of ownership to land and a conclusive evidence of proprietorship to land except where such a title has been challenged on grounds stipulated herein above. In the present case, the title produced by the Respondent shows that the suit land is registered in his name as the absolute proprietor. Among the rights to be enjoyed by a registered owner of any land is the right to peaceful and quiet enjoyment of the land he owns. In other words, the rightful owner of a registered land has a right to possession, occupation and use of the land to the exclusion of others.
16. Having proved that he was the registered owner of the suit land, the burden of proof shifted to the Appellant/Defendant to demonstrate that the Plaintiff/Respondent acquired the same unlawfully or unprocedurally.
17. As earlier mentioned, the Appellant/Defendant claims that together with her husband, they acquired the suit land vide an agreement dated 08/05/2021. In the said agreement, the seller is shown as Petronilla Ayuma Yaura while the purchaser is John Namisiko Sila. The land which is the subject of the sale is given as a portion of Land Parcel no. Ndivisi/Makusela/767 said to be measuring approximately 97M by 22.1M (approximately 0.2ha). The said agreement is shown to have been signed by the said seller and buyer in the presence of witnesses. It is her evidence that the said Petronilla Ayuma Yaura had entered into an agreement with Alice Naliaka Wanyama dated 03/04/2013 for the sale of ½ acre to be excised from parcel.NO. Ndivisi/Makuselwa/767



18. DW2 in her evidence testified that the said Alice Naliaka Wanyama was the Respondent's wife and that she informed her that she had the consent/authority to sell the land. It was her evidence that she was not shown the title deed for the said land before purchasing it. The totality of the evidence above is that the said Petronilla Ayuma Yaura did not conduct any due diligence prior to purchasing the said parcel of land. Although there is no documentary evidence to show the actual registered owner of the suit land at the time he purchased the same, oral evidence shows that the same was registered in the name of the plaintiff's father. The purported seller by the name Alice Naliaka Wanyama (whoever she was) did not have the capacity to sell the suit land and could not therefore give what she does not have.
19. This position is emphasized by the principle of 'nemo dat non-quod habet', which was enunciated by the Court in the case of Daniel Kiprugut Maiywa v Rebecca Chepkurgat Maim [2019] eKLR as follows:

“The nemo dat principle means one cannot give what one does not have. This principle is intended to protect the title of the true owner. The rationale behind this principle is that whoever owns the legal title to property holds the title thereto until he or she decides to transfer it to someone else.”
20. The said purchaser by the name Petronilla Ayuma Yaura as the purchaser had an obligation to conduct a search as due diligence before purchasing the land. See Ngere Tea Factory Company Ltd vs Alice Wambui Ndome [2018] eKLR. This also applies to the Appellant who at the time of the purported purchase on 02/10/2017 was in fact purchasing a non-existent piece of land considering that the title for land parcel no. Ndivisi/Makusela/767 had already been closed on partion. In my view, the Appellant was indeed reckless in purporting to purchase a non-existent parcel of land from a stranger who had no capacity to sell such a land.
21. Borrowing from the dictum of Okello JA, in the Ugandan case of Sir John Bagire vs Ausi Matovu, Court of Appeal at Uganda, Civil Appeal NO. 7 of 1996 cited in the case of Katende vs Haridas),

“...lands are not vegetables that are bought from unknown sellers. Lands are very valuable properties and buyers are expected to make thorough investigations not only of the land but also of the seller before purchase.” In the same Katende vs Haridas case, the following dictum in the case of Mpagazihe & Another vs Nchumisi (1992-93) HCB 148, was cited, “a purchaser who without investigating whether his predecessor had any title or Power of Attorney to sell the land could not be held as bona fide purchaser.”
22. It is therefore clear that the Appellant is unlawfully in occupation of the Respondent's land. The actions by the Appellant amount to violation of the Respondent's right as guaranteed in Article 40 of *the Constitution*, 2010 and must be stopped as rightly done by the trial court. To this end, I agree with the trial court that the Appellant has no right to be in occupation of the suit land in which the Respondent is the absolute registered owner. A such I find no fault in the trial court's interpretation and application of the evidence tendered and the law in arriving at the decision reached.
23. In the appeal, the Appellant seems to be introducing fresh facts that were not pleaded and were not in issue before the trial court. On ground 2 and 4 of the memorandum of appeal, the Appellant seems to be challenging the manner in which the Respondent obtained his title for the suit parcel of land yet these were not issues raised before the trial court. It is trite that a party is bound by their pleadings and a trial Court cannot depart from the pleadings, unless a party opts to amend their pleadings as required



in law. That position was well enunciated by the Court of Appeal in the case of Galaxy Paints Company Limited v Falcon Guards Limited Court of Appeal Case Number 219 OF 1998, where the Court held;

"issues for determination in a suit generally flow from the pleadings and unless the pleadings are amended in accordance with the Civil Procedure Rules, the trial Court by dint of the aforesaid rules may only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the Court's determination."

24. The issues raised in the said grounds of Appeal were not in issue before the trial Court. They cannot therefore be a basis upon which this Court is called upon to fault the Judgment of the trial Court. This Court finds and holds that these grounds must fail.
25. Having looked at the judgment of the trial court, it is unclear to me why the learned magistrate ended up ordering the eviction of the Appellant from land parcel no. Ndivisi/Makusela/767 which as noted in preceding paragraphs had ceased from existing and as correctly noted by the Appellant, was not the pleaded land. For this reason, I find that the Appellant is to be evicted from land parcel no. Ndivisi/Makusela/2647 and not land parcel no. Ndivisi/Makusela/767 which was no longer in existence.
26. Further, in line with the principles established in the celebrated case of Giella Vs Cassman Brown & Company Limited (1973) EA 358, I find that the trial court did not err in granting this prayer. As for mesne profits, the trial court correctly applied the law in rejecting the prayer and this court upholds the said finding.
27. The upshot of my finding is that this appeal partially succeeds and for the avoidance of doubt the following consequential orders are issued;
 - a. The Appellant is hereby ordered to vacate from land parcel no. Ndivisi/Makusela/2647 forthwith failing which the Respondent shall be at liberty to apply for an eviction order against her, her assignees and/or any other person acting through her.
 - b. A permanent injunction is hereby issued restraining the Appellant, her assignees or any other person acting through her from encroaching land known as Ndivisi/Makusela/2647.
 - c. Each party shall bear their own costs of this appeal.
28. It is so ordered.

DATED AND SIGNED AND DELIVERED AT BUNGOMA THIS 27TH DAY OF FEBRUARY, 2025.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. Mr. Simiyu Dennis H/B for Muaka for Appellant
2. Respondent/Advocate-absent.
3. Bett C/A.

