



REPUBLIC OF KENYA



**KENYA LAW**  
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**M'longi v M'impwi (Environment and Land Appeal E032 of 2023)  
[2025] KEELC 748 (KLR) (20 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 748 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E032 OF 2023**

**CK YANO, J**

**FEBRUARY 20, 2025**

**BETWEEN**

**M'MAILANYI M'ELONGI ..... APPELLANT**

**AND**

**JUSTUS MUGAA M'IMPWI ..... RESPONDENT**

*(Being an appeal from the ruling of Hon. P. Wechuli (S.R.M)  
dated and delivered on 13.10.2022 in Tigania ELC No. 39 of 2020)*

**JUDGMENT**

1. This Appeal emanates from the Judgment and Decree of Senior Resident Magistrate Hon. P. Wechuli delivered on 13<sup>th</sup> October, 2022 in Tigania PM ELC No. 39 of 2020, in favour of the Respondent. Aggrieved by the said decision, the Appellant lodged this Appeal vide a Memorandum of Appeal dated 3.04.2023 and outlined the following grounds: -
  - i. The Learned Trial Magistrate erred in law in failing to find that the appellant being the registered proprietor of the suit land under the Land Registration Act, his title to the land was indefeasible, save as is provided under section 26(1) of the Land Registration Act.
  - ii. The Learned Trial Magistrate erred in law in failing to find that the Respondent's case was untenable as he did not plead or seek to rely on any of the grounds for challenging a title to land under section 26(1) of the Land Registration Act.
  - iii. The Learned Trial Magistrate erred in law and misdirected himself in creating his own case and proceeding to make a determination, not on the basis of the respondent's pleadings and evidence on record, but on his own postulation, quite separate from the respondent's case.



- iv. The Learned Trial Magistrate erred in law in granting the respondent 2.0 Acres out of the suit land, a relief that was not made by the respondent and therefore granted that which was not prayed for by the respondent.
  - v. The Learned Trial Magistrate erred in relying on the Award of the Land Adjudication Officer made in 2007 which had become unenforceable by dint of the provisions of *Limitation of Actions Act*.
  - vi. The Learned Trial Magistrate erred in law and misdirected himself in finding that the respondent had proved his case whereas he had failed, from the evidence on record, to discharge the burden of proof under section 107 of the *Evidence Act*.
  - vii. The Learned Trial Magistrate erred in law in failing to find that the respondent's evidence was at variance with his pleadings and the respondent was in violation of the principle that parties are bound by their own pleadings and therefore his case was doomed to fail.
  - viii. The Learned Trial Magistrate erred in law in failing to analyse and consider the evidence of the appellant and failing to address his mind to the allegations of fraud, pleaded by the appellant.
  - ix. The Learned Trial Magistrate erred in law in failing to enter judgment for the appellant in the counter-claim in spite of the overriding evidence in his favour.
  - x. The whole judgment of the trial court is against the weight of evidence on record.
2. Consequently, the Appellant sought the following Orders: -
    - a. The Appeal be allowed.
    - b. The Judgment in favor of the respondent be set aside with an order of dismissal of the respondent's case.
    - c. Judgment be entered in favor of the appellant as per the Counter-claim.
    - d. Costs in the lower court and in this appeal.
  3. A brief background to bring the Appeal into perspective is that; vide a plaint dated 4/3/2020, the respondent sought the following orders; a declaration that he is the lawful owner of all that parcel known as Athinga/Athanja/1819, an eviction order against the Appellant, mesne profit against the Appellant for the period the Respondent had not used the land until the time of delivery of the judgment, an order of compensation for the destruction of the exotic trees and costs of the suit.
  4. It was his contention that he is the registered proprietor of the suit land, having been originally declared as such in the adjudication register upon conclusion of the AR Objection proceedings. That the appellant having been aggrieved by the decision of the DLASO, filed a Judicial Review Application No. 3 of 2007 in the High Court. The said case was heard and determined vide a judgment dated 28/6/2018 dismissing the said case.
  5. It was the respondent's claim that despite the said decision of the High Court dismissing the appellant's allegations, the appellant has remained on the land, destroyed the Respondent's trees, crops and continues to trespass into the land.
  6. During hearing, he produced a copy of the Judgment as Pexh.1, bundle of photographs as Pexh. 2 and a certificate of search as Pexh. 3. On cross-examination, he stated that his claim is in respect to 2 Acres out of the 6 Acres of the suit land, which was allocated to him by the DLASO. The Appellant filed a Judicial Review against the said decision which was dismissed and the decision of the DLASO upheld.



