



**Nyongesa v Nyongesa (Environment & Land Case E049 of 2022)
[2024] KEELC 6042 (KLR) (23 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6042 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE E049 OF 2022
DO OHUNGO, J
SEPTEMBER 23, 2024**

BETWEEN

SHEM MUKOYANI NYONGESA APPELLANT

AND

AMINA NELIMA NYONGESA RESPONDENT

*(Being an appeal from the judgment and decree of the Chief Magistrate's
Court at Kakamega (Hon. D. Alego, Senior Principal Magistrate)
delivered on 24th October 2022 in Kakamega MCCC No. 328 of 2019)*

JUDGMENT

1. The background of this appeal is that the Respondent moved the Subordinate Court through her Complaint dated 16th December 2019, against Moses Namutimbukho Barasa, the Appellant herein, Mary Namusia Ndombi and the Trustees Chebuyusi Yearly Meeting of Friends Church as the First to Fourth Defendants, respectively. The Respondent averred in the Complaint that she is an administrator of the estate of Juma Wamalwa Wasitia (deceased) who was the registered proprietor of land parcel number Bunyala/Nambacha/325.
2. The Respondent further averred that her share of Bunyala/Nambacha/325 was subdivided into Bunyala/Nambacha/2164 and 2166. That she contracted the First Defendant to subdivide Bunyala/Nambacha/2166 into 7 parcels but the First Defendant exceeded his instructions by processing a title deed for Bunyala/Nambacha/2193 in the name of the Appellant, allocating bigger portions and processing title deeds in the names of the Third and Fourth Defendants and creating a public access road on Bunyala/Nambacha/2164.
3. The Respondent therefore prayed for judgment jointly and severally against the Defendants named in the Complaint for:
 1. That the sub-division of L.R No Bunyala/Nambacha/2166 be nullified.



2. That the 1st Defendant be compelled at his own expense, to sub-divide LR No Bunyala/Nambacha/2166 into 7 portions in strict conformity to the instructions issued to him by the Plaintiff.
3. That the Mutation showing the existence of a public road upon LR No Bunyala/Nambacha/2164 be quashed.
4. Costs of the suit.
4. The Appellant filed a Statement of Defence through which he denied the Respondent's averments that his title for Bunyala/Nambacha/2193 was issued without instructions. He urged the Subordinate Court to dismiss the suit and to grant him a permanent injunction restraining the Respondent from making any claims over Bunyala/Nambacha/2193.
5. Prior to the matter going to trial, the Respondent's claim against the Third and Fourth Defendants was marked settled. Subsequently, upon hearing the remaining claim, the Subordinate Court (Hon. D. Alego, Senior Principal Magistrate) delivered judgment on 24th October 2022 against the Appellant as prayed in the Plaint.
6. Aggrieved by the outcome, the Appellant filed this appeal through Memorandum of Appeal dated 31st October 2022. He prayed that the appeal be allowed, and that the judgment of the Subordinate Court be set aside.
7. The following are the grounds of appeal, as listed in the Memorandum of Appeal:
 1. The Learned trial Magistrate erred in facts and in law in failing to take into consideration the cogent evidence of the then 1st defendant and thus resulting to an erroneous decision.
 2. The Learned trial Magistrate erred in fact and in law in rewriting a valid sale agreement between the appellant and the seller and thus wrongfully concluding that the agreement had not been fulfilled.
 3. The Learned trial Magistrate erred in fact and in law in failing to appreciate that the various roles played by the respondent including being physically present during the survey exercise and attending the requisite land control board meeting wholly estops her from denying the appellant's right to the land.
 4. The Learned trial Magistrate erred in fact and in law by introducing, and proceeding to make a finding, on the element of boundary dispute which was neither pleaded nor canvassed during the trial.
 5. The Learned trial Magistrate erred in fact and in law in failing to consider the sum total of the appellant's case including his defence, statement and exhibits.
 6. The Learned trial Magistrate erred in fact and in law in finding in favour of the respondent whose case fell short of being proved on a balance of probability.
 7. The Learned trial Magistrate erred in fact and in law in rendering a judgment whose net effect would be the unlawful cancellation of the title deed held by the appellant while no evidence was adduced to any fraud on his part.
8. The appeal was canvassed through written submissions. The Appellant argued that the decision to nullify the sub-division of Bunyala/Nambacha/2166 was erroneous since the net result thereof was cancellation of the resultant titles including that held by the Appellant. That validity of the Appellant's



title was not challenged, and the Respondent never sought cancellation of any title. He referred to Section 26 of the *Land Registration Act* and argued further that the Respondent did not plead that his title was obtained fraudulently, illegally or corruptly. That, consequently, it was grossly erroneous for the Subordinate Court to reach a conclusion which cancelled his title. He therefore urged this Court to allow this appeal.

9. In reply, the Respondent argued that through a letter dated 19th November 2019, the First Defendant admitted acting contrary to her instructions and that he illegally transferred parcel number Bunyala/Nambacha/2193 to the Appellant without the Respondent's permission. Consequently, the Respondent contended, the Subordinate Court was right to find in her favour.
10. This being a first appeal, this court's mandate is to re-evaluate, re-assess and re-analyse the record and then determine whether the conclusions reached by the learned trial Magistrate are to stand or not and to give reasons either way. I also bear in mind that I have neither seen nor heard the witnesses and I will therefore give due allowance in that respect. I further remind myself that it is the responsibility of this court to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in their pleadings and evidence. See *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR and *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123.
11. The issues that arise for determination are whether Moses Namutimbukho Barasa went beyond instructions and whether the Respondent was entitled to the reliefs that she sought.
12. The Respondent's case before the Subordinate Court was that she was the registered proprietor of land parcel number Bunyala/Nambacha/2166 and that she contracted Moses Namutimbukho Barasa, who was the First Defendant in the case before the Subordinate Court, to subdivide the parcel into Seven parcels. She contended that Moses Namutimbukho Barasa executed the instructions by having the parcel subdivided into Bunyala/Nambacha/2190 to 2195 and 2249. She further contended that Moses Namutimbukho Barasa went beyond the instructions by processing a title for Bunyala/Nambacha/2193 in the name of the Appellant, allocating larger portions to the Third and Fourth Defendants in the case before the Subordinate Court, and creating a public access road on Bunyala/Nambacha/2164.
13. The case against the Third and Fourth Defendants having been settled, the question of whether Moses Namutimbukho Barasa went beyond instructions by processing titles in their favour was no longer for determination by the Subordinate Court. The only bit that remained for determination was whether he exceeded instructions by processing a title for Bunyala/Nambacha/2193 in the name of the Appellant and creating a public access road on Bunyala/Nambacha/2164. Conversely, the Respondent was asserting that she neither instructed him to process the title in favour of the Appellant nor to create the access road.
14. Although her case revolved around parcels Bunyala/Nambacha/2166 and Bunyala/Nambacha/2164, the Respondent did not produce any certificate of search or copy of register to verify ownership of those parcels. I am alive to the fact that the parties to the litigation before the Subordinate Court did not dispute her ownership of the two parcels. Nevertheless, whenever a litigant is alleging ownership of registered land, she must produce proof of ownership and not take it for granted that ownership is not in dispute. There are many reasons for that kind of approach. Title to registered land is a statutorily documented process. The statutory records must themselves speak, and not parties' assertions. Further, parties may sometimes be genuinely mistaken as to registered ownership. Occasionally, there could be the odd case of a litigant who is bent on misleading. Whatever the scenario, records held by the Land Registrar should speak for each situation.



