



REPUBLIC OF KENYA



KENYA LAW
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**Buchere v Indimuli (Environment & Land Case 275 of 2015)
[2025] KEELC 4085 (KLR) (29 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 4085 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 275 OF 2015**

DO OHUNGO, J

MAY 29, 2025

BETWEEN

JULIUS TOYA BUCHERE PLAINTIFF

AND

HERBERT MUKUNZI INDIMULI DEFENDANT

JUDGMENT

1. Proceedings in this matter commenced on 9th October 2015, when the Plaintiff filed Plaintiff dated the same date, wherein he averred that he was the registered proprietor of the parcel of land known as Marama/Lunza/2211 (the suit property) which he purchased from Richard Indimuli Mukanzi, the Defendant's father. That the Defendant trespassed into the suit property, erected structures thereon and placed a restriction against the title. He therefore sought judgment against the Defendant for a permanent injunction restraining him, his agents, servants or any other person acting on his behalf from entering, working, erecting structures, or in any way interfering with the suit property. He further prayed for removal of the restriction, costs of the suit and interest.
2. The Defendant filed Amended Statement of Defence and Counterclaim amended on 13th November 2019. He denied the Plaintiff's allegation of purchase and averred that the Plaintiff had obtained title through fraud and misrepresentation. Consequently, the Defendant prayed that the Plaintiff's suit be dismissed with costs and that judgment be entered against the Plaintiff for a declaration that the Defendant's father is the legal owner of the suit property and the parcel of land known as Marama/Lunza/2212, a declaration that the sale and transfer of the suit property and Marama/Lunza/2212 from the Defendant's father is unlawful and fraudulent, cancellation of the Plaintiff's title, a permanent injunction restraining the Plaintiff from entering into, fencing, building, selling, transferring and or in any way interfering with his lawful use of the suit property and Marama/Lunza/2212. He further prayed for costs and interest.



3. At the hearing, the Plaintiff testified as PW1 and adopted his witness statement dated 9th October 2015 as his evidence in chief. He also produced copies of the documents listed as item numbers 1 and 3 in his list of documents dated 9th October 2015 and copies of the documents listed as item numbers 3, 4, and 6 in his supplementary list of documents dated 13th December 2019 as his exhibits.
4. The Plaintiff reiterated in the statement that he purchased the suit property from the Defendant's father and obtained title. That the Defendant trespassed into the suit property and started constructing a kiosk thereon, leading to the Defendant's father, the Defendant's brother by the name Arthur Namayi and the Plaintiff having a meeting but the Defendant declined any advice. That the Plaintiff then reported the matter to the area Chief who handled the dispute in his office without success. That later, the Defendant resorted to intimidating him using DCI officers at Butere Police and also placed a restriction on the suit property.
5. Under cross-examination and re-examination, the Plaintiff stated that the suit property originated from parcel number Marama/Lunza/39 which was subdivided into five parcels being parcels being Marama/Lunza/2111 to 2115 out of which he got Marama/Lunza/2113 which he subdivided into Marama/Lunza/2211 (the suit property) and Marama/Lunza/2212 which was registered in the name of one Wyclife Ongaya Buchere. He further stated that he and the Defendant's father attended the Land Control Board, and that the Defendant's father willingly and freely transferred the land to him.
6. Patrick Oyalo Andabwa (PW2), the Chief of Marama Central Location, adopted his witness statement dated 9th October 2015 and stated that he knew both parties to this case well and that they hail from his jurisdiction and once appeared before him in his official capacity. He stated in the statement that the Plaintiff reported to his office in May or June 2015 that the Defendant trespassed into the suit property and started erecting a kiosk. He added that he was aware that the suit property belonged to the Plaintiff who purchased it from the Defendant's father in 1995. That upon hearing both parties in the presence of elders including the Defendant's father, it became apparent that the Defendant had alternative land which was given to him by his father as a gift.
7. PW2 went on to testify that he had been Chief of the area for 22 years and knew the parties well, including Defendant's father who had since passed away. He also stated that he never saw the sale agreement or other documents pursuant to which the Plaintiff acquired the suit property.
8. The Plaintiff's case was then closed.
9. The Defendant testified next as DW1. He adopted his witness statement dated 13th November 2019 and produced copies of documents listed as item numbers 1, 2, 3 and 5 in his list of documents dated 19th May 2016 as his exhibits. He stated in the statement that although the Plaintiff was the registered owner of parcel number Marama/Lunza/39, he obtained title through fraud and did not purchase it from Richard Indimuli Mukunzi who was his father. That the only agreement between the Plaintiff and his father was that the Plaintiff was to assist his father to obtain title to Marama/Lunza/39 so that his father subdivides the said parcel. That contrary to the agreement, the Plaintiff subdivided Marama/Lunza/39 into Marama/Lunza/2111 to 2115 and transferred the said subdivisions to himself without any consent from him or his father.
10. The Defendant further stated that the Plaintiff subdivided Marama/Lunza/2113 into Marama/Lunza/2211 and 2212 and that despite claiming that he purchased Marama/Lunza/39, he misrepresented to the land registrar that he acquired the parcel from the Defendant's father as a gift. He added that he learnt from one Maloba Alufuma that the Plaintiff increased the size of his portion to more than the 0.44 hectares that his father had intended to give the Plaintiff. That having fraudulently