7. The Appellant on the other hand filed a Statement of Defence and Counter-claim in response to the allegations raised in the Plaint. In his defence, the appellant stated that he is the legal registered proprietor of the suit land and denied the respondent's ownership claims. He dismissed any such registration in the name of the respondent during the AR Objection as being unlawful since there was no proper hearing of the objection as outlined in section 26 of the [Land Consolidation Act](#). He also raised two points of law that the suit was time barred and res judicata.
8. In his Counter-claim, the appellant stated that the title held by the respondent to the suit land was acquired through fraud, misrepresentation, illegally and unprocedurally and outlined the particulars of fraud. He sought the following orders; a declaration that the suit land is his property, an order of permanent injunction against the respondent and the costs of the suit.
9. During hearing, the appellant produced the following documents as his exhibits; Map as Dexh.1, Registry Map as Dexh. 2, Extract of the decision of the DLASO as pexh.3 and Confirmation of ownership as Dexh. 4. On cross-examination, he confirmed that they had a case with respondent at the DLASO which found that he should give part of the land to the respondent. He conceded that his case at the High Court was dismissed and no proof of an appeal to the Court of Appeal against the said decision had been adduced. He further confirmed having cut down the trees on the land.
10. The suit was heard and determined vide a Judgment dated 13<sup>th</sup> October, 2022, whose effect was to allow the Respondent's case and dismiss the Appellant's Counter-claim hence the instant Appeal.
11. The Appeal was canvassed by way of written submissions. The Appellant filed his submissions dated 31/10/2024 together with authorities while the respondent filed his submissions dated 5/12/2024.

#### **Appellant's Submissions;**

12. Counsel gave a brief background that led to the case and submitted on the various grounds of appeal. On grounds 1 and 2 touching on the title held by the appellant over the suit land, he relied on the provisions of sections 25 and 26 of the [Land Registration Act](#) and it was his submission that both the title deed and the certificate of official search proved that the appellant was the registered owner of the suit land and this fact was confirmed by the respondent in his evidence. He thus maintained that by virtue of his registration as the owner, the rights and interests over the suit land crystallized in his favor and the title could only be challenged as per the provisions of section 26 1(b) of the [Land Registration Act](#).
13. He further argued that from the plaint, it is clear that the respondent did not challenge the legality of the appellant's title to the suit land on any of the grounds provided under section 26. That the respondent's claim was purely based on trespass and maintained that no orders could be issued affecting the appellant's title since the said title was not challenged in accordance with the law.
14. He thus submitted that the trial court erred in failing to find that the appellant's title to the suit land was indefeasible and that the respondent's claim was untenable against him.
15. On grounds 3 and 7, the appellant contends that the trial court departed from the pleadings filed by the parties. He submitted that the respondent's claim was based on trespass, that the respondent was the registered owner of the suit land and that the appellant occupied the land illegally and should be evicted. He avers that the respondent was therefore required to produce evidence of his registration as the owner of the suit land and the acts of trespass complained of.
16. It was his submission that any evidence led by a party that is contrary to the averments contained in the pleadings is unreliable and ought to be disregarded. He relied on the case of Mary Onyango vs South



