



**Akinyi v Bhaijee & 2 others (Environment & Land Case
E015 of 2023) [2025] KEELC 4091 (KLR) (28 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 4091 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E015 OF 2023
FM NJOROGE, J
MAY 28, 2025**

BETWEEN

DAMARIS AKINYI PLAINTIFF

AND

NOORDIN BHAIJEE 1ST DEFENDANT

SAIFUDIN BHAIJEE 2ND DEFENDANT

LAND REGISTRAR OF KILIFI COUNTY 3RD DEFENDANT

JUDGMENT

Pleadings

The Plaintiff

1. The present suit was commenced by way of a plaint dated 24/8/2023. That original plaint in this suit was filed on 28th August 2023 but it was subsequently amended on 28th of October 2024.
2. In the amended plaint, the plaintiff avers that at all material times to the suit she was the bona fide registered proprietor of plot number Mariakani/Kawala B/98 measuring 0.7 hectares situate at Kabenderani in Mariakani, having inherited the land from her late husband James Opiyo, to whose estate she obtained a grant of letters of administration dated 20th June 2019 in Succession Cause Number 247 Of 2018.
3. The said John Opiyo had purchased the property from one John Walter on 3rd August 1989. The plaintiff claims that at the time of land demarcation, the 1st and 2nd defendants interfered with the demarcation process, thus necessitating a complaint at the arbitration board. The arbitration board ruled in favor of John Opiyo.



4. Litigation later arose whereby the plaintiff obtained a judgment in her favor in Malindi ELC No 7 Of 2014 (formerly Mombasa HCCC number one hundred of 2010.) The 1st and 2nd defendants however appealed against that judgment successfully on the grounds of jurisdiction in Civil Appeal Number 139 Of 2019.
5. It subsequently transpired that while ELC Number 7 of 2014 was still ongoing the 1st and 2nd defendants obtained title to the suit land and the plaintiff attributes this to collusion between them and the 3rd defendant. She avers that the title was obtained by way of fraud, malice and irregularities, particulars of which are set out in paragraph 11 of the amended plaint. The plaintiff avers that since she acquired possession of the property, the 1st and 2nd defendants have prevented her and her family from enjoying peaceful possession, use and occupation thereof and she accuses them of trespass. She avers that she has suffered loss and damage from the conduct of the 1st and 2nd defendants. The trespass issue was reported to the police who did not act on it for the ostensible reason that they required a court order. The plaintiff is seeking the following orders against the defendants:
 - a. Declaration be and is hereby made that the Plaintiff is the bona –fide and registered owner of MARIAKANI/KAWALA ‘B’/98.
 - b. Declaration be and is hereby made that the 1st and 2nd Defendants have trespassed and is continuing to trespass onto the Plaintiff’s property.
 - c. Declaration be and is hereby made that the Defendants has violated the Plaintiff’s right to property under Article 40 of *the Constitution* of Kenya 2010.
 - d. General damages for trespass to land.
 - e. Compensation for breach of the Plaintiff’s right to property under Article 40 of *the Constitution* of Kenya 2010.
 - f. Interest on IV & V above from the date of Judgment until payment in full
 - g. Costs of the suit.

1st and 2nd Defendants’ Defence

6. The original defence of the 1st and 2nd defendants was dated 17th November 2023 but it was later amended on 12th June 2024 to introduce a Counterclaim. In the defense the 1st and 2nd defendants stated that the sold land was the subject of a dispute before the Land Disputes Tribunal and which was determined in their favor or in favor of their agents; the land was the subject of adjudication and the plaintiff had failed to exhaust the laid down procedure on dispute resolution in respect of such land and the present suit is an abuse of the judicial process.
7. The 1st and 2nd defendants admit that they hold title to the suit land which was issued on 3rd November 2014. They deny that the suit land formed part of the estate of the late James Opiyo. They aver that the inclusion of the suit land among the assets of the said estate was irregular, null and void. They maintain that the plaintiff has been attempting to use force to gain entry into the suit land without any color of right.
8. In the counterclaim they reiterate the contents of the defence as set out herein above and reiterate their claim in the defence to the effect that the plaintiff having failed to exhaust the laid down procedure of dispute resolution, the present suit is an abuse of the court process. They aver that their title was issued earlier than the plaintiff’s. They maintain that the Land Registrar was bound to effect cancellations and make new entries in the register chronologically as per the usual procedure. They further aver that the



registration of and issuance of a title to a deceased person in respect of the suit land was irregular and invalid, just as the existence of two titles in relation to the same parcel of land was. The counterclaim is seeking the following orders:

- a. The plaintiffs' suit be dismissed with costs;
- b. The Land Register for Mariakani/Kawala B/98 be rectified by revoking all entries in favor of James Opiyo Opondo his estate and the plaintiff;
- c. The title Mariakani/ Kawala B/98 held by Damaris Akinyi Nondi be revoked;
- d. The land register for Mariakani/ Kawala B/98 reflecting entries in favor of Saifudin Abdulhussein Bhajibai and Noordin Abdulhussein Bhajee be reinstated;
- e. Costs of the counterclaim be awarded.

3rd Defendant's Defence

9. The 3rd defendant filed a defence dated 28 June 2024. He denied the claim. He stated that he was not privy to the sale agreement mentioned by the plaintiff paragraph 8. He pleaded to inability to comment on matters relating to demarcation of land and averred that that his role is in registration of interests in land, and he can thus not be liable for collusion with the 1st and 2nd defendants as alleged. He states that if there was any fraud then the claim under fraud is time barred.

Plaintiff's Defence to Counterclaim

10. The plaintiff filed a defence to counterclaim dated 12th August 2024 and denied the contents of the counterclaim.

Evidence Of The Parties

Plaintiffs' Evidence.

11. The plaintiff testified in her case and called one witness. Her evidence is that her husband purchased the land in 1989 and she first occupied the suit land in that same year and the defendants trespassed onto the same land in 2010. She followed all the proper processes in the acquisition of title to the land. After the litigation was over she was issued with title in her husband's name in the year 2019; that by the time of the proceedings of the Land Disputes Tribunal held on 19th April 2001, John had already sold the land to her husband and she was already in occupation. She came to realize in 2014 that the 1st and 2nd defendants had obtained title to the land. However, by that time the litigation regarding the land between her and the defendants was still underway. According to her, the defendants obtained a title when she was still in occupation of the land. She averred that she obtained title by way of succession long after the adjudication process had been completed. Her husband was not party to the Land Dispute Tribunal case. According to PW1, the arbitration board did not enter judgment in favor of any of the parties. She blames the dispute for her failure to acquire a letter of allotment. She claimed that the 1st and 2nd defendants do not have a letter of offer or an allocation letter, receipt for initial payment prior to mapping, and a discharge of charge from the Settlement Fund Trustees or any sale agreement. She claimed that the Green Card produced by the 3rd defendant clearly indicated the proper history of the land and it does not show any registration of the land in the name of the two defendants. A report to the police regarding the dispute had borne no fruit.
12. Upon cross-examination by Mr Mogaka, she stated that by the time of filing of the Mombasa HCC Case Number 100 of 2010, her husband was already deceased but the court had already given her a



Limited Grant to his estate. She admitted that the title to the defendants and her title referred one and the same parcel of land. She started that she gave evidence at the Land Dispute Tribunal proceedings and called evidence. She did not challenge the Tribunal decision in court even though it never awarded her the land. She also admitted that she never challenged the Arbitration Board decision in court or before the Minister. She averred that the name of John Walter is misspelt in the Tribunal proceedings as “Obiero” instead of “Odiwuor”. She also admitted that John Walter Odiwuor was her brother who lives in Kisumu but who is now of unstable mind. Her brother never attended the Tribunal proceedings. According to her, the title she surrendered to the Kilifi land registry was issued in 2019. She admitted that a restriction had been registered against the title pending finalization of Civil Appeal Number 9 Of 2019 and that in that appeal, the judgment that she had obtained earlier was set aside.

13. PW2 Juma Mwanziye Lugwe testified and adopted his witness statement dated 30th April 2024. He stated that his original home is in Mariakani. He knows Chirunga Dzombo and Dzombo Ngoka and Ngoka Mbuzia. According to him it is Juma Dzombo, Chirunga Dzombo’s brother who sold land to John Walter Odiwuor. After Juma Dzombo’s demise Chirunga Dzombo came to him and requested to know whose land it is that John Walter was living on. PW2 answered that the land belonged to John Walter. Later on Chirunga and Morris Dzombo and Katana Dzombo and 3 other people went to that land and when PW2 appeared on the scene they again asked whose land it was. His further evidence is that John Walter had built a mabati house and irrigated cassava on the land. He also used to conduct some activities as of a mechanic on the suit land. He found Walter John on the suit land sometime in 1988 and ceased seeing him on the land sometime in 2009. After 2009, he never saw John’s mabati structure on the land again.
14. Upon cross-examination by Mr Mogaka, he stated that he attended the Land Dispute Tribunal meeting upon summons and there the complainant was the plaintiff in this case and that he gave evidence before the Tribunal to the effect that it was he that wrote down the Juma Walter agreement. According to him, consideration for the land was paid in small amounts of 1,000 2, 000 5,000 etc. which he would receive, count and hand over to the seller; to him the consideration for the Walter-Juma agreement was not paid for in 2 huge installments. As for the Juma Dzombo-John Odiwuor agreement he was only involved in the acknowledgment of monies only as they had already written it by the time he came in to participate. Juma Dzombo had not gone to school and PW2 did not know who drafted P. Exh 18. His further testimony was that PW2, John Odiwuor and the plaintiff herein had attended the Tribunal proceedings.
15. Upon cross-examination by Mr Ojwang, he denied using his initials for signature on documents.
16. Upon examination by the court, he stated that he lived about 200 metres from the suit land.

1st and 2nd Defendants’ Evidence

17. DW1, Saifudeen Bhajee, testified and adapted his witness statement dated 12th June 2024 as his evidence-in-chief and also produced 23 documents as exhibits. His evidence is that in 1996 he and his brother purchased and took vacant possession of the suit property from Mbundya Ngoka Mbudzya and Chironge Dzombo Ngoka for Kenya Shillings 150,000 and the agreement was reduced into writing by an agent, the local Chief and an advocate. The land was located in Kawala Adjudication Section. Cap 284 of the Laws of Kenya thus applied. The dispute went before the Land Disputes Tribunal which gave a decision on 27th July 2010 but their decision did not award the land to the claimant and the claimant, the plaintiff herein did not challenge it. According to him the 1st and 2nd defendants were registered as owners of the suit land on 28th January 2014. According to him that was a first registration and title issued on 3rd November 2014 pursuant to that registration. Judgment in ELC Case Number 7 Of 24 was issued on 20th September 2019. Upon conclusion of that case the Land Registrar registered



James Opiyo Opondo, who was already deceased, as owner of the land with effect from 7th November 2007 which according to him is backdating the registration entry. The register also indicated that title issued to James on 31st January 2020 and another title, also in his name, issued on 21st July 2020. Upon discovery of this fact the 1st and 2nd defendants lodged an appeal in the Court Of Appeal and also requested for registration of a caution, subsequent to which a restriction was registered against the suit land on 6th December 2022.

18. DW1 avers that the appeal against the decision in ELC Case Number 7 of 2014 was Civil Appeal Number 139 Of 2019, and that the said appeal was determined by a judgment delivered on 18th February 2022 which set aside all the orders made in the ELC case. During the pendency and before determination of ELC case number 7 of 2014 however, the process of adjudication and issuance of title was concluded and a title was issued in the name of the 1st and 2nd defendants. It is averred that the plaintiff in the ELC case had belatedly applied for and obtained the Land Adjudication Officer's consent to institute the suit in respect of the suit property, but the 1st and 2nd defendants term that consent as a nullity. The further evidence of the defendants is that the Land Adjudication and Settlement Officer Kilifi has recognized that the suit land was adjudicated in favor of the first and second defendants. The 1st and 2nd defendants aver that the only document that the plaintiff relied on in the ELC case, whose judgment was set aside, was an agreement entered into between her late husband and her brother John Walter Odiwuor. DW1's evidence is that the creation of a backdated Land Register or Green Card is irregular as the procedure recognized is that of making new entries chronologically in the same register whenever there's a new transaction over the same land or pursuant to a court order. DW1 also faulted the issuance of a another title in a third party's name while he and the second defendant were still holding on their own title and it had not been recalled or canceled. He averred that the Land Registrar who had registered a green card for the second title was the same officer who had issued the defendants with a certificate of official search dated 22nd February 2022 indicating that a suit land belonged to them.
19. Upon cross-examination by Mr Ojwang, he stated that the defendants had sought an agent who took them to the Chief; that the chief had confirmed that Chirunga Dzombo and Dzuya were the owners of the suit land which was not titled by then. DW1 did not know who the father to the two sellers was. He admitted that there is no Grant of letters of administration that the two brothers have put forward in order to claim the land. He admitted that the title the 1st and 2nd defendants hold was issued during the pendency of a case. He did not have any evidence that the title issued to Damaris, the plaintiff herein, was issued as a result of corrupting staff at the lands office. He admitted that there was a case between the 1st and 2nd defendant and James in 2001 before the Land Disputes Tribunal where James was the complainant. He denied having ever demolished any structure erected on the suit land. He stated that he did not find anyone on the land. According to him no activity was being undertaken on the land by anyone, but he found sisal plants marking the boundaries of the plot. He denied removing the sisal plants but at the same time admitted that the said plants are longer there. He admitted that the land titles emanated from land adjudication. According to him, he had filed a judicial review which was dismissed. He admitted that his name is not appearing on the green card produced in this court in respect of the suit land.
20. Upon re-examination PW1 stated that the plaintiff herein was not claiming Plot Number 1B at the Tribunal, but Plot 98. According to him however Plot Number 98 is the same as Plot Number 1B.
21. DW2, John Wachira Karanja Land Adjudication and Settlement Officer Kilifi testified orally and produced documents. According to him, official records show that Plot Number 98 was originally allocated to the 2nd defendant. There was a Land Committee Case Number 19 filed by the plaintiff herein. After that, there was an appeal to the arbitration board. The Adjudication Section register was



published on 13th February 2012 and Nurudeen Bhaijee filed an objection case requesting correction of name and an additional name. The name was corrected and another name included. According to the records DW2 holds, the land belongs to the 1st and 2nd defendants. According to him, his office only forwards to the Chief Land Registrar the particulars of the owners as they are in the adjudication record.

22. Upon cross-examination by Mr Odhiambo, he admitted he had not produced any document showing that the Director of Land Adjudication and Settlement forwarded to the Chief Land Registrar any document for registration. He also added that he was not working in Kilifi at the time of adjudication.

The 3rd Defendant's Evidence.

23. The third Defendant never called in any witnesses in the case.

Submissions

Plaintiff's Submissions

24. The plaintiff filed submissions dated 28/2/2025. In her submissions, the plaintiff restated the evidence given in the suit and submitted that it is not in dispute that the 1st and 2nd defendants have a title deed, but she also pointed out that there are several decisions made by the courts to the fact that having a title deed for a parcel of land is not proof of ownership of land, and that the proper process of acquisition of that title has to be proved. The plaintiff submitted that she had produced both the title deed as well as a certified copy of a green card as exhibits number 4 and exhibit number 10 respectively. She also stated that she had produced a certificate of official search which shows and proves that she is the proprietor of the suit land. The plaintiff further submitted that her evidence was corroborated by that of PW2 who produced exhibit 6, a sale agreement. It was her submission that the title deed was issued to her after the third defendant verified the grant of letters of administration vide letter dated 4th July 2020 (P. Exh 3a and b.)
25. She also stated that P. Exh 17 is dated 10th April 1986 and it states that the plot was indeed sold to John Walter by Juma Dzombo for Kenya Shillings 25,000 and that: P. Exh 18 and 19 are proceedings and a sketch map which states that Plot Number 1 belongs to Juma N. Dzombo, and that is the same plot that was sold by John Walter to her husband. She stated that the green card produced by the plaintiff P. Exh. 10 is a primary document which proves that James Opiyo Opondo was the one whose name was noted as the first proprietor of the suit land before the title deed was issued to the plaintiff. She avers that he had explained the reason why the name of her late husband appeared as the first proprietor and why a title deed was issued in his name even though he was deceased as at 2020. It is also her submission that her deceased husband became proprietor on 28th January 2014 before the two defendants got a title deed dated 3rd November 2014. The plaintiff further averred that the two defendants got their title deed when they were injunctive orders issued in ELC Number 7 Of 2014. The plaintiff father submitted that since the two defendants title deed was obtained during the dependency of a court case and against an order of injunction is used on 27th May 2011 the same is a nullity ab initio. She dismissed the two defendants' claim that theirs is a first registration title and averred that the two defendants did not produce a green card from the land registry to prove that they were the first to be registered as proprietors of the suit land. She stated that a title can be prepared from anywhere and it was incumbent upon the two defendants to produce an extract or a certified copy of a green card from the land of a which they failed to do.
26. She faulted the evidence of DW2 on the basis that he had no documents forwarded by the Director of Land Adjudication and Settlement to the Chief Land Registrar to prove that it was indeed the two



