



REPUBLIC OF KENYA



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**Emuria v Sambu & 2 others (Civil Appeal 63 of 2017)
[2025] KECA 1033 (KLR) (5 June 2025) (Judgment)**

Neutral citation: [2025] KECA 1033 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPEAL 63 OF 2017
JM MATIVO, GV ODUNGA & PM GACHOKA, JJA
JUNE 5, 2025**

BETWEEN

JOHN ESUGURU EMURIA APPELLANT

AND

ELIJAH KIPTANUI SAMBU 1ST RESPONDENT

THOMAS KIPLAGAT SAMBU 2ND RESPONDENT

ISSAC KIPCHUMBA SAMBU 3RD RESPONDENT

(An appeal from the judgment and decree of the Environment and Land Court of Kenya at Kitale (E.Obaga, J.) delivered on 28th January 2015 in ELC Case No. 75 of 2011)

JUDGMENT

1. Land disputes are sometimes met with befuddled exasperating claims. The conflict between the parties that started more than 15 years ago involves what is described by the parties as 3 points. At the hearing, the Court had to enquire what this fight on 3 points is all about, only to learn with amazement that a point is 1/10th of an acre. The appellant is before us challenging the judgment of the trial court. The gravamen of the appeal is that his suit, which sought an order of eviction of the respondents from the suit land was wrongly dismissed by the learned judge. Irrespective of who wins, one is left wondering whether parties in land disputes ever perform a cost-benefit analysis before engaging in lengthy and time-consuming litigation.
2. The other key issue that will become clear in the judgment is the necessity of proper pleadings and setting out of the cause of action. A judge hearing a matter is required to address the issues set out in the pleadings. Many a time parties realize, albeit late, that pleadings are everything.
3. To put the appeal in context, we shall give an abridged background to the dispute. One Malakwen Arap Serem owned a parcel of land namely L.R. No. Sinyerere/Kipsaina Block 2/Kesogon/ 88 measuring



10 acres. It is common ground that on 23rd February 2001, he sold one acre to the appellant, which was excised from the said parcel of land and registered as L.R. No. Sinyerere/Kipsaina Block 2/ Kesogon/457. The appellant took possession of the parcel of land and fenced it. From the record, there was peace between the parties until 2007 when Elijah Kiptanui Sambu, a son of Malakwen Arap Serem, the seller, threatened to kill the appellant. In the process, he destroyed the fence and occupied part of the parcel of land belonging to the appellant. The appellant sued the said Elijah Kiptanui Sambu vide a plaint dated 26th August 2011 that was amended on 23rd May 2012 which joined the other respondents. The cause of action pleaded was that the respondents had trespassed on the land and destroyed the fence.

4. At this stage, it is important that we reproduce the relevant part of the pleadings as this will be instrumental later in the judgment. The relevant part of the amended plaint dated 23rd May 2012 reads as follows:

- “4A. On or about the 23/3/2001 one Malakwen Arap Serem herein sold to the Plaintiff one (1) Acre at a consideration of Kshs.120,000.00 and subsequently in 2003, or thereabouts purchased an additional 0.3 Acres from the said Defendant part of the consideration was paid to the Defendant and part to Geometrics surveyors to facilitate sub-division and upon' completion the Plaintiff took immediate possession upon being shown the said portions by the 2nd Defendant.
- 4B. The said portion were duly surveyed and excised from the remaining portion of the said Malakwen Arap Serem title culminating in the issuance of a title in favour of the Plaintiff' on 12/ 4/2005 in respect of title number Sinyerere/ Kipsaina Block 2/Kesogon/459 measuring 0.121 Hectares (0.3 Acres) or thereabouts.
- 5A. Sometimes in January 2007 the Defendants herein jointly and severally threatened to attack the Plaintiff and proceeded to uproot Boma Rhodes and remove a fence erected by the plaintiff promoting the Plaintiff to make a formal report to Kesogon Police base vide O.B, number 4/3/1/2007 but no action was taken.
- 6A. The Plaintiff subsequently reported to the Area Chief who visited the site on 8/2/2007 and who subsequently referred the matter to the D.O Kaplamai and the Land Registrar for further action.
- 6B. The D.O Kaplamai advised the parties to keep peace until completion of the re-survey exercise by the Land, Registrar.
- 6C. Notwithstanding the advice by the Area Chief and the D.O the Defendants continued with their illegal activities and threatens (sic) and the Plaintiff and his family are now living in great fear.
- 6D. The Defendants have now forcefully and wrongfully utilized part of the Plaintiff's portion of land and have despite notice refused to move out and continue laying claim of the same.



5. In the amended defence dated 11th July 2012 (wrongly headed “reply to amended defence & defence for 2nd, 3rd, & 4th defendants”) the relevant paragraphs read as follows:

- “2. The defendants deny the allegations in paragraph 4A and 4B of the amended plaint and state that the plaintiff purchased only one (1) acre from Malakwen Arap Serem and not an additional of 0.3 of an acre.
3. The defendants state that the plaintiff obtained title for 0.3 acres i.e title No. Sinyerere/Kipsaina Block 2/Kesogon/459, fraudulently and that the same ought to be cancelled.

Particulars of the Plaintiff’s Fraud

- a) causing the said Malakwen Arap Serem to sign blank Land Control Board and Transfer forms without explaining to him what he was signing.
 - b) filling in the forms and indicating that 0.3 of an acre had been sold when it had not.
 - c. obtaining the title deed.
 4. The defendants deny uprooting any Boma Rhodes or fence and state that if they had done so, they would have been charged in court.
 5. The defendants state that they are lawfully working on and residing on the land.
 6. The prayer for injunction and eviction is not merited.
 7. Save what is expressly admitted herein all other allegations in the amended plaint are denied in toto.”
6. As can be noted, the respondents filed an amended defence and set out the particulars of fraud. However, they did not file a counterclaim seeking cancellation of the appellant’s title and the significance of this omission will become clear later in the judgement. The other significant point is that the appellant only prayed for one substantive order for eviction of the respondents from the suit land and a permanent injunction restraining them from interfering with his quiet possession of the land. These were the pleadings filed before the trial judge.
7. After the hearing, the only question that the trial judge framed for the determination was whether the extra 0.3 acres were acquired legally by the appellant. The relevant part of the judgment reads as follows.
- “8. There is no evidence to support the plaintiff’s allegation that on the day he bought one acre that is on 23/2/2001, he again bought one point in the afternoon at Ksh. 20,000/=. There was no written agreement made. It is very doubtful why the plaintiff could enter into a written agreement in the morning and yet on the same day in the afternoon buy additional land without entering into a written agreement.
 9. Though the defendants’ father testified that he never sold any land to the plaintiff, his evidence is contradicted by his own defence exhibit No. 1 in which he concedes that he sold one acre to the plaintiff and later sold to him one point which the plaintiff was buying on behalf of his sister. At least there is evidence that the plaintiff bought an additional point besides the one acre. The plaintiff produced a sale agreement dated 23/3/2003 [Exhibit 2] which shows



that he bought one point at Ksh. 19,000/=. He paid Ksh. 10,000/= on the date of signing the agreement and the balance was cleared on 15/4/2003. This agreement was witnessed by the 4th defendant. The balance of Ksh. 9,000/= was witnessed by the first and fourth defendants.

10. There is no evidence to support the plaintiff's claim that there was an agreement that he was to be given one point in lieu of expenses incurred. The plaintiff did not say how much he spent on the sub-division as to warrant being given one point of an acre. If he processed his title, that was to his benefit and the defendants' father should not shoulder that. The plaintiff testified that the first defendant is utilising two points. The first defendant and or his other brothers are entitled to utilise the two points because the plaintiff never bought the same. The defendants have left one acre and one point to the plaintiff which the plaintiff rightfully bought.
11. I have looked at the minutes of the Land Control Board dated 11/6/2003 (Exhibit 3). The minutes relating to the suit land as well as the one acre bought by the plaintiff do not show any details of what was approved. This is unlike all other minutes of that day which gave details of the transaction approved such as the land reference number and the acreage of the land to be sub- divided or transferred. It is therefore not surprising for the defendants' father who was illiterate to say that he did not know how the plaintiff came to be registered for more land than he bought.”
8. The appellant is dissatisfied with those findings. He filed his notice of appeal dated 9th February 2015 and memorandum of appeal dated 10th June 2015. The appellants raised nine grounds impugning those findings which we have summarized as follows: that the learned judge did not appreciate that there was no counterclaim; that the learned judge erred by ignoring the evidence that was adduced that showed that he was the lawful registered owner of the suit land; that the judge misdirected himself on the question of burden of proof; and that the trial judge erred in failing to uphold the two agreements for 0.2 acres.
9. In view of the foregoing, the appellant prayed that the appeal be allowed by setting aside the judgment and decree of the trial court and prayed for costs of the suit at trial and in this appeal.
10. The appeal was heard virtually on 10th March 2025. Present and representing the appellants was learned counsel Mr. Kiarie. The respondents appeared in person. Parties argued the appeal on the basis of their antipodal written submissions that were orally highlighted.
11. The appellants' written submissions, list of authorities and case digest, all dated 17th October 2022 reiterate the grounds of appeal and we need not rehash them. The main issues raised in the grounds of appeal are that the respondents did not file a counterclaim to challenge the title and that the appellant remained the registered owner of the suit land. Citing the case of *Vijay Morjoria vs. Nansingh Madhusingh Darbar & Another* [2000] eKLR, the appellant stated that the respondents did not challenge his title by way of a counterclaim and therefore an order for eviction against the respondents should have been issued.
12. The respondents filed written submissions dated 17th October 2013. They acknowledged that though they had not filed a counterclaim, the veracity of the appellant's ownership of the disputed suit land was a factual statement and thus we should strike out this appeal. Relying on the case of *Elijah Makeri Nyangw'ra vs. Stephen Mungai Njuguna* [2013] eKLR, the respondents submitted that a title obtained illegally, unprocedurally, and through a corrupt scheme can be impugned. The gist of the submissions was on the attack of the genuineness of the title and the respondents prayed that the appeal be dismissed.



13. We have carefully considered the parties’ written submissions, examined the record of appeal and analyzed the law. The predecessor of this Court in *Kenya Ports Authority vs. Kuston (Kenya) Limited* (2009) 2EA 212 succinctly elucidated our role as a first appellate court as follows:

“On a first appeal from the High Court, this 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.”

14. This Court has pronounced itself severally that parties are bound by their pleadings. A trial court duty is to frame the issues that arise from the pleadings. In *JTG Enterprises Limited vs. China Gezhouba Group & another* [2024] KECA 596 (KLR), this Court held:

“This Court will not tire to remind parties that proper drafting of pleadings is so paramount that it goes to the kernel of administration of justice. Where pleadings create incertitude to a fact finder, it will be impossible to understand the remedies being sought. As a result of this, a would-be good case is butchered because of poorly drafted pleadings. Parties are encouraged to draft painstakingly while bearing in mind that the very draft of that pleading could lead to its actual success or failure.”

15. Similarly, in *Mwinyihaji vs. Mwebeyu & another* [2025] KECA 868 (KLR), this Court emphasized as follows:

“Parties are bound by their pleadings and any evidence produced by the parties which is not supportive of, or is at variance with, what is stated in the pleadings must be disregarded. (See *IEBC & Another -vs- Stephen Mutinda*)”

16. As can be noted from the amended plaint, the only issue that the appellant raised was the issue of trespass to his land by the respondent’s father. He stated that he was the registered owner of the parcel of land. The issues raised in the amended defence were mere denials and a general statement that the title was obtained fraudulently. Though the respondents set out particulars of fraud in the amended defence, the legality or otherwise of the appellant’s title was not challenged.

17. We note that the only issue that the judge dealt with was on the legality of the 0.3 acres. He never considered the issue of trespass that was raised by the appellant. With due respect, in absence of the counterclaim, there was absolutely no basis for dealing with the question of the legality of the title. This was a serious misdirection and the holding leaves the parties in an absurd situation. The trial judge held that the appellant did not acquire 2 acres of the land lawfully, but there is no order for rectification of title and none could be made as there was no counterclaim.

18. It is important to emphasize that when a trial judge is placed with the duty of analyzing the facts and the evidence before him, he is called upon to avoid absurdity when making a determination on the issues before him. It is crucial that he understands the issues at hand so as to avoid an undesirable judgment. We borrow our sentiments from the decision of this Court in *Independent Electoral &*



Boundaries Commission vs. Maina Kiai & 5 Others [2017] KECA 477 (KLR), though speaking to the interpretation of *the Constitution*, remains relevant on matters of absurdity. The Court held:

“Finally, in *Center for Rights Education and Awareness & Another v. John Harun Mwau & 6 Others* [2012] eKLR, Githinji, JA, with whom we respectfully agree, outlined other important principles of interpretation of *the Constitution* and stated that;

“There are other important principles which apply to the construction of statutes which, in my view, also apply to the construction of a Constitution such as presumption against absurdity – meaning that a court should avoid a construction that produces an absurd result; the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces unworkable or impracticable result; presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an anomaly or otherwise produces an irrational or illogical result and the presumption against artificial result – meaning that a court should find against a construction that produces artificial result and, lastly, the principle that the law should serve public interest – meaning that the court should strive to avoid adopting a construction which is in any way adverse to public interest, economic, social and political or otherwise.”

19. It is trite law that an appellate court will only interfere with findings of fact if it is demonstrated that such findings are based on no evidence or the court considered irrelevant considerations or omitted to consider relevant considerations. We have reevaluated the evidence and the documents that were adduced in evidence. The appellant’s case was that he was the registered owner of the suit land and resultantly, sought an order of eviction and injunction against the respondents. The only way the respondents could lay a claim to the land was by way of filing a counterclaim seeking cancellation or rectification of the title. The order that the learned judge gave was to the effect that the appellant only bought 1.1 acres and that 0.2 acres were obtained fraudulently. The judge did not issue any further order for rectification of the title and he could not do so as there was no counterclaim. This means that the appellant will continue to hold a title for 1.3 acres but is only entitled to use 1.1 acres. On the other hand, the respondents will continue occupying 0.2 acres, which they have no title to. This is an absurd situation that is not legally sustainable. A court of law should at all times determine the issues that are before it by way of pleadings and should not award prayers that are not sought, which do not settle the dispute and which only adds fuel to the dispute, like in the appeal before us.
20. Having considered the grounds of appeal and the submissions, this is one case where an appellant has demonstrated that an interference by this Court is necessary. The upshot of our above findings is that the appeal herein has merit. Accordingly, we set aside the judgement of the trial court and allow the suit as prayed. Accordingly, the prayer for an order for eviction and injunction is allowed in the following terms:
 1. The respondents be evicted from the suit premises namely L.R. No. Sinyerere/Kipsaina Block 2/Kesogon/459;
 2. A permanent injunction be and is hereby issued restraining the respondents from trespassing onto or interfering with the appellant’s quiet possession and occupation of the suit land.
21. Regarding costs, we order that the appellant is entitled to the costs in the ELC and in this appeal together with interest thereon. Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 5TH DAY OF JUNE 2025.



J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA C. Arb, FCIArb.

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