- Nyanza Sugar Co. Ltd [2019] eKLR. He maintained that the respondent completely departed from his pleadings in his evidence and faulted the trial court for failing to confine itself to the issues raised by the respondent in his pleadings.
17. He further argued that it was not the duty of the trial court to determine whether the respondent was entitled to any part of the suit land since that was not part of the respondent's claim. That the trial court erred in altering the appellant's registration and title to the suit land and awarding the respondent a portion thereof when the registration and title thereof was not challenged in the pleadings.
  18. His submission on ground 4 was that the trial court ought not to have awarded the respondent 2 Acres out of the suit land which was not prayed for. That from the pleadings, it was clear that the respondent sought a declaration of ownership of the entire land and not a portion thereof measuring 2 Acres that was granted. That the trial court cannot depart from the prayers sought. He relied on the case of Alex Gichira Mwatha vs Joshua M. Maina [2016] eKLR.
  19. On ground 5, it was his submission that the trial court erred in relying on the award of the Land Adjudication Officer made in 2007, which had become unenforceable by dint of the provision of the *Limitation of Actions Act*. That despite the same points of law being raised in the statement of defence, the respondent who had an opportunity to respond to the same in his reply to defence, the trial court failed to consider the said issue of whether the suit was time barred.
  20. He further submitted that the import of the trial court's findings was simply to enforce the award of the DLASO made in the year 2007 outside the stipulated limitation period under section 4(4) of the *Limitation of Actions Act*. That the suit was filed 13 years after the award had been issued, whereas the limitation period lapsed in the year 2019.
  21. On ground 6, counsel submitted that the respondent failed to discharge the burden of proof as required under sections 107, 109 and 112 of the *Evidence Act*. That no shred of evidence was adduced to support the respondent's claims of ownership.
  22. His submissions on grounds 8 and 9 was that the appellant produced evidence of his ownership of the suit land and that his title has never been challenged.
  23. He maintained that his claim against the respondent was based on fraud arising from the proceedings of the A/R Objection and therefore the judgment ought to have been entered in his favor as per his counter-claim.
  24. On ground 10, he submitted that the decision of the trial court was against the weight of the evidence. That the appellant having proved that he is the registered owner of the suit land, he could not have been deemed to be a trespasser on the land.
  25. He thus urged the court to allow the appeal and dismiss the respondent's claim in the lower court.

### **Respondent's Submissions;**

26. The Respondent gave a brief background of the case from the trial court and commented on the finding of the trial court on the issue of the case being time barred and res judicata.
27. He reiterated the evidence adduced by the rival parties during trial and maintained that the remedy available to the appellant after the judgment of the judicial review was delivered on 28/6/2018, was to file an appeal to the Minister to challenge the AR Objection proceedings or to file an appeal against the decision in Judicial Review No. 3 of 2007. He contends that neither review nor appeal has been preferred.



28. It was his submission that the respondent sufficiently demonstrated that he is entitled to 2 Acres and that the appellant did not controvert the evidence adduced in support of the respondent's case.
29. On the allegations of fraud and collusion on the part of the respondent and the DLASO Officers as alleged by the appellant, he submitted that the appellant ought to have exhausted the mechanism outlined under sections 28 and 29 of the *Land Adjudication Act*.
30. He maintained that from the surveyor's report filed, the evidence of registration all show that he was entitled to 2 Acres of the suit land No. Athing'a A/Athanja/1819 and the trial court was right in ordering that he is entitled to the said portion and directing that he be issued with the certificate of title.
31. In conclusion, he submitted that the trial court's decision was arrived at after proper consideration of the evidence on record and the disposition was with the evidence and law. He thus urged the court to dismiss the appeal with costs.

### **Analysis and Determination;**

32. I have critically looked at the grounds in the Memorandum of Appeal, Record of Appeal filed and the rival submissions in totality and it is my considered view that the main issue arising for determination is whether this Court should interfere with the exercise of discretion by the trial court by setting aside its judgment and decree. I will proceed to address the grounds of appeal on account of: -
  - a. Whether the suit was time barred
  - b. Ownership of the suit land.
  - c. Evidence adduced in support of the rival claims
  - d. Exhaustion of remedies doctrine
  - e. Whether the appellant is entitled to the reliefs sought
33. This court's jurisdiction as a first appellate court is to reappraise the evidence or issues which were before the trial court and make its own conclusion. This mandate does not however entail taking on board new issues which were never brought to the trial court's attention or matters that were not subject of the trial court's consideration. See the Court of Appeal decision in *Ol Pejeta Ranching Limited vs David Wanjau Muhoro* [2017] eKLR.
34. From the onset, I wish to state that the appellant's main ground of appeal mainly revolves around the fact that the respondent in his pleadings stated that he was the registered owner of the entire suit land but that no documentary evidence was adduced in support of the said averments.
35. He further contends that the respondent's claim in the trial court was based on trespass and therefore the court ought not to have delved into the issue of ownership of the land by relying on the findings of the DLASO and the decision in the Judicial Review Case No. 3 of 2007 since the respondent had not challenged the title held by the appellant as provided under section 26 (1) (b) of the LRA.

