Mudenyo & 3 others v County Government of Kakamega & another (Civil Appeal E002 of 2023) [2025] KECA 117 (KLR) (31 January 2025) (Judgment)

Neutral citation: [2025] KECA 117 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL E002 OF 2023

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

JANUARY 31, 2025

BETWEEN

LILIAN SHIBALILA MUDENYO ..... 1ST APPELLANT

JOAN JAYVONNE MUDENYO ..... 2ND APPELLANT

MELSA OBANDA OSORE (SUING AS TRUSTEES OF NASIO SELF HELP GROUP) ..... 3RD APPELLANT

NOAH'S ARK EDUCATION CENTRE ..... 4TH APPELLANT

AND

COUNTY GOVERNMENT OF KAKAMEGA ..... 1ST RESPONDENT

BENEDICT OPATTAH (SUED ON BEHALF OF THEMSELVES AND ON BEHALF OF MUMIAS TEACHERS HOUSING CO-OPERATIVE LIMITED) ..... 2ND RESPONDENT

(Being an appeal from the Judgment of the Environment and Land Court at Kakamega (Ochungo, J.) dated 1st November 2022 in ELC Case No. 107 of 2017)

JUDGMENT

1. This appeal arises from a dispute involving two land parcels S/Wanga/Lureko/2863 and S/Wanga/Lureko/2864 (herein parcel No. 2863 and 2864 respectively). The suit was initiated in the Environment and Land Court (ELC) by the appellants, Lilian Shabalila Mudenyo, Joan Jayvonne Mudenyo and Melsa Obanda Osore, as trustees of Nasio Self Help Group. Noah's Ark who, is the 2nd appellant, was not a party in the ELC.

2. The suit was initially against the 1st respondent, Benedict Opatta Wambani, who had been sued by the appellants on his own behalf and on behalf of Mumias Teachers Housing Co-operative Society Limited

(the Society). The 2nd respondent, County Government of Kakamega, was subsequently enjoined in the suit as an interested party.

3. According to the amended plaint filed in the ELC, the appellants claimed ownership of parcel No. 2863 and 2864, which they contend were subdivision of a parcel identified as No. 579 that they had bought from one Muzee Hussein Mambo, in 2003. They alleged that the 1st respondent had encroached onto parcel No. 2863 and 2864 and started a construction of a permanent structure, claiming that the suit properties belong to the Society, and is registered as LR No. 8056/317 Mumias County (parcel No. 8056).

4. The appellants sought several orders, including a declaration that they are legally registered as beneficial owners of parcel No. 2863 and 2864; that the creation and registration of parcel No. 8056 was null and void ab-initio and unlawful; a permanent injunction against the respondent and the interested party restraining them from trespassing, constructing working on or in any way interfering with the suit properties; and eviction orders against the respondent or alternatively an order for the interested party to provide full compensation to the appellants at the current market price of parcel No. 2863 and 2864.

5. The 1st respondent filed an amended statement of defence and amended counter claim in which he denied the appellants' claim, maintaining that the title to parcel No. 2864, was extinguished by the compulsory acquisition of parcel no 579, and the land now forms part parcel No. 8056 which belongs to the Society, while parcel No. 2863 is nonexistent in the land register at Kakamega or anywhere within the republic. They contend that parcel No. 579 was acquired by the government in 1972, and parcel No. 2863 and 2864 became part of parcel No. 8056 from 1st January, 1998 when it was duly allocated to the 1st respondent as lessee.

6. The 1st respondent counter claimed against the appellants, for fraudulent concealment of facts and collusion to defraud the respondent. This was through purporting to have bought parcel No 579 from Muzee Hussein Mambo who had been paid for the land, after the compulsory acquisition of the land; illegally occupying part of the land and putting up a school called Noah's Ark Academy, pursuant to which the appellants were given parcel No. 2864 as alternative land.

7. The 1st respondent, therefore, prayed for an order of permanent injunction restraining the appellants, their agents, servants or assigns from continuing to occupy the portion forming part of parcel No. 8056 belonging to the 1st respondent. They also sought an order of eviction of the appellants from that parcel, and an order of cancellation of parcel No. 2864 and all parent titles existing after the said parcel was acquired by the government.