defendants who ought to have been issued with a title deed to the suit land. Since the Land Registrar did not testify, there was no acknowledgement by him that any documents recommending registration of the two defendants as proprietors had been received from the Adjudication Department by the Chief Land Registrar's office. She faulted lack of such correspondence demonstrating that the Director of Land Adjudication had sent a Chief Land Registrar any document warranting registration of the two defendants as proprietors. She also pointed out that the 3rd defendant the Land Registrar did not attend court to testify in the case as to why it is the plaintiff's name which appears in the green card issued by his office showing he is proprietor of the suit property. She further averred that evidence of 1st registration was not rebutted by the defendants, and the two defendant's evidence that they were the first registered proprietors was not corroborated by the 3rd defendant.

27. The plaintiff also took issue with the judgment of the Magistrate adopting the award in Case Number 17 Of 2001 on 31st May 2001, stating that judgment ought to have been executed on or before the 31st May 2013 and that the defendants had failed to provide evidence that they executed the judgment and took possession of the plot. She maintained that she has been in occupation, possession and use of the suit land from the time when her husband purchased it to date and that their attempt to evict her was done contrary to the law and *the Constitution*. She stated that it is trite law that one can only recover land within a period of 12 years, and that first two defendants having failed to file any suit to recover the suit land and to execute the Magistrate's court judgment within that period, they now have no right to recover the same.
28. The plaintiff also pointed out that the defendants have never filed any case against her save a Miscellaneous Judicial Review application which was in any event dismissed.st and 2nd defendant land lacked capacity to do so because it had already been sold to John Walter who in turn had sold it to her late husband and there was nothing else to be sold to any other person by the time the two defendants came along. She pointed out to the fact that DW1 had admitted that there were sisal plants all around the land when he bought it. Besides that, she submitted, the alleged vendors to the defendants were not related to the person who sold the land to John Odiwuor; that Kiringa Dzombo had testified before the tribunal that Juma Dzombo was his uncle who sold the suit land to Walter John for Kenya Shillings 85,000. The evidence of Kiringa and Mbudzia before the tribunal thus confirmed that the suit land belonged to Juma Dzombo and therefore the two had no authority to sell it to the two defendants or to any other person; that PW2 and also testified that Juma Dzombo was his uncle and that he had sold the suit land to John Odiwuor who in turn sold it to John Opiyo who resided thereon on from the year 1988. PW2 also acknowledged to having counted the money paid by John Walter to Juma Dzombo who was his uncle. The plaintiff submitted that in Land Case Number 13 Of 1985 the suit land was decreed to belong to Juma N. Dzombo and the defendants had not demonstrated that the two vendors who sold them the land had demonstrated their ownership before the sale transaction took place. It was therefore evident that the two defendants purchased land from a person who neither owned nor possessed it.

She asserted that the persons who sold the 1

29. The plaintiff submitted that the proceedings between John Walter and the first defendant in the Land Disputes Tribunal Case Number 4 Of 2000 should not persuade this court to find in favour of the two defendants because a suit land had been sold by the said John Walter and it was not within the jurisdiction of the tribunal to determine ownership of the land.
30. It was a submission of the plaintiff that the two defendants have not produced documentary evidence to prove that their names were recorded into the land records opened on 28th January 2014 in the



land registry. The plaintiff asserted that there was no proof that the Land Registrar backdated the land register or green card in favor of her deceased husband.

31. She maintains that she produced evidence of entries of the police Occurrence Book pursuant to complaints that she had lodged against the two defendants who unlawfully attempted to evict her from the suit land. She asserts that the two defendants have not established that they possessed, occupied and used the suit land or ever reported the matter to the area police. Also, their counterclaim is incompetent and as there is no prayer that they be declared as the owners of the land granting the prayers there in would be futile.