a). Whether the suit was time barred;

PARA 36.

The first issue on whether the suit is time barred touches on the jurisdiction of the court to hear and determine the suit was filed and the same is outlined in ground 5 of appeal. It is the appellant's contention that the trial court erred by not making a determination on the issue despite the fact that the same had been raised in the statement of defence and the respondent therefore had an opportunity to respond and submit on the same.



PARA 37.

It is his claim that the decision of the DLASO made in the year 2007 is unenforceable by dint of section 4(4) of the *Limitation of Actions Act*. That the suit was filed after 13 years in 2020 after the award had been issued whereas the limitation period lapsed in the year 2019.

PARA 38.

I have looked at the decision by the trial court on whether the suit was time barred and I do note that the trial court disregarded the said issue for the reason that the respondent did not have an opportunity to respond and react to the same during the hearing of the suit. I must state that the suit being time barred is an issue that goes to the root and jurisdiction of the trial court in entertaining the suit and thus ought to have been addressed. Be that as it may, I will proceed to deal with the merit of the same as hereunder.

PARA 39.

Section 4(4) of the *Limitation of Actions Act* provides as follows:

- (4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.

PARA 40.

While it is settled that any order or decision of the court or a quasi-judicial body ought to be enforced within a period of 12 years from the date of issue, the important question to consider in this case is when time started running for purposes of limitation.

PARA 41.

It is not in dispute that the decision of the DLASO was issued on 3/11/2007. Aggrieved by the said decision, the appellant filed a Judicial Review Application No. 3 of 2007 seeking to quash the said decision among other orders of mandamus and prohibition. The Judicial Review was heard and determined vide a judgment delivered on 28/6/2018. The question that therefore follows is whether time started running on 3/11/2007 or 28/6/2018 for purposes of limitation.

PARA 42.

My answer to the above is that time started running on 28<sup>th</sup> June, 2018 after the delivery of the decision in the Judicial Review Application. The decision of the judicial review case had a direct impact on the decision of the DLASO and thus time stopped running upon filing of the same. Thus, this case having been filed 2 years after the decision of the High Court, the same cannot be said to have been time barred by dint of section 4(4) of *Limitation of Actions Act*. I therefore find that ground 5 of appeal is not merited.

### **Ownership of the suit land;**

43. The issue on ownership of the suit land has been at the centre of the dispute herein. It is the appellant's claim that he is the legally registered proprietor of the suit land and holds the title thereto. In support of his ownership claims, he produced Dexh. 4, a letter from the Ministry of Lands on Confirmation of Ownership. He contends that the respondent did not challenge his title to the suit land as provided under section 26 (1) (b) of the *Land Registration Act*, either in his pleadings or during trial. He



therefore avers that the trial court ought to have found that he is the legal owner of the suit land and grant the orders sought in the counter-claim.