8. The interested party also filed a statement of defence denying the appellants claim. It contended that the titles of the appellants for parcel No. 2863 and 2864 were fraudulently obtained, as they are subdivisions of parcel No. 579 which was compulsorily acquired by the interested party and the then owner Muzee Hussein Mambo, compensated. Subsequently a lease for parcel No. 8056 was created in favour of the 1st respondent. The interested party alleged that the appellants in collusion with Muzee Hussein Mambo, fraudulently and un-procedurally removed a restriction on parcel No 579 in order to have it subdivided, despite the compulsory acquisition; that the appellants have been forcefully occupying and developing the purported subdivisions parcel No. 2863 and 2864 with full knowledge of the compulsory acquisition. The interested party maintained that the 1st respondent holds a valid lease for parcel No. 8056, and therefore has a legal right to develop the land.

9. During the hearing of the suit, the appellants called one witness, Joan Tabuche, who is a member of the self-help group. She produced a certificate of registration for the group and testified that the

group purchased two subdivisions of parcel No. 579. She produced a certificate of official search which showed that as at 26th January, 2015, the registered proprietor of parcel No. 2864 was Nasio Self Help Group, which was registered on 15th January, 2007. She also produced a copy of a Green Card for S/Wanga/Lureko/579 showing that Muzee Hussein Mambo was the registered proprietor from 19th August, 1983, and that the title was closed upon subdivision on 15th January, 2007. She produced a receipt for Parcel No. 2863, contending that they have been paying rates for the property and that although they did not get the title, they were allowed to construct a day care center where they have 300 children. It was not until 2014, that the 1st respondent trespassed on their property, and put up beacons and a foundation, and although the matter was reported to the police and the chief, the 1st respondent continued to trespass on the land.

10. Under cross examination, Joan explained that they got title for 2864 in 2004, and conceded that the respondent has a lease for the property. She also conceded that they do not have any title in regard to No. 2863. She denied any knowledge of the land having been compulsorily acquired in 1972. She maintained that the Self Help group carried out due diligence, although they were not aware of the restriction on the Green Card. She stated that they have developed parcel No. 2863 and have class rooms, a store and a kitchen since 2004.

11. The 1st respondent testified on his own behalf and on behalf of the Society. He stated that he is the secretary to the Society, and had authority to represent the Society. He adopted his statement which he had filed in court. In his statement, the 1st respondent had explained that they acquired a lease in regard to parcel No. 8056 from the County government on 1st January, 1998, for a term of 99 years. That they have conducted surveys on the property twice, but each time some unknown unscrupulous persons vandalized the beacons. He was aware that there were people who were claiming their land, some of whom had started developing on part of the land but maintained that there was fraud being perpetrated by one Muzee Hussein Mambo who had not surrendered his title following the compulsory acquisition of his land.

12. The interested party called one Hezekiel Buhuru Nandwa, who is employed by the interested party as a land surveyor. Referring to documents filed by the 1st respondent, the witness testified that parcel No. 579 was acquired by the government and there was a restriction placed on the title, and that there was no authority given by the Commissioner of Lands for the subdivision of parcel No. 579 that could have resulted in parcel No. 2864. He maintained that the lease in parcel No. 8056 was still in existence, and the title for parcel No. 2864 could not be planted on the lease. He testified that following a field visit, they prepared a survey report, which established that parcel No. 2864 and 2863 were not existing on the ground. He confirmed that parcel No. 579 was closed upon subdivision into parcels Nos. 2863 and 2864, and reiterated that parcel No. 579 was government land that had been allocated to the 1st respondent, and that the compulsory acquisition regarding the land was done between 1971 and 1973.

13. The learned Judge upon considering the evidence and the submissions that were made by the parties delivered a judgment in which he identified the issue for determination as, whether the appellants have valid titles over parcel No. 2863 and 2864; whether the appellants demonstrated encroachment on parcel No. 2863 and 2864; or whether the 1st respondent has a valid title to parcel No. 8056; and what reliefs should issue.