obtained title, the Plaintiff did not take any step until the year 2015 when he demolished a structure which the Defendant had built on the suit property.

11. The Defendant added that he reported the matter to the area Chief and that a meeting was held on 12th May 2015 during which it was agreed that the Plaintiff would avail a copy of any agreement between him and the Defendant's father, but he failed to do so. That he later lodged a caution against the suit property and Marama/Lunza/2212 upon discovering that the said parcels had been registered in the Plaintiff's name without his knowledge or his father's knowledge.
12. During cross-examination and re-examination, the Defendant stated that he was in occupation of the suit property as of the date of his testimony and that his father passed away in the year 2017. He further stated the title in respect of Marama/Lunza/39 was closed on 6th September 1990 upon its subdivision into Marama/Lunza/2111 to 2115.
13. Evans George Muyia Namayi (DW2) testified that the parties were his neighbours. He adopted his witness statement dated 1st November 2018 and produced a copy of the document listed as item number 4 in the Defendant's list of documents dated 19th May 2016. He stated in the statement that he was a village elder and that he was present during a meeting between the parties and clan members held on 12th May 2015. That during the meeting, the Plaintiff could neither explain how he became the registered proprietor nor produce the sale agreement.
14. During cross-examination and re-examination, DW2 stated that the Plaintiff was not his neighbour and that it was the Defendant who was his neighbour. He further testified that the Defendant's father attended the meeting of 12th May 2015 and that the Defendant did not have any other land.
15. The Defence case was then closed. Directions were thereafter given for filing and exchange of written submissions. The Plaintiff filed submissions dated 2nd April 2024 while , the Defendant filed submissions dated 18th April 2024.
16. I have considered the pleadings, evidence and submissions. The issues that arise for determination are whether the Defendant has locus standi in respect of his counterclaim, if so whether the Defendant has established fraud and misrepresentation and whether the reliefs sought should issue.
17. There is no dispute that the Plaintiff is the registered proprietor of the suit property. The material on record shows that the Plaintiff became the registered proprietor on 8th October 1993 and that title deed was issued to him on 6th January 1995. The suit property is a subdivision of parcel number Marama/Lunza/2113 which in turn was a subdivision of parcel number Marama/Lunza/39.
18. From the material on record, it is not disputed that the registered proprietor of parcel number Marama/Lunza/39 was Richard Indimuli Mukunzi who was the Defendant's father and who became registered proprietor on 4th May 1990. A perusal of the register in respect of the parcel shows that the parcel was closed on 6th September 1990, upon its subdivision into parcel numbers Marama/Lunza/2111 to 2115. Richard Indimuli Mukunzi remained the registered proprietor as of the date of the subdivision.
19. A perusal of the register in respect of parcel number Marama/Lunza/2113 which the Defendant produced in evidence shows that the first registered proprietor of the parcel was Richard Indimuli Mukunzi who was registered as such on 6th September 1990. Subsequently, the Plaintiff became the second registered proprietor on 5th March 1991. Pursuant to entry number 4 in the register, the title was closed on 8th October 1993, upon its subdivision into the suit property and Marama/Lunza/2212.



20. The law jealously guards the rights of a registered proprietor of land and guarantees protection of his right to property, pursuant to Article 40 of *the Constitution*. To further secure those rights, Section 24 of the *Land Registration Act* makes specific provisions as follows:

Subject to this Act—

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
 - (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.
21. The protection accorded to a registered proprietor of land is further fortified by Section 26 of the *Land Registration Act* which obligates the Court to accept the proprietor's certificate of title as prima facie evidence of proprietorship unless the provisos under Section 26 (1) (a) or (b) are established. Those provisos lay down the grounds on which a title can be nullified as 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. Thus, despite the ironclad protection, title to property which is found to have been unlawfully acquired is open to impeachment.
22. In view of the Plaintiff's registered proprietorship and the above provisions, unless the Defendant is able to successfully impeach the Plaintiff's title, the Plaintiff's rights as a proprietor must be upheld. I will therefore deal with the Defendant's counterclaim first and turn to the Plaintiff's claim thereafter.
23. The Plaintiff contended in his submissions that the Defendant lacks locus standi in respect of the counterclaim. From the onset, I must restate that locus standi is an issue of jurisdiction.
24. The Court of Appeal considered the meaning and scope of locus standi in the case of *Rugiri v Kinuthia & 3 others* [2024] KECA 1601 (KLR) where it stated:

The Black's Law Dictionary, 9th Edition (page 1026) defines locus standi as "the right to bring an action or to be heard in a given forum". This Court in *Alfred Njau and Others vs. City Council of Nairobi* [1982] KAR 229 held that: "The term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings".

Locus standi is cardinal in civil proceedings because without it, a party lacks the right to institute and/or maintain the suit even where a valid cause of action subsists. It can be equated to a court acting without jurisdiction. In *Amlers Precedents of Pleadings*, Lexis Nexis LTC Harms et al 2018 on page 248 the following is said: "The question of locus standi is in a sense procedural, but it is also a matter of substance. It concerns the sufficiency and directness of a person's interest in the litigation to be accepted as a litigating party. It is also related to the capacity of a person to conclude a jural act. Sufficiency of interest depends on the facts of each case and there are no fixed rules."

Locus standi concerns the sufficiency and directness of a litigant's interest in proceedings which warrants his or her title to prosecute the claim asserted, and should be one of the first things to establish in a litigation.