44. The respondent on the other hand averred that he is the registered owner of the suit land, having been deemed as such pursuant to the decision in the Adjudication objection proceedings. He however conceded that the land is registered in the name of the appellant as evidenced in pexh. 3 and that the appellant has been in possession and occupation thereof.
45. From the record of appeal, it is not in question that the dispute between the parties arose from the adjudication process. That while the appellant was registered as the sole owner of the suit land during the adjudication process, the respondent was aggrieved by the same and lodged an objection as statutorily required. The said objection was heard and culminated in the decision of the DLASO delivered on 3/11/2007 and whose effect was to give the respondent a portion measuring 2 Acres of the suit land to be excised from the appellant's land.
46. The appellant being aggrieved by the said decision by the DLASO, filed a Judicial Review Application No. 3 of 2007, seeking to quash the said decision and for the 2 Acres portion to revert to him. Can it therefore be said that the appellant's title has not been challenged as per the provisions of section 26 of the *Land Registration Act?*
47. The registration of the suit land herein arises from the adjudication process. However, what is before this court is not the merit of the decision of DLASO and I will therefore be careful not to delve into the same. I must state that the genesis of the dispute was the decision by the DLASO which in my considered view challenged the ownership of the appellant of the entire suit land and held that a portion measuring 2 Acres thereof ought to be given to the respondent. The averments by the appellant that his title to the land has never been challenged is therefore not true.
48. The Court of Appeal in *Munyu Maina vs Hiram Gathiha Maina* [2013] eKLR held that where an instrument of title is challenged, such proprietor must go beyond the instrument to prove legality:

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”
49. Guided by the above, it is therefore not enough for the appellant to wave his title deed without further explanation and justification. The said title document cannot be taken in isolation of the findings of the DLASO and subsequent decision of the High Court on the judicial review application touching on the subject land. The effect of the decision of DLASO was to challenge the title of appellant in respect to a portion measuring 2 Acres of the suit land.
50. The trial court in addressing the issue of ownership relied on the decision of the DLASO in finding that the respondent was indeed entitled to the 2 acres as awarded by the DLASO.
51. In view of the foregoing, it is the finding of this court that even though the suit land is registered in the name of the appellant and he is in possession and occupation, the ownership of a portion measuring 2 Acres thereof belongs to the respondent. As rightfully held by the trial court, the decision of the DLASO awarding the said portion to the respondent has never been reviewed, set aside and/or vacated and thus remains the lawful position. Any contrary finding would amount to appeal of the said decision through the backdoor without following the statutory procedure and allowing the appellant to benefit from his own disobedience of the decision of the DLASO.



52. I therefore find that grounds 1 and 2 of the appeal are not merited.

**Evidence adduced in support of the rival claims;**

53. It is the appellant's claim at grounds 3, 4, 6 and 7 of appeal that the evidence adduced by the respondent was at variance with the pleadings and that the respondent did not discharge the burden of proof to warrant the finding in his favor. He contends that no shred of evidence was adduced to support the registration and ownership claims or prove the acts of trespass complained of.
54. The respondent on the other hand maintained that he had sufficiently demonstrated that he is entitled to 2 Acres and that the appellant did not controvert the evidence adduced in support of the respondent's case.
55. I have critically looked at the evidence adduced by both parties in support of their rival claims. As earlier pointed out, the genesis of this dispute is from the decision of the DLASO and which culminated to the High Court vide Judicial Review No. 3 of 2017. Both the extract of the decision of the DLASO and the Judgment in the judicial review application were adduced in evidence.
56. Although no ownership documents in the form of a title deed or a certificate of search in favour of the respondent was produced, the evidence on record support his basis and ownership claims. On the allegations of trespass, the respondent produced bundle of photographs which showed the trees and crops on the land. It was the respondent's contention that the appellant cut down the exotic trees that were on his portion of land. This fact was confirmed by the appellant during cross-examination.
57. The appellant on the other hand has not provided a sufficient reason and justification for his continued possession and occupation of a portion of the suit land measuring 2 Acres in total disregard to the decision of the DLASO ordering that the said portion rightfully belongs to the respondent and directing that the same be hived off from the appellant's land. Further, he did not rebut the allegations of destruction of property.
58. Trespass has been defined as "any unjustifiable intrusion by one person upon the land in possession, an invasion of another's right.
59. The upshot of the above is that the respondent satisfactorily discharged his burden of proof. The appellant on the other hand did not adduce sufficient proof, either in the form of setting aside DEXH. 3 being the decision of the DLASO or at all, to warrant the grant of the orders sought.
60. Consequently, grounds 3,4,6 and 7 of appeal are not merited.