14. The learned Judge found that parcel No. 579 which was 1.46 acres was compulsorily acquired by the government. The compulsory acquisition was captured in the register as far back as 11th June 1987, when a restriction was registered. The learned Judge found that the appellants did not demonstrate how parcel No. 579 was subdivided or how they purchased the land in 2004, and became registered proprietors, notwithstanding the two restrictions on the title and the compulsory acquisition; and that

no valid subdivision or transfer could have taken place without the restrictions having been removed. The learned Judge concluded that the appellants did not have valid titles over parcel No. 2863 and 2864.

15. In addition, the learned Judge found that the appellants had failed to prove any encroachments on parcel No. 2863 and 2864, as the parcels were not in existence on the ground; that the 1st respondent holds a lease from the government and has a title which was earlier in time compared to that of the appellants; that the appellants' witness admitted that the appellants have constructed on the disputed property; and as the disputed property fell within land parcel No. 8056, the 1st respondent was entitled to an eviction order and a permanent injunction against the appellants; and that a case had been made for cancellation of the appellants title in regard to parcel No. 2864.

16. Consequently, the learned Judge dismissed the appellants suit and cancelled the appellants/the Group's title in respect to parcel No. 2864; and ordered the appellants and Nasio Self Help Group to vacate the suit premises within six months from the date of the judgment, failing which the 1st respondent would be at liberty to evict them. The learned Judge also issued a permanent injunction restraining the appellants and the Group from dealing with the suit property or carrying out any academic activity after a period of six months.

17. It is this judgment that has aggrieved the appellants. In its memorandum of appeal, the appellants have raised nineteen grounds basically faulting the learned Judge for erring in law and fact in dismissing the appellants claim, allowing the respondent's counter claim, and also in cancelling the title deed in regard to parcel No. 2864. In support of the appeal, the appellants filed written submissions that were duly prepared by learned advocate, Kaira Nabasenge, who reduced the nineteen grounds into three issues as follows:

    i. Whether there were restrictions on the parcels of land in question and whether there was cogent evidence on record to warrant the cancellation of the title in issue (Grounds 1,2,3,4,5,6,7,8,9)

    ii. Whether the defendant proved ownership of the suit land against the appellants Nasio Trust a charitable institution (Grounds No.10, 11, 12, 13, 14, 15 and 16)

    iii. Whether the appellants were entitled to be compensated on cancellation of the title in issue and whether the superior court relied on wrong principles of law in reaching the impugned decision. (Grounds 17).

18. On the first issue, the appellant submitted that under Section 26 of the *Land Registration Act* No. 3 of 2012, a title deed is conclusive evidence of proprietorship, and such title deed is sacrosanct and can only be cancelled when there is proof that it was procured illegally. That although the learned Judge found that the appellants' titles were not valid because they were acquired when there were restrictions on the land register, the learned Judge did not establish who placed the restrictions on the title, and how the Land Registrar processed the appellants title, notwithstanding the restrictions.

19. The appellants faulted the court for failing to call the Land Registrar to explain the position about the land to the court. The appellants faulted the learned Judge for failing to apply Order 1 Rule 10(2) of the Civil Procedure Rules, which failure casts doubt on whether there was really a restriction on the land. They faulted the Judge for finding that a case had been made for cancellation of the appellants' title in respect to parcel No. 2864, after concluding that there was corruption without any evidence having been adduced in support of any corrupt dealings.

20. On the second issue, the appellants reiterated that by dint of Section 26 of the *Land Registration Act*, they had been issued with an indefeasible title and the respondent had no colour of right or any claim over their title. That the appellant's title to the suit property was issued on 15th January, 2007, while the appellants had been on the suit property from 2003 to 2023, which was a period of twenty years. The appellants submitted that during that period, they had fully developed the property with a school, and yet the respondent never sought cancellation of the appellants' title until they were sued for interfering with the appellants' peaceful and quiet occupation of that property.

21. The appellants argued that the respondent was guilty of laches and could therefore not claim or prove ownership of the suit property. That in cancelling the title deed and ordering the appellants to vacate the suit property, the learned Judge failed to appreciate that the school erected on the suit property is a charitable institution offering education, shelter and feeding program to many children of tender years. Therefore, the orders issued by the learned Judge were against public interest, and also violate the constitutional rights of children who are beneficiary of the suit property. The appellants referred the Court to Article 53 of *the Constitution*, and Section 4 of the *Children Act* in regard to the interest of the minor children which should be paramount.

