



REPUBLIC OF KENYA



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**Wambole & 2 others v Tumo (Environment and Land Appeal
E007 of 2023) [2025] KEELC 2986 (KLR) (27 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 2986 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT AND LAND APPEAL E007 OF 2023**

**LN MBUGUA, J
MARCH 27, 2025**

BETWEEN

SIMON LOSOGOYO WAMBOLE 1ST APPELLANT

PETER KARIUKI KARANJA 2ND APPELLANT

JAMES NGARI KAMOTHO 3RD APPELLANT

AND

BENJAMIN KIMUTAI TUMO RESPONDENT

*(Being an appeal from the judgment of Hon. S.O Mogute (SPM) delivered
at Nyabururu in Nyabururu C.M ELC No. 334 OF 2018 Benjamin
Kimutai Tumo v Simon Losogoiyo Wambole & Others on 17th October 2023)*

JUDGMENT

1. The suit before the trial court was instituted by the current respondent vide a plaint dated 20/8/2018 where he contended that he was the registered owner of land parcel Laikipia/Uaso Narok/1581 measuring 1ha. He also contended that the 2nd and 3rd appellants (by then 2nd and 3rd defendants) were the registered owners of the land parcel Laikipia/Uaso Narok/649 also measuring 1 ha. but the defendants had encroached on his land.
2. The plaintiff had therefore sought for the following orders;
 - a. A declaration that the plaintiff is the legal owner of Land Reference No. Laikipia/Uaso Narok/1581 measuring one point zero zero (1.00) hectares which he occupies.
 - b. A permanent order of injunction do issue restraining the defendants by themselves, their agents, servants or anybody claiming either under them or in their names from in any manner whatsoever interfering with the suit land.



- c. An eviction order do issue against the defendants herein and all their agents, servants and anybody else whatsoever either claiming in or by their name from the plaintiff's parcel of land LR. Laikipia/Uaso Narok/1581.
 - d. Costs of the suit and interest.
 - e. Any other or further relief that this honourable court may deem fit and just to grant.
3. The suit was opposed by the defendants vide their statement of defence dated 3.10.2018 where they denied allegations made against them by the plaintiff, arguing that their parcel No. 649 measures 2 ha. They contended that there was a purported alteration of the register in terms of size of the land so as to include plaintiffs land which defendants term as fraudulent transactions orchestrated by the plaintiff in collusion with the Land Registrar. The particulars of the said fraud are set out at paragraph 9 of the defence.
 4. The matter was heard in a full trial and in a judgment delivered on 17.10.2023, plaintiff's case was allowed with costs as against the defendants.
 5. Aggrieved by the said decision, the defendants have now appealed to this court vide a Memorandum of Appeal dated 16.11.2023 raising 15 grounds therein, which the court has condensed into the following grounds:
 1. That the trial magistrate erred in law and fact in relying on the green cards for parcel Laikipia/ Uaso which were fraudulently and unlawfully amended on the basis that the appellants title was erroneously measuring 2 ha instead of 1 ha.
 2. That the trial Magistrate erred in law and fact in misapplying the equitable doctrine of "where the equities are equal, the earlier in time prevails"
 3. The trial magistrate erred in law and fact in disregarding the surveyor's report, and in failing to find that parcel 649 fell in a block where parcels were measuring 2 hectares and not 1 hectare as reflected in the registry index mark and that parcel 1581 did not follow the numerical order of the neighbouring parcels.
 6. The suit before this court was heard by way of written submissions. The submissions of the appellants are dated 12/12/2024 where they rehashed the evidence tendered by the parties before the trial court. They argued that no documents for allocation from the settlement were produced and the alleged error mentioned by the land registrar just cropped up whereby the said land registrar had rushed to rectify the register without involving the appellants, thus no basis was laid down by the respondent for the alleged or purported amendment of the register for parcel 649 to reflect 1 hectare instead of 2.02 hectares.
 7. To this end, the appellant relied on the provisions of Section 142 (1) of the Repealed Registered *Land Act* which mirrors Section 79 of the *Land Registration Act* of 2012. The appellants also relied on the cases of R v Chief Registrar & Another Exparte Yosabia Kerubo Manyura [2018] eKLR and Elias Joseph Waburi Wamunyu v Joseph Mwangi Njoroge [2017] eKLR terming it a clear case of manipulation of the land records.
 8. It was further argued that the trial court wrongfully invoked the doctrine of "where there are two competing titles the earlier one prevails" because as at 21/8/2003 when Hellen Timbwa who sold the parcel to the respondent was being issued with a title, the appellants land 649 was already measuring 2.02 hectares.



