



REPUBLIC OF KENYA



**Chuma v Agau & another (Environment and Land Appeal  
E003 of 2023) [2025] KEELC 236 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 236 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET  
ENVIRONMENT AND LAND APPEAL E003 OF 2023  
GMA ONGONDO, J  
JANUARY 30, 2025**

**BETWEEN**

**EDWARD KOECH CHUMA ..... APPELLANT**

**AND**

**LELEITO AGAUI ..... 1<sup>ST</sup> RESPONDENT**

**ABRAHAM KIPTANUI LELEI ..... 2<sup>ND</sup> RESPONDENT**

*(An appeal arising from the judgment and decree in Kapsabet  
Chief Magistrate's Court Environment and Land Case No. 78  
of 2022 by Hon. S. M. Mokuu, SPM on 29th November 2023)*

**JUDGMENT**

1. This appeal stems from the trial court's judgment rendered on 29<sup>th</sup> November 2023 in the original suit where the learned trial magistrate concluded thus;  
  
'In a nutshell, the appellant has not proved his case on a balance of probabilities. His case is dismissed with costs to the defendants.'
2. The appellant who was the plaintiff in the suit, through the firm of Limo R. K. and Company Advocates, lodged the appeal by way of memorandum of appeal dated 8<sup>th</sup> December 2023 premised upon seven grounds inter alia;
  - a. That the Learned Magistrate erred in law and fact in failing to hold that the Appellant was a purchaser for value of the suit property.
  - b. That the Learned Magistrate erred in law and in fact by misdirecting himself in not addressing all the issues for determination set out in the body of the judgment.



- c. That the Learned Magistrate erred in law and in fact by making a judgment without taking into consideration the pleadings and the documentary evidence exhibited.
  - d. That the Learned Magistrate gave judgment against the law and weight of evidence.
  - e. The Learned Magistrate erred in law and fact in disregarding the evidence tendered by the Appellant and thus making a wrong judgment.
  - f. That the Learned Magistrate erred in law and fact in relying on irrelevant matters which led to a wrong conclusion.
  - g. That the Learned Magistrate erred in law and fact in disregarding the submissions by the Appellant.
3. Thus, the appellant has sought the orders that;
- a. The appeal be allowed.
  - b. The judgment of Hon. S. M. Mokuia in Kapsabet Chief Magistrate's Court Environment and Land Case No. 78 of 2022 delivered on the 29<sup>th</sup> November, 2023 be set aside and be substituted with orders sought in the plaint dated 16<sup>th</sup> November 2022.
  - c. Costs be awarded to the appellant.
4. The appellant also filed a Supplementary Record of Appeal dated 6<sup>th</sup> November 2024 comprising a copy of a land sale agreement dated 15<sup>th</sup> March 1996.
5. By the submissions dated 6<sup>th</sup> November 2024, the appellant's counsel submitted that the sale agreements produced in evidence at the trial are valid under Section 3(3) of the Law of Contract Act. That therefore, the appellant is entitled to an order of specific performance as against the respondents. That in any event, it is the respondents who failed to adhere to Section 3(3) (supra) when they caused the suit land to be transferred and registered in the name of the 2<sup>nd</sup> respondent herein, which action was fraudulent. That since the appellant was in possession of the suit land, the entry of the respondents thereon amounted to an act of trespass. That the respondents hold the suit land in trust for the appellant. To buttress the submissions, reliance was placed on various authoritative pronouncements including Kenya National Highway Authority vs Shalien Masood Mughal & 5 others (2017) eKLR and Willy Kimutai Kitilit vs Michael Kibet (2018) eKLR.
6. The respondents' counsel, Kipruto Maritim and Company Advocates, filed submissions dated 15<sup>th</sup> November 2024 and identified two issues for determination thus: whether there was a valid sale of land agreement by the appellant herein and whether the appellant proved his case to the required standard. Learned Counsel submitted that the sale agreements produced in evidence did not demonstrate the existence of a contractual relationship between the parties herein. That the same do not bind the respondents due to the doctrine of privity of contract. That at the trial court, the appellant was the sole witness and the sale agreements so produced in evidence were uncorroborated. That further, no sufficient evidence was produced to show that the mutation form in respect to the suit land was fraudulent. Hence, he urged the court to dismiss the instant appeal with costs. Counsel relied on among others, the case of Ndolo vs Ndolo (2008) 1KLR (G&F) 742, to reinforce the submissions.
7. It is established law that in a first appeal like the present one, the court is bound to revisit the evidence on record, evaluate the same and arrive at its own conclusion. However, the court appreciates that the appellate court will not ordinarily interfere with findings of fact by the trial court unless they are based on no evidence at all, or on a misapprehension of it, or the court is shown demonstrably to have



acted on wrong principles in reaching the findings; see *Selle and another-vs-Associated Motor Boat Company Ltd* (1968) 1 EA 123, *Mwanasokoni-vs-Kenya Bus Services Limited* (1982-88) 1 KAR 278.

8. In the original suit, the appellant sued the respondents who were the defendants therein by way of a plaint dated 16<sup>th</sup> November 2022 for;
  - a. Permanent injunction restraining the respondents from encroaching, trespassing, constructing, alienating or dealing in any manner with that parcel of land known as Nandi Hills/Kapsimotwo Block 2/270 (Ketchem) (the suit land herein).
  - b. An order of specific performance compelling the 2<sup>nd</sup> respondent to transfer the suit land and in the alternative, a vesting order be issued authorizing the Executive Officer of the honourable court to execute transfer instruments in favour of the appellant.
  - c. An order of eviction against the respondents and their agents from the suit land.
  - d. Mesne profits of Kshs.389,600/- annually from April 2021 until the determination of this matter.
  - e. General damages for loss of use.
  - f. Costs of this suit.
  - g. Any other relief that the Honourable Court deems fit and just to grant.
9. Vide their joint Statement of Defence dated 10<sup>th</sup> March 2023, the respondents denied the claim and stated that the same is statute barred and offends Section 302 of the *Land Control Act*. Thus, they urged the court to dismiss the same with costs.
10. The plaintiff/Appellant (PW1) relied on his statement recorded on 16<sup>th</sup> November 2022, which was adopted as part of his evidence in chief and a land sale agreement dated 21<sup>st</sup> July 1999, agreement dated 15<sup>th</sup> March 1996, land sale agreements dated 6<sup>th</sup> July 1991 and 8<sup>th</sup> June 1994, a copy of the charge sheet, a Report dated 20<sup>th</sup> August 2021, a copy of the green card, mutation in respect of the suit land and certificate of official search for land parcel numbers Nandi Hills/Kapsimotwo Blk/269 and 270 (PEXhibits 1 to 8b).
11. PW1 testified that he purchased the suit land from one David Kipwambok, hereinafter referred to as the seller, who had previously purchased the same from the respondents herein on 7<sup>th</sup> June 1994. That the suit land was originally registered as Block 2/42 and he purchased an acre thereof. That in 2021, the respondents entered the suit land and fenced it off. That he reported the same to Nandi Hills Police Station and the respondents were charged with causing malicious damage to property. He averred that he would plant tea thereon and earn an annual income of Kshs. 389,000/- from the proceeds thereof, excluding bonuses.
12. Upon cross-examination, PW1 revealed that he owns a separate parcel of land, which is adjacent to the suit land herein.
13. The 1<sup>st</sup> defendant/respondent (DW1) relied on his statement dated 10<sup>th</sup> March 2023, which was adopted as part of his evidence. He stated that the suit land initially belonged to him. That he sold it to the 2<sup>nd</sup> respondent herein who subdivided it.
14. During cross-examination, DW1 stated that there exists another suit between himself and PW1 over the suit land. That he is the one who planted tea on the suit land. That he sold the suit land to the 2<sup>nd</sup>



respondent, who is his son, in 2021 but they did not enter into a written sale agreement. That it is the 2<sup>nd</sup> respondent who subdivided the suit land into two portions.

15. The 2<sup>nd</sup> defendant/respondent (DW2) relied on his statement dated 10<sup>th</sup> March 2023, which was adopted as part of his evidence. He stated that he has planted tea on the suit land. On cross-examination, he admitted that although his father transferred the suit land to him, he did not have the consent of the Land Control Board in respect thereof. He also did not avail the search certificate which he relied on during the purchase.
16. In the foregone, the issues for determination herein are as set out on the grounds of appeal which crystallize to:
  - a. Whether the instant appeal is tenable?
  - b. Just orders to issue herein.
17. The Honourable trial magistrate observed that although the appellant had sought an order of specific performance against the respondents, he did not meet the threshold for grant of the same since the respondents were not party to the sale agreements produced in evidence as PExhibits 1 and 2.
18. Further, the trial court found that:

“...I am not satisfied that he has proved that the defendants are trespassers and their actions violate Section 3(1) of the *Trespass Act*...”

