



REPUBLIC OF KENYA



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**Mulewa & another v Kombe & another (Land Case E010 of 2023)
[2025] KEELC 1480 (KLR) (20 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1480 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
LAND CASE E010 OF 2023
EK MAKORI, J
MARCH 20, 2025**

BETWEEN

FRANKLIN MUKARE MULEWA 1ST PLAINTIFF

HERBERT MWADHI MULEWA 2ND PLAINTIFF

AND

KEA KOMBE 1ST DEFENDANT

NICHOLAS KOMBE PEMBE 2ND DEFENDANT

JUDGMENT

1. The Plaintiffs brought this suit against the Defendants vide a plaint dated 23rd February 2023 that was later amended on 7th March 2024 wherein they sought, among other orders:
 - a. A declaration that the Plaintiffs are the owners of the parcels of land, Nos. Kaloleni/Vishakani/909 and Kaloleni/Vishakani/907 respectively.
 - b. An injunction restraining the Defendants jointly and severally from occupying, entering into, alienating, or in any way whatsoever dealing in the parcels of lands Nos. Kaloleni/Vishakani/909 and Kaloleni/Vishakani/907, respectively.
 - c. Removal or exhumation of the body of Charo Kea from the 1st Plaintiff's parcel of land known as Kaloleni/Vishakani/909.
 - d. Costs of this suit.
2. In opposition to the Plaintiffs' case, the 2nd Defendant filed his statement of defense dated 13th April 2023, denying the Plaintiffs' claim and further stating that the alleged Plot Nos. Kaloleni/Vishakani/909 and Kaloleni Vishakani/907 are part and parcel of the larger Plot No. Kaloleni/Vishakani/538 registered in the name of the late Pembe Murongo Kithi.



3. The Plaintiffs assert that the parcels of land in contestation in this suit were rightfully acquired by the Plaintiffs via sale for consideration, transfers were presented to the Lands Registry, and title deeds were issued in the names of the Plaintiffs herein.
4. The Defendants, without any legal basis, have recently buried one of their own on that parcel of land in blatant violation of an order of this court.
5. The Defendants have no title deeds for these parcels of land, which are in the names of the Plaintiffs. The Plaintiffs pray that apart from an order for the body to be removed from the parcels of land, they should be given quiet possession of their parcels of land. The Defendants have, in their purported Defence, mentioned several cases that have nothing to do with the parcels of land as they exist now and in which the Plaintiffs were never parties.
6. The Plaintiffs maintain that other than intermittent acts of violence by the Defendants, they are in actual possession and are in the process of erecting beacons. The Plaintiffs reiterated their ownership rights and pointed out that the 2nd Defendant is not claiming ownership of their parcels of land.
7. Conversely, the 2nd Defendant maintained that Plot Nos. Kaloleni/Vishakani/909 and Kaloleni Vishakani/907 were fraudulently and illegally excised from the mother title—Kaloleni/Vishakani/538—by Kenga Kombe and Kaleso Kombe, who had fraudulently and illegally misrepresented that they were beneficiaries of the late Pembe Murogo Kithi.
8. The 2nd Defendant maintained that as a result of the aforesaid fraudulent activities by Kenga Kombe and Kaleso Kombe, Plot No. Kaloleni/Vishakani/538 was, through the aforementioned illegality, fraud, and misrepresentation, illegally subdivided into three Plots, to wit, Plot Nos. Kaloleni/Vishakani/876,877 and 878.
9. The 2nd Defendant, in its Defence, maintained that the aforementioned illegal subdivisions to Plot No. Kaloleni/Vishakani/538, which includes the parcels claimed by the Plaintiffs herein, were later canceled as a result of the orders issued in Mombasa CMCC No. 2259 of 2007-Nicholas Kombe Pembe v Kenga Kombe & Kaleso Kombe and Malindi ELC No. 111 Of 2020 Nicholas Kombe Pembe v Kenga Kombe, Kaleso Kombe, Registrar of Lands Kilifi & the Hon. Attorney General.
10. The 2nd Defendant's position was that, pursuant to the orders issued in the abovementioned cases, all the illegal subdivisions to Plot No. Kaloleni/Vishakani/538, which include the parcels claimed by the Plaintiffs herein, were canceled, and consequently, the parcels contended by the Plaintiffs herein are non-existent.
11. The 2nd Defendant maintained that upon cancellation of all the illegal subdivisions to Plot No. Kaloleni/Vishakani/538, the Plaintiffs alleged parcels arising from Subdivision No. Kaloleni/Vishakani/878 were also cancelled.
12. The 2nd Defendant urged the court to find that the decisions above settled the questions of ownership of the suit property with finality and, consequently, the court should proceed to dismiss the Plaintiffs' suit with costs.
13. The Plaintiffs called two witnesses, Franklin Mukare Mulewa—PWI, who stated that he lives in Kaloleni. He adopted his statement dated 23rd February 2023 and a further statement dated 19th June 2023 as part of his evidence. He produced his bundle of documents in the List of Documents dated 23rd February 2023 and Supplementary List of Documents dated 19th June 2023, which were marked as Exhibits No. 1- 9. He stated that he is the registered proprietor of Plot No. Kaloleni/Vishakani/909. He said he acquired the plot after purchasing it from Kaleso Kombe Kithi. He maintained that the



plot was not unlawfully excised from Plot No. Kaloleni/Vishakani/538. He has not been a party in the various cases filed by the 2nd defendant, which are CMCC No. 2259 of 2007 Nicholas Kombe v Kenga Kombe & Kaleso Kombe, Malindi ELC No. 111 of 2020 Nicholas Kombe Pembe v Kenga Kombe & Anor. Neither has he been a party in a suit relating to his plot or Plot No. Kaloleni/Vishakani/538. The decision in case ELC No.111 of 2020 does not affect his plot ownership. He further stated that his title document had not been cancelled and that Plot No. Kaloleni/Vishakani/538 does not exist, as it was cancelled after a Gazette Notice.

14. In 2023, the 1st Defendant entered his plot No. Kaloleni / Vishakani/909 and dug a grave where he buried his son Charo Kea despite being served with a Court Order prohibiting him from burying on the said parcel of land. In the further statement by the witness dated 19th June 2013, he explained that by order of the then Land Disputes Tribunal involving a case between Kaleso Kombe and the father of the 2nd defendant, who was a key participant, where his father fully participated when the parcel of land known as Kaloleni/Vishakani/538 was subdivided into three portions. One was given to Kaleso Kombe - Kaloleni/Vishakani/878; the proceedings were produced as Exhibit 6. By dint of issuance of three new titles and after gazettelement when the father of the 2nd Defendant declined to surrender the title for Kalolelni/Vishakani/538, it ceased to exist, which is the position to date. He prayed that the court grant the prayers sought in the plaint.
15. In cross-examination, he maintained that they were the actual owners of the parcels of land. The decree presented by the 2nd Defendant in Court does not accurately reflect the judgment dated 24th July 2020.
16. Herbert Mwathi Mukare – PW2, the 2nd Plaintiff, adopted his Witness Statement dated 23rd February 2023 as part of his evidence. He stated that he is the registered proprietor of Plot No. Kaloleni/Vishakani/907. He purchased the plot with the 1st Plaintiff from Kaleso Kombe. He has never been a party in any court proceedings with respect to his title deed, and neither has it been cancelled.
17. On cross-examination, the 2nd Plaintiff maintained that he owned that parcel of land and produced documents.
18. Nicholas Kombe Pembe—DW1, in his evidence before the court, relied on his statement dated 25th April 2023. He alluded to several cases that resolved the issues raised in this suit, which decreed the cancellation of all titles that emanated from the parent title Kalolelni/Vishakani/538. Orders made were so that titles, as mentioned earlier, would be cancelled. The land reverted to its original form and was registered under Pembe Murogo Kithi.
19. The issues I frame for determination arising from the materials placed before me are whether the Plaintiffs are lawfully registered as proprietors of the suit properties. Did the Plaintiff acquire the suit property illegally? Has the 2nd Defendant’s suits settled the issue of ownership? Whether the 1st Defendant should exhume the body of Charo Kea? Who will bear the costs of the suit?
20. Learned counsels for the parties extensively submitted on the framed issues above.
21. Ms. Okumu, for the Plaintiffs, asserted that he who avows must prove as envisaged by Section 109 of the *Evidence Act*. She stated Sections 24 and 25 of the *Land Registration Act* confer proprietorship rights on the title holder. In this case, the Plaintiffs are the registered owners of the suit property, having legally purchased the same, and ownership is protected further under Article 40 of *the Constitution*. The rights of a proprietor can only be negated as provided under Section 26 of the *Land Registration Act*, which provides:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie



evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. where the certificate of title has been acquired illegally, unprocedurally, or through a corrupt scheme.
 - (1) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