9. It was also argued that the surveyor's report by Agago and Associates indicated that map sheet no. 2 where parcel 649 is to be found was for parcels measuring 2.02 hectares and not 1 hectare and that this evidence was not dislodged by the respondent.
10. The submissions of the respondent are dated 17.9.2024 where similarly, the evidence tendered before the trial court was rehashed. The respondent further argues that the rectification of the register in respect of parcel 649 was necessitated by the fact that the acreage of 2 hectares was erroneously indicated in the said parcel and did not correspond with the relevant records including the list of beneficiaries of the Uaso Narok Scheme. It is argued that the land registrar was therefore well equipped to rectify the register accordingly.
11. To this end, the respondent stated that each claimant was bound to demonstrate that the root of their titles was valid. It was further argued that the report of the surveyor did nothing to resolve the dispute as it was based on documents which had the erroneous measurements, adding that the said report has no signature of its maker. It was also argued that efforts had been made to contact the defendants as at the time the register was being rectified and that soon after the rectification, the 1st appellant has been fully involved in further actions regarding the establishment of the ground positions of the suit parcels.
12. On the doctrine of ; “ where the equities are equal the earlier one prevails”, it was argued that the case presented itself with two competing titles thus it was in order for the trial court to invoke the said doctrines adding that the court cannot be called upon to sanitize interest in land which had been acquired by errors and mistakes.
13. To this end, the case of Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others [2016] eKLR and Joseph Kiprotich Bor v Tabutany Chepkoech Chebusit [2021] eKLR were relied upon.
14. On the allegation that parcel no. 1581 was not aligned to the numberings in the neighbourhood, the respondent contends that the issue was properly explained by the District Surveyor Laikipia West (PW5) who contended that parcels in the neighbourhood bore different numbers with no sequential manner.
15. The respondent urges the court to dismiss the appeal with costs to the respondent.

Determination

16. The duty of the 1st appellate court was explained in the case of Selle and Another Versus Associated Motor Boat Company Ltd & Others [1968] Ea 123, where it was observed thus:-

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion. Though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judges findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence on the case generally.”

Also see Abok James Odera t/a A.J Odera & Associates Vs John Patrick Machira t/a Machira & Co. Advocates (2013) eKLR.



17. The court therefore proceeds to recapture the evidence as tendered before the trial court in order to re-evaluate the same and draw its own conclusions. At this juncture, it is pertinent to note that the proceedings capturing the evidence of pw1 up to part of the evidence of Pw4 are not in the record of appeal. They can however be traced in the original file.
18. PW1 (The respondent herein) Benjamin Kimutai Tumo testified that he has a title to parcel 1581 which is 2 ½ acres equivalent to 1 hectare. He contended that he bought the land from one Hellen Luswa Tembwa vide a sale agreement dated 12.6.2006 of which Hellen had acquired the land through the settlement scheme vide a letter of allotment dated 3.7.2000.
19. He contends that they had a dispute whereby the 1st appellant used to cut his trees and to this end, there is a letter from the chief dated 12.9.2007 confirming that the dispute existed, adding that the 1st appellant only sold the land to the 2nd and 3rd appellants in year 2018. He further stated that the dispute had been escalated to various platforms including to the chief, the police, the DC and even the Land Registrar.
20. In support of his case Pw1 produced several documents including a search dated 22.3.2018 indicating that he owns the land 1581, the sale agreement of 12.6.2006, the transfer from Helen to himself, the letter of allotment dated 3.7.2000, the search dated 14.4.2014 in respect of 1st appellant's title showing that parcel 649 was measuring 1.ha amongst other documents.
21. In cross-examination, Pw1 stated that the transfer from Hellen was not dated but they had attended the Land Control Board. He had no proof that he paid stamp duty, adding that he stopped using the land in year 2012. He contends that he has never seen the title deed for Ngari and Peter (the 2nd and 3rd appellants).
22. PW2 was one Elijah Korir Komen, a brother of the plaintiff whose evidence mirrors that of Pw1. On cross-examination, Pw1 stated that they had not constructed any structure on that land.
23. PW3, Margaret Njoki Mwangi was the Land Registrar at Rumuruti Sub County. She availed the green cards in respect of the two disputed parcels. She averred that for parcel 1581, the green card was a first edition opened on 20.8.2002 with an acreage of 1 hectare as seen in the registry map sheet no. 2. That the 1st proprietor was the Government of Kenya of which the land was transferred to H. Aluso Timbura on 21.8.2003 and she was issued with a title on the same date. Then on 14.2.2008 the land was transferred to Benjamin Tumo (the respondent) and he was issued with a title on the same date.
24. That for parcel 649 it was also a first edition card opened on 20.8.2002 which initially indicated that the acreage was 2.0 hectares. It was further rectified on 2.2.2011 to read 1 hectare and the same was countersigned by a Land Registrar. That the initial card opened on 2.8.2002 indicated that the 1st proprietor was the Government of Kenya of which the land was transferred to the 1st appellant herein on 26.7.2004 and a title deed was issued on the same date. That on 5.3.2018, the land was transferred to the 2nd and 3rd respondents and a title deed was issued accordingly.
25. On cross-examination Pw3 confirmed that the first registration for parcel 649 was for 2.02 hectares and the cancellation occurred on 2.2.2011. She contends that she cannot confirm what acreage is indicated in the titles issued to the 2nd and 3rd respondents, she cannot tell why the same reads 2.02 hectares. Nevertheless, the acreage in such a title should reflect the acreage in the green card. She averred that whenever a green card is amended, another title is reissued to tally with the green card, but for the green card for parcel 649 it does not state that a title was issued. She does not know the circumstances under which the acreage of this land was made.