25. A perusal of the Amended Statement of Defence and Counterclaim and a consideration of the Defendant's evidence reveals that the Defendant's case against the Plaintiff is that the Plaintiff obtained title to the suit property through fraud and misrepresentation. His position is that the Plaintiff obtained title to parcel number Marama/Lunza/39, subdivided it and ended up with the suit property and that the entire process was tainted by fraud and misrepresentation. In essence therefore, the Defendant was seeking to right a wrong that he claimed to have been committed against his father who was the registered proprietor of parcel number Marama/Lunza/39 and its subsequent subdivision Marama/Lunza/2113 which yielded the suit property.
26. In his testimony, the Defendant stated that Richard Indimuli Mukunzi passed away in the year 2017. This suit was filed on 9th October 2015 and the Defendant initially filed Statement of Defence and Counterclaim dated 19th May 2016 which was later replaced with Amended Statement of Defence and Counterclaim amended on 13th November 2019.
27. The Defendant has never been the registered proprietor of Marama/Lunza/39, Marama/Lunza/2113 or the suit property. He could not lawfully advance his father's case as regards the said parcels between the date of institution of this suit and the year 2017 when his father was still alive. He had no locus standi to do so. After the death of his father, he could not validly agitate any cause of action vested in his deceased father's estate without being appointed a personal representative of the said estate. See *Trouistik Union International & another v Jane Mbeyu & another* [1993] eKLR and *CKM v ENM & another* (Civil Appeal 250 of 2019) [2024] KECA 293 (KLR) (8 March 2024) (Judgment).
28. The Defendant has neither alleged nor demonstrated that he is a personal representative of his deceased father's estate. As the Court of Appeal stated in *Rugiri v Kinuthia & 3 others* (supra), where a suit is filed relating to a deceased's estate without a grant of representation, the proceedings are null and void for want of locus standi. I have no hesitation in finding, as I now do, that the Defendant's counterclaim is null and void for want of locus standi and the Court has no jurisdiction to hear and determine it. I hereby strike out the said counterclaim.
29. For the avoidance of doubt, even if I had not reached the conclusion that the Defendant's counterclaim is null and void for want of locus standi, I would have still dismissed it upon considering its merits. The Defendant sought to impeach the Plaintiff's title on grounds of fraud and misrepresentation. Fraud is a serious allegation. The party alleging it has to go an extra mile to plead and strictly prove it to a standard of proof which is higher than proof upon a balance of probabilities. Further, in cases where fraud is alleged, it is not enough to simply infer fraud from the facts. See *Kinyanjui Kamau vs. George Kamau* [2015] eKLR and *Vijay Morjaria vs. Nansingh Madhusingh Darbar & Another* [2000] eKLR.
30. The particulars of fraud pleaded by the Defendant are inter alia that the Plaintiff purported to transfer land without proprietary interest, illegally transferred the suit property, tendered falsified documents, registered property belonging to the Defendant's father without the Defendant's father's consent or approval, and misrepresenting to the registrar that the land had been gifted to him.
31. As is manifest from the chronology given earlier in this judgment, the suit property traces its roots to parcel number Marama/Lunza/39 whose registered proprietor Richard Indimuli Mukunzi (the Defendant's father) with effect from 4th May 1990. The said title was closed on 6th September 1990 following its subdivision into parcel numbers Marama/Lunza/2111 to 2115. The Defendant's father remained the registered proprietor as of the date of the subdivision. In other words, the Defendant's father did the subdivision.
32. It is not disputed that the suit property is a subdivision of parcel number Marama/Lunza/2113. The register in respect of parcel number Marama/Lunza/2113 shows that the first registered proprietor of



the parcel was the Defendant's father who was registered as such on 6th September 1990. The Plaintiff only became the registered proprietor later, on 5th March 1991. Even though the consideration for the transfer is indicated in the register as gift, I note that the Defendant's father who was alive both during the transfer and as of the date of filing of the counterclaim neither questioned the transfer nor the stated consideration. PW2 who was the area Chief testified that he was aware that the Plaintiff had acquired the suit property from the Defendant's father.

33. In those circumstances, the Defendant's particulars of fraud and misrepresentation remain mere claims. They are not proven to the required standard. On the contrary, the material on record shows that the Defendant's father freely transacted in his property. The Defendant's attempts to infer fraud and misrepresentation into the transaction do not rise to the standard required to impeach a title to registered land.
34. To the extent that his title remains unimpeached, the Plaintiff is entitled, in terms of Section 24 of the *Land Registration Act*, to the absolute ownership of the suit property together with all rights and privileges belonging or appurtenant thereto. The Defendant testified that he is in occupation of the suit property. The Defendant's unjustified occupation of the suit property warrants a permanent injunction as is sought by the Plaintiff.
35. A perusal of the certificate of official search that the Plaintiff produced shows that a caution was registered on 26th August 2015 in favour of the Defendant who was claiming a beneficiary interest. In his testimony, the Defendant confirmed that he lodged the caution. I am persuaded that the Plaintiff has made case for removal of the caution.
36. In view of the foregoing discourse, I make the following orders:
 - a. The Defendant's counterclaim is null and void for want of locus standi and is therefore struck out.
 - b. A permanent injunction is hereby issued restraining the Defendant by himself, his agents, servants or any person acting on his behalf from entering, working upon, erecting structures on, or in any way interfering with the parcel of land known as Marama/Lunza/2211.
 - c. The caution registered in favour of the Defendant on 26th August 2015 against the parcel of land known as Marama/Lunza/2211 be removed forthwith.
 - d. The Plaintiff shall have costs of the suit and interest thereon at Court rate.

DATED, SIGNED, AND DELIVERED THROUGH MICROSOFT TEAMS, AT NYAMIRA, THIS 29TH DAY OF MAY 2025.

D. O. OHUNGO

JUDGE

Delivered in the presence of:

No appearance for the Plaintiff

Ms Nyiva for the Defendant

Court Assistant: B Kerubo