22. Ms. Okumu is of the view that the Plaintiffs are bona fide purchasers for value and cannot be liable if it is found that the subsequent titles were irregularly or unprocedurally obtained, citing the decision in *In Charles Karathe Kiarie & 2 others v Administrators of the Estate of John Wallace Mathare (Deceased) & 5 others* (2013) eKLR, the court held:

“We have taken this long route in order to explain that it has always been the law under the Registration of Titles Act and based on the Torrens system, that the title of a bona fide purchaser for value and without notice of fraud could not be impeached. This is what the judges in the Uganda case of *Lwanga versus Registrar of Titles, Misc. Cause No. 7A of 1977 (1980) HCB 24* called the paradox of registered conveyancing – that the registration obtained by fraud was void and yet capable of becoming a good root of title to a bona fide purchaser for value. Because of the seriousness of allegation of fraud, a criminal act, the burden of proof is on the party who alleges it and the standard of proof is more than a mere balance of probabilities. Fraud, for that reason, is treated as matter of evidence.”

23. She further cited the decision in *Elijah Makeri Nyangw’ra v Stephen Mungai Njuguna & another* [2013] eKLR where the Court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. The Court, in the case, while considering the application of Section 26(1) (a) and (b) of the *Land Registration Act*, rendered itself as follows:

“the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”

24. Ms. Okumu believes the allegations of fraud associated with her client have not been surmounted. The Plaintiffs acquired their titles procedurally and do not fall under the exceptions of the indefeasibility of title as laid bare in Section 26(1) of the *Land Registration Act*, which provides:

“The certificate of title issued by the Registrar upon registration, or to a purchase of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except:-



- a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b) Where the certificate of title has been acquired illegally, unprocedural, or through a corrupt scheme.
25. She states that the 2nd Defendant claims that the Plaintiffs acquired their properties illegally or fraudulently. She further questioned whether the property registered in the name of Pembe Murogo Kithi had been restored. No restoration evidence was provided, which is not enough evidence to prove fraud.
 26. That the Plaintiffs, through their Exhibit Nos. 1- 4 demonstrated how they acquired their title deeds through transfers from the previous owner, Kaleso Kombe Kithi. They attended the Land Board for consent to transfer and duly paid stamp duty. They are bona fide purchasers with good titles. The court cannot hold that there was fraud or illegality. The evidential threshold required to impeach a title is quite high and has not been met by the 2nd Defendant.
 27. Ms. Okumu contrasts the decisions cited by the 2nd defendants and avers that the court is invited to look at the parties in the several suits filed by the 2nd Defendant, the Plaintiffs herein are not parties in those suits, the Plaintiffs' title documents are not the subject matters in those suits, the title deed in dispute in those suits is No. Kaloleni / Vishakani/538, there is no court order against the Plaintiffs and precisely no court order canceling the title deeds registered under the Plaintiffs names.
 28. The alleged order marked Defence Exhibit No. 7 restoring the 2nd Defendant's ownership is in the decree dated 24th July 2020. The parties in that suit are Nicholas Kombe Pembe v Aldestone Kenga Kombe (sued as administrator of the estate of Kenga Kombe), Registrar of Lands Kilifi, and The Attorney General.
 29. The Decree does not reflect the judgment dated 24th July 2020, which resulted from the Amended Plaint dated 12th November 2018, where Kaleso Kombe was not a party and was deceased; therefore, no order could be issued against him. The Amended plaint was mischievously drawn to that effect. The Plaintiffs' title deeds are not mentioned in the decree; they were not parties to the suit, yet the 2nd Defendant knew of their ownership rights, and they are bona fide purchasers; they are not beneficiaries of the estate of Kaleso Kombe. The estate of Kaleso Kombe was not joined in the proceedings. The decree is fatally defective and amounts to no order, as no order can be made against a deceased person, not a party in the suit.
 30. Ms. Okumu avers that the Plaintiffs, in their Exhibit No. 7, Gazette No. 2979, confirm that as a result of a court order arising from Kaloleni Case No. 13 of 1996, which had directed that Plot No. Kaloleni/ Vishakani/538 be divided into three portions, the plot was lawfully subdivided, and in all the suits by the 2nd Defendant, that order was never challenged or appealed against by that gazette notice Plot No. Kaloleni/Vishakani/538 was cancelled and or gazetted in 2003, long before the various cases were filed.
 31. Mr. Ndambuki, for the 2nd Defendant, maintains that the issue of ownership of Kaloleni/ Vishakani/538 is not available for litigation before this court, noting that the same was determined with finality by courts of competent jurisdiction as demonstrated by the aforesaid decisions in Mombasa CMCC No. 2259 Of 2007 and Malindi ELC No. 111 Of 2020.



32. Mr. Ndambuki relied on the decision in the case of *John Kennedy Agengo v Moses L. Ochanda* [2018] KEHC 4983 (KLR), where the Court expressed itself as follows:

“... I am equally persuaded by the words of the Court of Appeal of Tanzania in *LOTTA VS TANAKI& OTHERS* [2003] 2 EA 556 (CAT) where the Court held as follows with regard to the doctrine of *res judicata*; Its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgment between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit”. Further that, “a person does not have to be formally enjoined in a suit, but he will be deemed to claim under the person litigating on the basis of a common interest in the subject matter of the suit.” See also *E.T VS ATTORNEY GENERAL & ANOTHER* (2012) eKLR

33. Mr. Ndambuki submits that the court of appeal found that a person does not have to be formally joined to the suit to be barred by the doctrine of *res judicata*, it is enough to demonstrate that he/she is a proxy or a person claiming under a person litigating on the basis of common interest in the subject matter of the suit.
34. Counsel believes that in this case, as admitted by the Plaintiffs during cross-examination, they were aware of the pending cases over the suit property even when purchasing the same from Kaleso Kombe. As such, this makes the courts' decisions aforesaid binding, and consequently, the only available avenue for them is to apply for review of the same if they feel aggrieved or affected upon satisfying the provisions of Order 45 of the Civil Procedure Rules.
35. The court was further invited to note that during cross-examination, the 2nd Plaintiff confirmed that, indeed, when they purchased their portions of the suit property, they were aware of the pending cases in court challenging the title held by one Kaleso Kombe. That by dint of the common law doctrine of *lis pendens*, the Plaintiffs were actually barred from purchasing the suit property during the active litigation of the aforesaid cases, and as such, their purchase of the same during the pendency of the said cases was illegal, and illegality that this court cannot sanctify. That the net effect of the common law doctrine of *lis pendens* is that the decision of the court with respect to any property that is the subject of litigation is binding upon any third parties, such as the Plaintiffs herein, who might have, through whatever means, acquired some rights over any such property during the pendency of litigation. This is to say that if the title of the vendor of any property that is subject to litigation is nullified upon determination of any such proceedings, then that nullification affects even the third parties who might have purchased the suit property during such litigation. As such, the decisions described above bind the Plaintiffs.
36. Reliance is placed on the case of *Belleny v Sabine* (1857) 1 De J 566, 584, where Turner L. J held as follows:

“Where a litigation is pending between the Plaintiff and the Defendant as to the right of a particular estate, the necessities of mankind require that the decision of the court in the suit shall be binding not only on the litigating parties but also on those who derive title under them by alienating pending the suit whether such alienees had or had no notice of proceedings. If that were not so, there could be no certainty that the proceedings would ever end...”



37. Reliance was also placed on the case of *Mawji v US International University & another* [1976] KLR 185, Madan, J.A. stated thus:

“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..... Every man is presumed to be attentive to what passes in the courts of justice of the State or sovereignty where he resides. Therefore, purchase made of a property actually in litigation *pendete lite* for a valuable consideration and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had notice and will accordingly be bound by the judgment or decree in the suit.”

38. Mr. Ndambuki believes the subdivisions to the suit property were nullified and the resultant titles cancelled. The Plaintiffs’ claim, which flows from the cancelled titles, cannot stand, and as such, it is only ripe for dismissal.
39. Mr. Ndambuki concludes that noting that the Plaintiffs’ claim is pegged on cancelled titles, they are not entitled to any of the orders sought, as allowing any of the orders sought would be tantamount to this court sitting as an appellate court to the decision of the High Court in Malindi ELC No. 111 of 2020, which is a procedure alien in law.
40. As noted in the introductory section of this judgment, the parties involved in these proceedings and those they represent have been engaged in litigation regarding the suit property since the original title was Kaloleni/Vishakani/538. Olola J. thoroughly addresses this situation in the judgment delivered by this court on July 24, 2020, reported as *Nicholas Kombe Pembe v Kenga Kombe & 3 others* [2020] KEELC 1600 (KLR). The judge commented on the numerous previous suits related to the parent title and the ongoing litigation among the parties:

“That being the case, disputes over ownership or title to land were not within the mandate of those tribunals. Accordingly, in purporting to award parcels of land already registered in the name of the Plaintiff’s father to the Defendants, the Tribunal clearly went beyond its jurisdiction, and the purported award cannot stand.

26. From the record, it was clear to me that the Plaintiff has overtime relentlessly made efforts to correct this anomaly. Having obtained a Confirmed Grant of Letters of Administration in the year 2004, the Plaintiff moved on 4th April 2006 and filed Mombasa High Court Civil Suit No. 63 of 2006; *Nicholas Kombe Pembe –vs- Kenga Kombe and Kaleso Kombe*. That suit was, by an order made on 13th June 2007, transferred to the Chief Magistrates Court at Mombasa for hearing and disposal.
27. On 28th November 2007, the Chief Magistrates Court having heard the dispute now registered as Mombasa CMCC No. 2259 of 2007 decreed that the Title Deeds issued arising after the sub-division of the property known as Kaloleni/Vishakani/538 be cancelled and that the said property be registered in the Plaintiff’s name. Perhaps as a measure of the apparent vested interest in the property, the Land Registrar Kilifi chose to ignore the fact that the suit had



initially been properly filed by the Plaintiff in the High Court and refused to carry out the orders on the purport that the Lower Court had no jurisdiction to cancel the titles.

28. In the confusion that ensued, the Plaintiff was compelled to file a fresh the present suit. Another Judgment awarded in favour of the Plaintiff herein on 3rd July 2015 was again set aside after it emerged that the matter had proceeded despite the then Defendants having passed away.
29. The Plaintiff's testimony during all these proceedings has remained consistent and unchallenged. In the premises, I am satisfied that he has proved his case on a balance of probabilities. I did not, however, find any basis for an award of damages as sought under prayer 'C' of the Plaint.
30. Accordingly, the 1st Defendant's Counterclaim is dismissed, and Judgment is hereby entered for the Plaintiff as prayed in Amended Plaint dated 12th November 2018."

41. The decree that emanated from that judgment was extracted as follows:

1. That an Order be and is hereby issued directed to the 3rd and 2nd Defendants to cancel the title deeds issued in place of Kaloleni/Vishakani/538 and register the said property in the name of the Plaintiff.
2. That the beneficiaries of Kenga Kombe and Kaleso Kombe (now deceased) be and hereby directed to vacate the property."

42. I concur with Mr. Ndambuki, and without delving into the doctrine of lis pendens, I assert that the overall consequence of the judgment by Olola J., along with the ruling in Mombasa CMCC No. 2259 of 2007, was the annulment of all titles derived from the parent title. This includes Plot Nos. Kaloleni/Vishakani/909 and Kaloleni/Vishakani/907 fraudulently and unlawfully separated from parcel No. Kaloleni/Vishakani/878. This separation was executed by Kenga Kombe and Kaleso Kombe, who deceitfully claimed to be beneficiaries of the late Pembe Murogo Kithi; consequently, due to the fraudulent actions of Kenga Kombe and Kaleso Kombe, Plot No. Kaloleni/Vishakani/538 was unlawfully subdivided into three plots: Kaloleni/Vishakani/876, 877, and 878. As stated, the latter was subdivided to create the Plaintiff's plots. Therefore, this court cannot act as an appellate court to reassess, modify, or review the determinations made by competent courts. I down tools.

43. To that extent, the Plaintiffs' suit is hereby dismissed with costs to the Defendants.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 20TH DAY OF MARCH 2025.

E. K. MAKORI

JUDGE

In the Presence of:

Ms. Okumu, for the Plaintiffs

Mr. Ndambuki for the 2nd Defendant

Happy: Court Assistant