26. She contends that they have a members register for parcels of land in that area whether emanating from land buying companies or settlement schemes and in the case at hand they have a register of the original owners of the Uaso Narok Settlement Scheme. They have no records as to how the alteration from 2.02 hectares to 1 hectare was done.
27. In re-examination Pw3 contended that the amendments occur when the ground and the records don't tally and therefore a government surveyor carries out the measurement on the ground and also prepares a ground report and presents the same to the land registrar's office indicating the actual acreage on the ground.
28. PW4 is one Joseph Njagi Githinji the land adjudication and settlement officer Laikipia County. He contended that he had the list of beneficiaries for the Uaso Narok settlement scheme of which the allocations took place in year 2002. Pw4 was stood down and when he re-appeared, he testified that he had the settlement scheme register dated 1.8.2002 and he produced the same as an exhibit. He averred that the two suit plots are measuring 1 ha. Each but he could not confirm if both exist on the ground.
29. On cross-examination, Pw4 averred that their register is dated 1.8.2002 and the said list is prepared first before issuance of the allotment letters. He contends that both parties have allotment letters dated 3.7.2000, thus there may have been another list which was issued.
30. PW5 is one Peter Mwangi Waititu the District Surveyor Laikipia West. He produced a reported dated 16.7.2021 done by his predecessor Nathan Mbugua. He also produced a map of the area as an attachment to the report and he contends that the two suit parcels measures 1 hectare each.
31. In cross-examination Pw5 contended that a survey has to be done before titles are issued and that an RIM has to be prepared and in case of subdivisions, amendments have to be done to the RIM. He further stated that the parcels appearing in RIM are not numbered in any sequential manner. He could not confirm the size of the land at the point of allotment.
32. In re-examination, Pw5 stated that he could not tell where the index map availed by the defendant emanated from. He averred that there are other parcels of land in the area bearing different numbers like 649/ 450/457.
33. DW1 is the current 1st appellant Simon Losogoyo Wambole. He adopted his witness statement dated 10.11.2018 as his evidence and he produced his documents as defence exhibits 1-9, the surveyors report was marked as DMFI 10, while documents in another list dated 19.5.2019 were produced as defence exhibit 1-11.
34. In his witness statement, he contended that he bought parcel 649 measuring 2.02 hectares equivalent to 5 acres from the Government of Kenya and that he has been in full possession of the said land to date. He contends that the allocation was done in year 2000 and he could not have encroached on his own land. He further stated that the records at the lands registry must have been altered by the plaintiff and the land registrar Laikipia illegally. He contends that parcel 1581 does not exist on the ground.
35. In cross-examination, Dw1 stated that the surveyor pointed out the beacons to him but he doesn't have the beacon certificate. He averred that his land is no. 3614 but the search dated 16.3.2018 shows that parcel 649 is measuring 1 hectare. He avers that the undated green card shows that the plaintiff's land is measuring 1 hectare. He contends that there are no buildings on the suit land and that there is a time they fought with the plaintiff over the subject matter.
36. In re-examination Dw1 stated that he sold the 5 acres of land to the 2nd and 3rd defendant.



37. DW2 was James Ngari Kamoko currently the 3rd appellant. He adopted his witness statement dated 12.11.2018 as his evidence. He contends that him and the 2nd defendant bought parcel 649 from the 1st defendant in year 2018 and it was measuring 5 acres equivalent to 2.02 hectares. He is not aware of any parcel of and known as 1581 because the same is not there on the ground. They have fenced the land and they are the ones using the same.
38. On cross-examining Dw2 contended that they have a sale agreement but he didn't have a transfer form or consent. He averred that the map in court does show that parcel 1581 borders parcel 649. He contends that parcel 1581 is measuring 1 hectare while parcel 649 is measuring 2.02 hectares but was later changed to 1 hectare. He avers that he was present when the land registrar visited the land in question (1581 and 649) and the report thereof indicates that each parcel is measuring 1 hectare in size. However, he is currently using parcel 649 consisting of 5 acres.
39. In re-examination he contends that they got their title on 5.3.2018 and it shows that their land is 2.02 hectares and not 1 hectare.
40. DW3 is one Onyango George Njeri a surveyor. He produced a report dated 14.8.2018 as an exhibit. He contends that he relied on the registry index map filed on 15.5.2019 where parcel 649 is intact.
41. In cross examination Dw3 averred that he is a qualified surveyor and that in his report he looked at the letter of allotment of 3.7.2000, the search of 25.2.2009, the title issued to the 2nd and 3rd defendant, copy of the green card as well as the registry index map. He did not deal with parcel 1581. He contends that parcels 1581 and 649 appear on the ground where they follow each other.
42. Based on the above evidence, what is the appropriate determination to make? On the claim of fraud raised by the appellants which apparently gave rise to the amendment of the green card for parcel 649, I make reference to the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR cited in Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, where it was stated that:-
- “No party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....”
43. A perusal of the defence proffered by the appellants reveals that particulars of fraud were heaped upon the plaintiff as particularized at paragraph 9(a) to (e) of the defence. No such particulars were set out as against the Land Registrar, and no counter claim was made even for reversal of the altered records, yet by the time the pleadings were filed, the appellants were aware of the amended records.
44. Even in their submissions before the trial court the issues framed for determination by the appellants were;
- A. Whether parcel Number Laikipia Uaso Narok /649 was allocated measuring 2.00 ha I.e 5 acres or 1 ha. I.e 2.5 acres,
- B. Whether the plaintiffs is entitled to the reliefs sought.
45. I find that the trial magistrate recaptured the evidence of the land registrar indicating that in their records, they have the two green cards of which the one for parcel 649 was rectified to capture the



correct acreage. It was therefore not permissible for the trial court to frame the issue of rectification of the register and fraud on the part of the Land Registrar when the same had not been captured in the pleadings. Thus it is unconscionable for the appellants to raise arguments on rectification of the register as a fresh point for determination before this court. See *Caltex Oil Kenya Limited v Rono Limited* (2016) eKLR.

46. On the doctrine of “where the equities are equal, the 1st in time prevails”, I find that the trial court correctly applied the said doctrine and relied on several authorities. After all Hellen’s title was issued on 21.8.2003 while that of the 1st appellant was issued on 28. 7.2004. The claim that by 21.8.2003, plot 649 was measuring 2.02 ha. doesn’t suffice because on the same breadth, plot 1581 also existed, its green card having been opened on 20.8.2002 and was measuring 1 ha.
47. On the issue that the trial court ignored the surveyors report (the one by the defendant), I note that the magistrate did not analyze in depth any of the reports availed by the surveyors (the one by Pw5 and the one by Dw3). Nevertheless, the trial court noted that the scene was visited by the Land Registrar. Further, the trial court did note that the Registry Index map depicted parcel numbers which did not follow each other.
48. I have also looked at the surveyor’s report where at page 65 of the record of appeal, I see just a drawing. The document at page 59 is perhaps the one referred to as the Registry Index map. It has no visible dates of authentication and or approval or any other date. It does not capture how the survey had been done as at 3.7.2000 the date of allocation. If anything, it captures parcels 649 and 1581 which borders each other with a complete line in between and the parcels appear to be of the same size. What more, the said document indicates that the neighboring parcel numbers don’t follow any sequential order i.e. Parcels 1578, 450, 652, 658, 1580, 625 and 1577.
49. To this end, I find that failure to analyze the reports does not impact upon the verdict of the trial court in any way.
50. In conclusion, I do find that the basis of the claims of the rival parties are the letters of allotments issued on 3.7.2000. Those claims have to be interpreted to their logical conclusion. Allowing the claim of the appellant would in essence be tantamount to making a determination that there was no allotment made in favor of Hellen.
51. As I conclude, I find that the appellants have not sought for any prayers before this court. Nevertheless, I find that the appeal is not merited, the same is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 27TH DAY OF MARCH 2025 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of;

Muriithi for the Respondent