22. On the third issue, the appellants submitted that there was no substantial evidence to warrant the cancellation of the title which title was properly issued by the Land Registrar. That the respondents were aware of the developments on the suit property but never objected to the construction of the school, and therefore it was only fair that if title was to be cancelled, the appellants should be compensated. In this regard the appellants cited Mike Maina Kamau -vs-Attorney-General [2017] eKLR, ELC Case No. 1303 of 2014, arguing that the 1st respondent had been indolent in pursuing its claim, and therefore the appellants should be compensated.

23. Finally, the appellants urged the Court to allow the appeal as the learned Judge applied wrong principle of law, by cancelling the title in question, without any evidence to warrant such cancellation, and by failing to compensate the appellants.

24. The 1st respondent also relied on written submissions that were duly filed by learned counsel, Ms. Elizabeth Chunge. She pointed out that the 1st respondent was allotted parcel No. 8056 for a lease of 99 years, effective from 1st January, 1998. That the appellants' alleged parcel No. 2864 was part of the respondent's leasehold property, and this was demonstrated during the hearing. Ms. Chunge argued that the appellants acquired parcel No. 2864 in 2007, almost nine years after that property had formed part of parcel No. 8056; that the appellants purported to have titles on a parcel of land that had a restriction put by the government; and that they did not demonstrate to the court how they managed to create the fraudulent titles for parcel No. 2863 and 2864 with the restrictions in place.

25. The 2nd respondent, also filed written submissions through its advocate Phoebe Munihu Muleshe & Co advocates. It supported the judgment of the learned Judge maintaining that there were restrictions registered on the suit property, and the appellants failed to explain how the restrictions were removed; that it was incumbent upon the appellants to call any witnesses of their choice in support of their case, and they could not shift this burden to the court; and that Order 1 Rule 10(2) of the Civil Procedure Rules was not applicable as it deals with joinder of parties to a suit and not calling of witnesses.

26. On cancellation of the titles, the 2nd respondent submitted that the court was right in cancelling the appellants' titles as fraud was demonstrated when the appellants failed to demonstrate how they acquired the titles with the restrictions in place. The 2nd respondent dismissed the issue of the appellants having been in possession for a long time, arguing that the issue of laches was not raised in the plaint and cannot be introduced at this point in time. Similarly, on compensation, the 2nd appellant submitted that

no evidence was led in this regard, and therefore the court could not issue the orders sought. Finally, on the issue of children's rights, the 2nd respondent argued that this was not pleaded in the primary suit and cannot therefore be raised as an issue in this appeal.

27. This being a first appeal, this Court is under a duty to re- evaluate, re-assess and reanalyze the evidence on record, and all the issues raised, in order to arrive at its own conclusion. In Kenya Ports Authority v Kuston (Kenya) Limited [2009] 2EA 212 this Court stated this 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, the court's responsibility is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

28. In addition, the 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.)

29. In accordance with our aforestated duty, we have carefully perused and considered the record of appeal, the submissions which were made before us and the law. It is not disputed that the dispute leading to the appeal involved the same parcel of land which according to the appellants is parcel No 2684 and 2683, which are subdivisions of parcel No 579, while according to the respondents the parcel of land is parcel No.579 which was compulsorily acquired and thereafter partly allocated to 1st respondent as a leasehold title registered as parcel No. 8056. The appellants and the respondents have each produced copies of their respective titles. The issue for consideration in this appeal is therefore whether the disputed properties were properly registered as per the titles produced, and if so, who has established ownership, and what orders should have issued.

30. Section 26 of the Registered *Land Act* No 3 of 2012 states:

26.

(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, un-procedurally or through a corrupt scheme.

31. It is instructive that although Section 26 is categorical that a certificate of title is prima facie evidence that the person named therein is the proprietor of the identified land, the section provides for such title to be challenged where there is evidence that the Certificate of title has been acquired either fraudulently, un- procedurally or through corrupt practice. This has been reiterated by this Court in many decisions, for instance (Embakasi Properties Ltd & Another -vs- Commissioner of Lands & Another [2019] eKLR). In the matter before us, the appellants were the ones who sued, relying on

their title for parcel No. 2864, but the 1st respondent also relied on his leasehold title for parcel No. 8056. This poses an issue regarding which of the two titles was legally and procedurally acquired, and who is the rightful owner.