19. The appellant contends that the trial court erred in law and fact in failing to hold that he was a purchaser for value of the suit land. On that score, the ingredients of a bona fide purchaser as described in the case of *Katende-vs-Hardar & Company Limited (2008) 2 E.A 173* which was applied in, among other authoritative pronouncements, *Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura-vs-Attorney General & 4 others (2017) eKLR* are: that the purchaser holds a certificate of title, purchased the property for valuable consideration, in good faith, had no knowledge of fraud, without notice of any fraud, was not party to any fraud and the vendor had apparent valid title.
20. In the present case, it is evident from the copy of green card produced in evidence that the suit land was initially registered in the name of the 1<sup>st</sup> respondent herein who later transferred the same to the 2<sup>nd</sup> respondent and a title deed duly issued on 24<sup>th</sup> June 2021. Thereafter, its title was closed upon subdivision into two parcels of land; 269 and 270. There is no evidence adduced showing that the alleged seller, David Kibwambok Sitienei, held a valid title to the suit land at any one point. Notably, the alleged seller was not called to testify in support of the appellant’s case. Further, the appellant/purchaser does not hold a certificate of title to the suit land. Therefore, the threshold for a bona fide purchaser as laid out in the cases of *Katende* and *Lawrence P. Mukiri Mungai* (both supra), has not been met.
21. The appellant laments that the Learned trial Magistrate did not address all the issues for determination set out in the body of the judgment. That the trial court did not take into consideration the pleadings and the documentary evidence exhibited. That the trial court’s judgment was against the law and weight of evidence. That it disregarded the evidence tendered by the Appellant thereby, making a wrong judgment. That further, the Learned Magistrate erred in law and fact in relying on irrelevant matters which led to a wrong conclusion.
22. It is trite law that the issues for determination arise from the pleadings or as framed by the parties for the court’s determination; see *Great Lakes Transport Company (U) Ltd-vs-Kenya Revenue Authority (2009) KLR 720*.



23. It is worth to note that the learned trial magistrate stated the parties' respective cases, delineated four issues for determination, discussed them and reached the decision based on reasons. So, the impugned judgment complied with Order 21 Rule 4 of the Civil Procedure Rules, 2010. In my mind, and based on the trial court's record, I do not see any indication that the Learned trial magistrate disregarded the pleadings and the documentary evidence exhibited by the appellant.
24. The appellant laments that the Learned Magistrate erred in law and fact in disregarding the submissions by the Appellant. In that regard, this court subscribes to the decision in the case of Daniel Toroitich Arap Moi vs Mwangi Stephen Muriithi and another (2014) eKLR, where the Court of Appeal observed that;
- .'...submissions are generally parties' 'marketing language'. Each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.....'
25. This court is guided by Section 107 of the *Evidence Act*, Chapter 80 Laws of Kenya which provides as follows:
- 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.
- When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
26. In the case of Raila Amolo Odinga & Another vs. IEBC & 2 Others (2017) eKLR, the Supreme Court of Kenya pronounced itself as follows:
- “...Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and “remains constant through a trial with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced...”
27. In the instant case, the appellant miserably failed to establish the facts and contentions in support of his case. Therefore, it is this court's considered view that the evidential burden of proof did not shift to the 2<sup>nd</sup> respondent to show the trial court how he acquired the title to the suit land.
28. To that end, I find that the appellant who was the plaintiff at the trial court did not prove his claim on a balance of probabilities. In the premises, the trial magistrate's judgment delivered on 29<sup>th</sup> December 2023, is not faulty at law. I hereby endorse the same.
29. Wherefore, the instant appeal lodged by way of a memorandum of appeal dated 8<sup>th</sup> December 2023, is devoid of merit. The same is hereby dismissed with costs to the respondents.
30. Orders accordingly.

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

**G.M.A ONG'ONDO**

**JUDGE**

**Present**



1. Mr. W. Koskey holding brief for Mr. Maritim, Learned Counsel for the respondent
2. Walter, Court Assistant