15. Among the documents that the Respondent produced in support of her case was mutation form dated 10th February 2016, in respect of Bunyala/Nambacha/2166. A perusal of the form shows that it was signed by the Respondent and that it specified that the parcel was to be subdivided into eight parcels whose sizes are clearly specified therein. The form further includes provision for a road. The Respondent did not suggest that her signature on the mutation form was forged.
16. The Respondent placed heavy reliance on a document dated 19th November 2019, which she produced and contended was proof that Moses Namutimbukho Barasa admitted exceeding his instructions. I note however that the Respondent also produced another document dated 22nd November 2019 wherein Moses Namutimbukho Barasa disowned the document dated 19th November 2019 on the basis that it was written under duress after he had been detained in police custody. I note that the Respondent expressly pleaded at paragraphs 14 and 15 of her Plea that Moses Namutimbukho Barasa was arrested and detained at Navakholo Police Station and that the document dated 19th November 2019 was prepared and executed following his release. In those circumstances, duress cannot be said to be improbable.
17. Regarding the public access road said to have been created on Bunyala/Nambacha/2164, I note that the Respondent did not produce any mutation form in respect of Bunyala/Nambacha/2164, to support that claim. No copy of register was produced to show any change in the acreage of the said parcel as a result of creation of any access road. Simply put, there was no proof that a public access road was created from the said parcel.
18. Among the documents that the Respondent produced was a copy of certificate of search for Bunyala/Nambacha/2193 showing that the Appellant was registered as proprietor of the said parcel on 14th September 2017. Assuming, as the Respondent contended, that the said parcel was a subdivision of Bunyala/Nambacha/2166 whose registered proprietor was the Respondent, title could only be issued to the Appellant on the basis of instruments executed by the Respondent. The Respondent did not claim that her signature was forged so as to facilitate the Appellant's title.
19. In view of the foregoing, the Respondent did not prove that Moses Namutimbukho Barasa went beyond any instructions.
20. Among the reliefs that the Respondent sought was that the sub-division of Bunyala/Nambacha/2166 into Bunyala/Nambacha/2190 to 2195 and 2249 be nullified and that a mutation showing the existence of a public road on Bunyala/Nambacha/2164 be quashed. As already noted, the Respondent did not produce any mutation form in respect of Bunyala/Nambacha/2164 to support the claim that a public access road was created. No relief to that effect could be granted without proof that such a road was created.
21. Regarding the plea for nullification of the sub-division of Bunyala/Nambacha/2166 into Bunyala/Nambacha/2190 to 2195 and 2249, the Respondent in essence sought cancellation of titles in respect of Bunyala/Nambacha/2190 to 2195 and 2249. She contended that title in respect of Bunyala/Nambacha/2191 and 2249 were issued in favour of the Third Defendant and Fourth Defendant, respectively. Having settled her case against the said Defendants, it would be impractical to obtain judgment whose effect is cancellation of their titles.
22. To the extent that the Appellant is the registered proprietor of Bunyala/Nambacha/2193, he is entitled to the rights, privileges, and benefits under Article 40 of *the Constitution* and Section 24 of the *Land Registration Act*. Pursuant to Section 26 of the *Land Registration Act*, the Subordinate Court was obligated to accept the Appellant's certificate of title as conclusive evidence of proprietorship, unless the provisos under Section 26 (1) (a) or (b) were established.



23. The grounds on which a title can be nullified are fraud or misrepresentation to which the registered proprietor is proved to be a party or where it is shown that the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme. The Respondent did not plead or prove any that the Appellant was party to any fraud or misrepresentation regarding how he obtained title. She neither sought cancellation of the Appellant's title nor satisfied the grounds for cancellation of any title. It follows therefore that she was not entitled to the reliefs that she sought.
24. A reading of the judgment rendered by the learned Magistrate shows that she decided in favour of the Respondent on the ground that there was non-compliance with Sections 18 and 19 of the [Land Registration Act](#). The said provisions deal with boundaries and the manner of resolving boundary disputes. The case that was before the learned Magistrate had absolutely nothing to do with Sections 18 and 19 of the [Land Registration Act](#). The learned Magistrate misdirected herself in basing her findings on the said provisions.
25. I have said enough to show that the judgment rendered by the Subordinate Court is erroneous and cannot therefore stand. I find merit in this appeal, and I therefore allow it. I set aside the judgment of the Subordinate Court and replace it with an order dismissing the Respondent's case. The Appellant shall have costs of both this appeal and of the case before the Subordinate Court.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 23RD DAY OF SEPTEMBER 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the Appellant

No appearance for the Respondent

Court Assistant: M Nguyayi