32. In Dina Management Limited v County Government of Mombasa & 5 others [2023] KESC 30 (KLR) (21 April 2023) (Judgment); the Supreme Court reiterated what had been stated by this Court (differently constituted) in Munyu Maina v Hiram Gathiha Maina [2013] eKLR, that where the registered proprietor's root title was under challenge, it was not enough to dangle the instrument of title as proof of ownership, as it was the instrument that was in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title, and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register.

33. The appellants, who started the ball rolling by filing suit, relied on their certificate of title for parcel No. 2864 to prove ownership. In regard to parcel No. 2863, the appellants only produced receipts for payment of rates and this is not sufficient to establish ownership. Moreover, it was argued that land parcel No. 2863 does not exist on the ground, and other than the green card showing that the title to parcel No 579 was closed upon subdivision, there was nothing to establish ownership.

34. The 1st respondent has challenged the legality of the appellants' title to parcel No. 2864, maintaining that at the time it was issued, the land parcel had been compulsorily acquired, and there was a restriction on the title; and that the land parcel is purported to have been subdivided and a title issued, when a restriction was in place. The appellants produced a Green Card for parcel No. 579 as evidence that they bought the land from Muzee Hussein Mambo. Although the Green Card confirms that Muzee Hussein Mambo was registered owner of that land parcel from 9.1.1967, the Green Card shows that there was an endorsement on the easement section that the land had been compulsorily acquired, and there was also a restriction on the title.

35. The appellants were not able to explain how the land was subdivided and a title issued in their name, when there was such restriction in place. In fact, the appellant's witness denied any knowledge of the compulsory acquisition. Given that the Green Card that the appellants produced in evidence had the endorsement that the land was compulsorily acquired, under Section 31 of the former Land Registered Act (now repealed), the appellants cannot feign ignorance of the compulsory acquisition. That section stated that:

> " Every proprietor acquiring any land, lease or charge shall be deemed to have had notice of every entry in the register relating to the land, lease or charge and subsisting at the time of acquisition."

36. The compulsory acquisition was a matter that the appellants ought to have been aware of if they had carried out due diligence, as it was the responsibility of the appellants to prove the root of their title by showing how they acquired the title, and proving that the acquisition was legal and procedurally done. Other than producing the Green Card and the certificate of title for parcel No. 2864, the appellants did not call any evidence, but took issue with the fact that the ELC accepted the evidence of the surveyor and blamed the court for failing to call the Land Registrar to testify.

37. Section 107 and 108 of the *Evidence Act* provides that:

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(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

38. Halsbury's Laws of England Fourth Edition Vol. 17 paragraph 13 and 14 also states:

> " The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial, he has failed to establish these to the appropriate standard, he will lose.
>
> The legal burden of proof normally rests upon the party desiring the court to take action; thus, a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues."

39. The burden of proof remained on the appellants to establish that they not only had a title for parcel No. 2864, but also that the title was acquired legally and procedurally. Other than testifying that they bought the disputed land from Muzee Hussein Mambo, and producing the Green Cards and certificate in their name, the appellants did not offer any evidence regarding the conveyance and registration of the title in their names. Nor did the appellants call the Land Registrar who is responsible for registration of land transaction, and who could have given evidence on the root of the appellants title, by explaining the endorsement on the Green Card, and how the land was transferred to the appellants, notwithstanding the endorsement.

40. The upshot of the above is that, the appellants failed to establish any ownership in regard to parcel No. 2863 or 2864 and also failed to prove that their certificate of title in regard to parcel No. 2864 was legally and procedurally obtained. Consequently, there was no evidence upon which the orders sought by the appellants could be anchored. The learned Judge cannot be faulted for dismissing the appellants' claim. In the circumstances, the orders made by the learned Judge for eviction of the appellants from parcel No. 8056 and a permanent injunction restraining them from entering or in any manner dealing with parcel No. 8056 was justified.

41. We find no merit in this appeal. It is dismissed with costs.

Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 31ST DAY OF JANUARY, 2025.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR