



Saka v Muraya (Civil Appeal E367 of 2023) [2025] KECA 1306 (KLR) (18 July 2025) (Judgment)

Neutral citation: [2025] KECA 1306 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E367 OF 2023
W KARANJA, LA ACHODE & GV ODUNGA, JJA
JULY 18, 2025

BETWEEN

JAMES SIMPSON SAKA APPELLANT

AND

BERNARD WANDURWA MURAYA RESPONDENT

(Being an appeal against the judgment and Decree of the Environment and Land Court at Nairobi (J.A Mogeni J) dated 19th January, 2023 in Milimani E.L.C. No 962 of 2012)

JUDGMENT

1. This appeal originates from a suit, Milimani E.L.C. No. 962 of 2012, that Bernard Wandurwa Muraya, the respondent, filed in the Environment and Land Court (ELC), seeking orders that:
 - a. A permanent injunction do issue to restrain the defendant either acting by himself or through his agents, servants, workers or persons claiming any right through him from trespassing onto, getting into, remaining on, constructing or continuing with the construction of anything upon parcel and land numbers V11890 and V7492 situate at Embakasi Ranching Company Limited – Ruai, within Nairobi County.
 - b. A declaration that plot No.V7492 lawfully belongs to the plaintiff.
 - c. The defendant do pay to the plaintiff damages for illegal and malicious trespass plus loss of plot No. V7492 Embakasi Ranching Company Limited – Ruai, Nairobi County at the current market price and the cost of building materials lost on the site.
 - d. The defendant do pay the plaintiff's costs of this suit plus interest.
2. James Simpson Saka, the appellant herein filed a defence denying the allegations in the plaint. He also filed a counterclaim and joined Embakasi Ranching Company Limited (Embakasi Ranching), and



The Chief Land Registrar as the 2nd and 3rd defendant respectively. He sought that his counter claim be allowed on the following terms:

- i. That there be a declaration that the plaintiff is the lawful allottee and thus the exclusive owner of plot No. P6960 equivalent to Block No. 136/166 situated at Ruai, Embakasi Ranching Company Limited and any title deed or lease issued by the 3rd defendant over the plot, be deemed as unlawful and irregular and that the same be cancelled forthwith.
 - ii. The 1st and 2nd defendants their agents, servants and /or employees be restrained from evicting the plaintiff, selling, dealing with, trespassing, alienating, damaging, constructing or destroying and or however interfering with the developments upon the plaintiffs plot No. P6960 equivalent to Block No. 136/166 situated at JKIA Embakasi Ranching Company Limited,
 - iii. That the 2nd Defendant does facilitate the processing of the title deed/lease for plot No. P6960 equivalent to Block No. 136/166 and 3rd defendant does issue the title deed/ lease for plot No. P6960 equivalent to Block No. 136/166,
 - iv. Alternatively, and without prejudice to the above averments, the plaintiff be compensated for the actual market value Block No.136/166 at the time of hearing hereof by the defendants,
 - v. Costs and interests.
3. The respondent averred that he is the lawful proprietor of the parcels of land stated herein and has been issued with the certificates of ownership by the allocating original owner, Embakasi Ranching. That he has already obtained a title to Plot No.V11890 and the allocating company awaits the conclusion of this case to release the title to Plot No. V7492.
 4. The respondent stated that the appellant had maliciously and unlawfully trespassed onto his property being Plot No. V7492, after the court restrained him from interfering with the adjacent Plot No. V11890. He stated that the appellant forcibly entered into the suit property and proceeded to develop, alienate and convert it into his own by force. As a result, the respondent has suffered great loss and damage.
 5. In his defence, the appellant asserted that he is the exclusive owner of Plot No. P6960 equivalent to Block No. 136/166, which he is in lawful occupation of. He posited that the respondent obtained documents in relation to Plot No. P6960, fraudulently and through misrepresentation and collusion with Embakasi Ranching and the Chief Land Registrar.
 6. It was his case that he lawfully bought Plot No. P6960 (Block No. 136/166) on the 9th April 1994 from one Michael K. Ndegwa via an agreement for sale. That in 1992, the said Michael paid to Embakasi Ranching all the requisite sums for him to be allocated the plot. He took possession and developed the plot by putting up commercial premises, which the respondent and Embakasi Ranching have continuously threatened to invade and have the plot reallocated to the respondent.
 7. During the hearing, the respondent testified that the appellant was in occupation of Plot No. V7492, but had also entered into Plot No. V11890, whose personal number is Block 136/165. Plot No. V7492 is Block 136/166. He referred the Court to the Embakasi Ranching sheet showing that Plot No. 136/166 and 165 belong to Bernard Wandurwa, the respondent. He referred to a certificate of non-members indicating that he paid for the plot on 1st April 2008.
 8. The respondent testified that he got the plots, including V7492 on 21st March 2013, although the Embakasi Ranching allocation document does not bear a date. He also stated that he processed the



- lease as the suit over the land was going on. There was however, no date on the transfer of lease and he had not paid stamp duty to the government. He contended that the orders sought ought to be granted to him because his title was issued in 2010.
9. He testified that the certificate of non-members dated 1st April 2008 shows the date he paid for the plot, and on which the land registrar processed the title. He stated that Embakasi Ranching made the application for the consent and the processing of the title started in 2010. Further that the original map shows LR Block 136/165 and 166 and that those are his plots that he acquired genuinely.
 10. Jack Kamau Wachira PW2, was an expert witness. He was a Registered Land Surveyor No. 1027 and had worked for Embakasi Ranching as a surveyor since 2003. He testified that the procedure for allocation of land has changed over time. Initially, there was no balloting. People bought land and the surveyor would go and show them the land they had bought. However, this changed and now people go to the Embakasi Ranching offices and the surveyor fills the map with the allocation numbers contained in the member's certificate, in the presence of the Allocation Director. He clarified that there are two categories of members; shareholders and those who hold non-member certificates.
 11. The expert witness acknowledged that the respondent's certificate receipts and non-member certificate of ownership were genuine. He confirmed that the copy of the transfer document for plot No. 136/166 was signed by their two directors who are now deceased. He stated that before transferring the land, Embakasi Ranching would apply for consent to transfer and take the documents for registration. The Ministry of Lands would then process the lease and issue the land title to the owners. According to the witness, their records show that LR. No. 136/166 was allocated to respondent, although there was no entry made for the respondent or the appellant.
 12. The expert witness pointed out that the appellant's documents do not bear the signature of the surveyor who allocated the plots. They bear the signature of one E.W. Mahinda, and that they were allocated on 6th June 1992 and given the parcel No. P6960 Nairobi/Block 136/166. However, the witness testified that according to the Survey Map, these parcel numbers did not exist until after July 1994, and that in 1992, there were no parcel numbers.
 13. The appellant on his part testified that he has a share certificate issued by Embakasi Ranching as a shareholder. His internal number is P5785 which was allocated in July 1992. He is in possession of the suit land, and he has a hotel, a butchery, and restaurant on it. That he has never seen the respondent on the plots, and that one cannot get the plots if they are not a member. He conceded however, that one could buy a plot from a member. It was his testimony that he bought the plots from a third party, one Michael Ndegwa, who was a shareholder, and who transferred his right to him in 1993. He produced an agreement between himself and Michael dated 9th April 1994 in evidence.
 14. The appellant stated that the plot reference number in Embakasi Ranching is parcel No. Nairobi/136/166 and he was shown the land by the seller, but he has not yet processed the title. He conceded that a certificate indicates shareholding and not ownership of plots. He stated that vide a receipt dated 17th December 2012, he paid for and purchased the government map indicating his plots, and that the respondent did not produce any documents to prove ownership.
 15. Upon considering the matter before her, Mogeni J, dismissed the appellant's counter claim with costs to the respondent, and allowed the respondent's prayers as sought in the suit. That decision provoked this appeal. In a memorandum of appeal dated 25th May 2023, the appellant raised the following grounds of appeal:



1. The learned judge erred in law and in fact in failing to analyze, contextualize and appreciate the pleadings and evidence of the appellant. The judgment thus fails to address the issues holistically, factually, and legally.
 2. The learned judge addressed the issues in the suit haphazardly without interrogating the evidence and documents by the appellant altogether as a matter of fact, the learned judge purported to change the purport and the contents of those documents whereas she has no powers to change any document.
 3. The learned judge ignored well established principles of law with regard to construction of documents thus ignoring the fact that the appellant's documents of allocation of the plots had been issued well before the respondent's, i.e., first in time in the allotment, allocation and subsequent occupation.
 4. The learned judge ignored the fact that whereas the appellant's documents of plots' ownership were coherent, the respondent's were not, and had all manner of unexplained and unjustified alterations in them that the respondent did not explain.
 5. The learned judge ignored the doctrine of Lis Pendens.
 6. That generally, the learned judge was biased against the appellant unlawfully, in an inappropriate and untoward manner.
 7. That the learned judge failed to distinguish the respondent's claimed plots V11890 and V7492 and the appellant's plot P6960 (I.R. No. 136/166 as per the processed lease)
 8. That as a result of the above errors, omission, and lack of appreciating the law, the learned judge erred in law and in fact by dismissing the appellant's defence and counterclaim especially that his plot is P6960 (L.R. No. 136/166) and asserting that this plot belonged to the respondent.
16. Through the submissions dated 7th March 2024, filed by the firm of Messrs. A.I. Onyango & Co. Advocates, the appellant urged that he purchased plot No. P6960, Nairobi Block No. 136/166, on 9th April 1994 from Michael K. Ndegwa, a shareholder in Embakasi Ranching as per the Agreement for Sale and the receipts produced. That Michael had been allocated the plot upon payment of the requisite charges and by then the respondent had no claim to the plot. He submitted that Michael owned a tangible plot on the ground which he was free to develop, alienate, bequeath, lease or charge. Further, that Embakasi Ranching did not cancel these documents, or the allocation of the plot to Michael, or the subsequent sale to the appellant.
17. He contended that the respondent did not state when he acquired the plots and/or, if they were allocated to him by Embakasi Ranching. That his documents do not indicate the actual allocation of plot Nos. V11890 and V7492. He argued that the respondent produced documents of lease that were processed on 12th December 2019 during the pendency of the suit filed on 6th December 2012.
18. The appellant submitted that there is no nexus between the Certificate of Lease and plot Nos. V11890 and No. V7492. Further, that the document concerning ownership of Plot No. V7492 shows that the respondent acquired it on 21st March 2013, during the pendency of the suit, while the document of allocation does not disclose the date of allocation. The appellant urged that the respondent also produced an unfilled Transfer of Lease and application for consent forms, and that the documents concerning Plot No. V11890 do not show proof of allocation.



19. According to the appellant, he was the first in time to acquire documents to Plot No. V11890 in 1994 and he has occupied it
from then to date. He submitted that the respondent's documents indicated fraud, collusion, and misrepresentation and therefore, the legal and evidentiary burden of proof had shifted to the respondent. He urged that the superior court had no jurisdiction to cancel the appellant's ownership and occupation of the plot, as this was not one of the prayers sought, or an issue in the case.
20. It was also submitted that the learned Judge ignored the common law doctrine of *lis pendens*. That the court erroneously ventured into litigation between the parties and awarded the respondent KShs.500,000 without any basis and evidence to justify and support an award of general damages for trespassing
21. In rebuttal, the respondent filed submissions dated 18th March 2024 through the firm of Messrs Muchangi Nduati & Co. Advocates and contended that the appellant failed to prove any alleged particulars of fraud, collusion, and misrepresentations on the part of the respondent. He submitted that PW2 testified that the subdivision of Block 136 Embakasi Ranching, started in 1993 and not 1992 as alleged by the appellant.
22. The appellant contended further, that there were no parcel numbers when the appellant alleges to have obtained parcel No. 136/166 for his plot No. 6960. The respondent therefore posited that it is the appellant who got the parcel number irregularly through fraudulent means. He asserted that the impugned judgment cannot be faulted as it was analytical and meticulously done.
23. During the hearing of the appeal, the appellant was represented by M/s Aloo learned counsel, while the respondent was represented by Mr. Nduati learned counsel. Both counsel confirmed that although Embakasi Ranching and the Chief Land Registrar were originally impleaded, this appeal is only between the appellant and Bernard Wandurwa Muraya the respondent.
24. Mr. Nduati urged the Court to consider that both the computer print-out of the company register of plot owners, and the evidence of the surveyor as an expert witness, confirm that parcel Nos. 136/165 and 166 belong to the respondent. Further, that it was fatal for the appellant to fail to implead the third party from whom he bought his plot, or to call him as a witness.
25. This being the first appeal our duty is as stated by this Court's decision in *Kenya Ports Authority v Kuston (Kenya) Limited* [2009] 2 EA 212 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.”
26. We have considered the record of appeal and the rival submissions before us. The issues that arise for our considerations in this appeal are to establish first, which of the plots between Plot No. V7492 and Plot No. P6960 was allocated parcel No. Nairobi/Block 136/166 (suit property), by Embakasi Ranching and second, whether the award on trespass was justifiable.
27. The undisputed facts of the suit are that the appellant is laying claim to Plot No. P6960 while the respondent has staked his claim on Plot No. V7492. The two plots are unregistered and are situated in Embakasi Ranching in Ruai. The gravamen of the suit however, is that each party is claiming the same survey number Nairobi/Block 136/166 (suit property) for their plot.



28. Each party has made a claim and it is up to each of them to prove the existence of the facts they allege obtain. The basis for the legal burden of proof is section 107 (1) of the *Evidence Act* which provides that:
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.
29. The appellant's position is that he purchased Plot No. P6960 on 9th April 1994 from Michael K. Ndegwa, a shareholder of Embakasi Ranching, and produced an agreement to prove as much. On the other hand, the respondent claims to have been allocated Plot No.V7492 by Embakasi Ranching as a non - member. On the record, there is a non-member certificate and a copy of transfer document to prove that plots Nos. 165 and 166 were allocated to the respondent, who paid for them on 1st April 2008.
30. This Court has addressed disputes arising from ownership of unregistered land in a myriad cases. In *Mariam Fadhili v Samson Maricho Otweyo & 3 Others* (2016) KECA 249 (KLR) the Court held that:
- “In our view, in the absence of registration as aforesaid, in order to determine the rightful proprietor of the suit land, the matter was left to the realm of the law of contract. Since these are competing interests, it was for each party to prove validity and priority of their title.”
31. In tracing the validity and priority of the ownership of unregistered land, as is the case before us, the Court must trace the root of the title in the same way it would, in a situation where it is faced with two titles over the same land. This Court pronounced itself regarding contestation over two or more titles to land in *Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others* [2016] KEELC 1092 (KLR) as follows:
- “A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or certificate of lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.” (Emphasis added)
32. In the present case the superior court, upon considering the history provided by each party to its claim, observed that:
- “71. The documents relied on by the plaintiff include a non-member certificate of a plot ownership no.020325 dated 10/01/2014 which is seen at page 30 for plot no. V11890, a certificate of lease for Title No. Nairobi/133/166 issued on 12/03/2019, another non-member certificate of plot ownership no.026383 dated 21/03/2013 which is seen on page 22 for plot No.V7492 together



with subsequent receipts for payment made towards purchase of V11890 and V7492 among other documents.

72. The documents relied on by the defendant include a sale agreement dated 9/04/1994 between himself and one Michael K. Ndegwa and various receipts in favour of Michael K. Ndegwa for payment toward plot No. P6960 and a document showing P6960, which allegedly was equivalent to 136/166 was allocated on 6/06/1992 and the same was signed by one E.W Mahinda. The Defendant did not adduce a member certificate of plot ownership showing that Michael K Ndegwa was a shareholder of Embakasi Ranching Co. Ltd.”

33. We are cognizant of the fact that it is not enough for a party to assert that their title was first in time. We are obligated to trace the processes and procedures that birthed the two competing titles to determine which title conformed to procedure and can properly trace its root without a break in the chain, and is therefore to be upheld.

34. From the evidence, we noted that first, in the testimony of the expert witness PW2, the respondent’s documents were authentic and were issued by Embakasi Ranching, and according to the record he referred to, LR. No. 136/166 was allocated to the respondent. Regarding the appellant’s documents, the witness testified that his claim that the plot was allocated to one Michael Ndegwa in 1992 could not be true since, according to the Survey Map, parcel numbers only came into operation after July 1994, and therefore, in 1992 there were no parcel numbers.

35. Secondly, the appellant assailed the learned Judge for ignoring the common law doctrine of *lis pendens*. That the respondent obtained his documents during the pendency of the suit the appellant had filed. Madan, J.A. defined the doctrine of ‘*lis pendens*’ in the case of *Mawji v US International University & Another* [1976] KLR 185, as follows:

“The doctrine of *lis pendens* under section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of *lis pendens* is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice. It therefore overrides, section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other...”

36. In *Naftali Ruthi Kinyua v Patrick Thuita Chege & Another*, Civil Appeal No. 44 of 2014 [2015] KECA 911 (KLR), this Court considered at length the application of the doctrine of ‘*lis pendens*’ and stated as follows:

“Black’s Law Dictionary 9th edition, defines *lis pendens* as the jurisdictional, power or control acquired by a court over property while a legal action is pending.

Lis pendens is a common law principle that was enacted into statute by section 52 Indian Transfer of Property Act (ITPA) - now repealed. While addressing the purpose of the principle of *lis pendens*, Turner L. J, in *Bellamy v Sabine* [1857] 1 De J 566 held as follows:-

‘It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation *pendente lite* were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendants alienating before



the judgment or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same course of proceedings.”

37. The Embakasi Ranching sheet showed that Plot Nos. 136/166 and 165 belonged to the respondent and the certificate of non-members indicated that he paid for the plot on 1st April 2008. The copy of the transfer document for plot No.136/166 was signed by two directors who are now deceased. Embakasi Ranching made the application for the consent and the processing of the title started in 2010. Further, that the original map shows the plots LR Block136/165 and 166. This period predates 6th December 2012, the date of filing the suit adverted to by the appellant. The transfer was, therefore, not caught up by the doctrine of ‘lis pendens’.
38. Thirdly, the appellant by his own testimony bought his plots from a third party, one Michael Ndegwa, who was a shareholder, and who transferred his right to him in 1993. There was however no evidence of the membership of the said Michael Ndegwa, as no member certificate of plot ownership showing that he was a shareholder of Embakasi Ranching was adduced. The appellant’s documents do not have the signature of the Surveyor who allocated the plot to Michael and they indicate that the plot parcel number was allocated on 6th June 1992. As stated earlier, evidence of the expert witness was that according to the Survey Map, the parcel number attributed to the appellant’s plot did not exist until after July 1994 and that in 1992 there were no parcel numbers. This evidence was not controverted.
39. In view of the foregoing evidence, we arrive at the conclusion that the respondent discharged his burden of proof of ownership of parcel No. L.R. 136 /166 on a balance of probability. His acquisition of the property in this case was legitimate and no fraud or misrepresentation was demonstrated on his part. We discern no bias in the analysis of the evidence by the learned Judge and are therefore, satisfied that she did not err in her finding.
40. Turning to the second issue, the appellant argued that the respondent did not plead for general damages, and thus, the learned Judge erred in awarding him Kshs. 500,000 as general damages for trespass. We note that this was not one of the grounds of appeal in the memorandum of appeal. The respondent also did not submit on it. Notwithstanding, we observe that in prayer (b) of the respondent’s pleading, he prayed that:

The defendant do pay to the plaintiff damages for illegal and malicious trespass plus loss of plot No. V7492 Embakasi Ranching Company Limited – Ruai, Nairobi County at the current market price and the cost of building materials lost on the site.”

We shall not belabor the issue further, but only to state that the learned Judge did not err in awarding the respondent general damages for trespass.

Accordingly, we find that this appeal lacks merit and is hereby dismissed with costs to the respondents.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF JULY, 2025.

W. KARANJA

JUDGE OF APPEAL
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L. ACHODE

JUDGE OF APPEAL
.....



G.V. ODUNGA

JUDGE OF APPEAL

I certify that this is a true copy of the original Signed

DEPUTY REGISTRAR