**Exhaustion of remedies doctrine;**

61. The Doctrine of Exhaustion is defined in Black's Law Dictionary 10th Edition as follows –
- “The doctrine that, if an administrative remedy is provided by statute, a claimant must seek relief first from the administrative body before judicial relief is available. The Doctrine's purpose is to maintain comity between the courts and administrative agencies and to ensure that courts will not be burdened by cases in which juridical relief is unnecessary.
62. It is the appellant's contention at grounds 8 and 9 of appeal that the trial court failed to consider his allegations of fraud. That he produced evidence of ownership and his title remained unchallenged. He stated that the fraud claims arise out of the AR objection proceedings and the trial court thus ought to have entered judgment in his favor as per the counter-claim.



63. The respondent dismissed the said claims and submitted that the appellant ought to have exhausted the mechanism under sections 28 and 29 of the [Land Adjudication Act](#) in case of any allegations of fraud and collusion. He thus urged the court to dismiss the same.
64. The adjudication process is primarily governed by the [Land Consolidation Act](#) Cap 283 and the [Land Adjudication Act](#) Cap 284, which both provide an elaborate dispute resolution mechanism. Sections 26 of the [Land Consolidation Act](#) and section 29 of the [Land Adjudication Act](#) state in detail the procedure to be followed by an aggrieved party in relation to the dispute resolution.
65. The court in the case of Speaker of National Assembly Versus Karume [1992] KLR 425 the Court held that;
- “ .... where there was a clear procedure for the redress of any particular grievance prescribed by [the Constitution](#) or an Act of Parliament, that procedure should be strictly followed”.
66. This position was reiterated in the case of Mohamed Ahmed Khalid (Chairman) and 10 Others –vs- Director of Land Adjudication & 2 Others [2013] eKLR where Angote J. held as follows: -
- “Considering that the [Land Adjudication Act](#), Cap 284 has an elaborate procedure on how complaints arising from the planning, demarcation and surveying of Trust Land are supposed to be dealt with, it is my view that this court cannot substitute the established bodies which are supposed to deal with these complaints. The Petitioners can only move this court for declaratory orders and judicial review orders, or by way of an ordinary suit, once they have exhausted the mechanisms that the law has put in place. In view of the provisions of the [Land Adjudication Act](#), Cap 284, I find that the petition was prematurely filed.”
67. The trial court in his finding held that the appellant had not lodged any appeal against the High Court decision in the judicial review. The court went on to state that the complaints against the merits of the decision of the DLASO ought to follow the mechanism outlined under section 29 of the [Land Adjudication Act](#) and not to challenge the same through the counter-claim, which position I agree with.
68. To this end therefore, it is my finding that the appellant has not exhausted the dispute resolution mechanism as elaborated under section 29 of the [Land Adjudication Act](#) and this court as constituted cannot therefore determine the said allegations of fraud. Further, the trial court was also not vested with the requisite jurisdiction to determine the said issues. The appellant ought to have duly complied with the outlined procedure instead of jumping the gun. Grounds 8 and 9 of the appeal are not merited.
- e) Whether the appellant is entitled to the reliefs sought
69. I have carefully looked at the trial court judgment and the evidence adduced in support of the rival claims. It is the finding of this court that the decision of the trial court was arrived at upon proper analysis of the facts of the case and the evidence adduced. The trial court therefore exercised its discretion judiciously.
70. The appellant’s claim is mainly founded on allegations of fraud which I have already discussed at length herein above and I seek not reiterate. The trial court’s finding on the appellant’s counter-claim, and which I agree with, was that any complaint on the impropriety with regards to the decision of the DLASO or the process employed in arriving at the said decision was not properly before the court and ought to be lodged before the appropriate forum.
71. Consequently, it is the finding of this court that the appellant is not entitled to the reliefs sought.



**Conclusion:**

72. In the premises, I accordingly find that the Appeal dated April 3, 2023 is not merited and is hereby dismissed with costs to the Respondent.

73. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET ON 20<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**C.K. YANO**

**JUDGE**

In the presence of: -

Ms. Gumato holding brief for Murango Mwenda for Appellant.

No appearance for Respondent

Court Assistant- Laban