1st and 2nd Defendants' Submissions

32. The 1st and 2nd defendants filed submissions dated 24th March 2025. Counsel for the 1st and 2nd defendants identified the following issues for determination in the case:
- a. Whether the plaintiff is in contravention of the doctrine of exhaustion, guilty of forum shopping and abusing the judicial process on a matter that is res judicata.
 - b. Whether the 1st and 2nd defendants interfered with the demarcation process that necessitated the plaintiff's lodging of a dispute which was determined in her husband's favor as alleged in paragraph 9 and 11 of the amended plaint;
 - c. Who between the plaintiff and the 1st and 2nd defendants holds a valid titled the suit property known as Mariakani/ Kawala B/98;
 - d. Reliefs and costs.
33. On the first issue, it was submitted that the suit property fell within Kawala B Adjudication Section and was that governed by the procedures under the Land Adjudication Act. That the plaintiff had successfully sought the consent of the demarcation officer to institute proceedings was evidence of inclusion into that adjudication section; that there were records of disputes between either the 1st and 2nd defendants or their representatives in all the disputes that came up under that Act; that pursuant to consent granted by the Adjudication Officer Mombasa HCCC 100 of 2010 was lodged; however before the conclusion of that case the plaintiff lodged Land Committee Case Number 19 Of 2010 against the 2nd defendant. Walter John Odero, brother to the plaintiff and who was the claimant, was in attendance at the tribunal hearing. The decision of the tribunal was never challenged. For this reason, the defendants stated that the plaintiff is guilty of contravention of the principle of exhaustion and abuse of judicial process; they maintained that the Committee Decision in Case Number 19 Of 2010 is binding on all the parties. Mutanga Tea and Coffee Company Limited Versus Shikara Limited and Another 2015 eKLR was cited for the proposition that court should not be the first port of call where there exist statutory mechanisms for dispute resolution.
34. As to whether the 1st and 2nd defendants interfered with the demarcation process that necessitated the plaintiff to lodge a dispute which was determined in a husband's favor, it was submitted that this was an expressly pleaded issue but no documentary evidence or oral evidence was adduced in support of the statement at the hearing. It was submitted that the plaintiff was an untruthful witness for several reasons: failing to call Walter John to testify in the present suit, denying that her brother was in attendance at the tribunal case, feigning ignorance of the 1st and 2nd defendant's interest in the suit land yet she had obtained consent from the Land Adjudication Officer in 2010 and claiming in her oral testimony to be in possession of the suit land which varied from her written witness statement and pleading that the 1st and 2nd defendants have completely locked her out of the suit property.



35. Regarding who holds valid title to the land, it was submitted that a claim related to interest in land in an adjudication section in whatever manner acquired ought to be lodged with the recording officer and disputes, if any, determined by the adjudication officer, the Committee, tribunal or arbitration board, the Minister and thereafter, court. It was submitted that the parties were fully aware of the adjudication process and that it was incumbent upon the plaintiff and the 1st and 2nd defendants to have their interest lodged as per CAP 284; that evidently the plaintiff lodged Case Number 19 Of 2010 against the defendants and a decision was made on 27th July 2010 which has not been appealed; that the 1st and 2nd defendants merely lodged their claim of interest in the suit property to a Recording Officer and the same was so recorded demarcated and adjudicated in their favour after which title was processed and they collected it from the land registry. With no appeal lodged, 1st and 2nd defendants obtained their title pursuant to a legal and statutory process of adjudication and their title is valid. *RG Patel Versus Lalji Makanji 1967 EA 314* and *VJ Morjaria Versus Nansingh Madhusing Darba and Another 2000 eKLR* were cited for the proposition that allegations of fraud must be strictly proved to a standard higher than on a balance of probabilities. It was stated that the allegations of fraud in the pleadings had not been proved by the plaintiff, that no judgment or decision in favor of her late husband from the arbitration board or Committee was exhibited in evidence to prove the plaintiff's case; instead the plaintiff in her witness statement alleged that the 1st and 2nd defendants lacked certain documents yet the two defendants exhibited sale agreements and a demarcation officers' evidence in terms of D.Exh 3 recording the parcel of land in their favor which evidence was corroborated by the District Land Adjudication and Settlement Officer Kilifi DW2. Counsel for the two defendants further submitted that PW1's evidence was that she was issued with title on the basis of judgment and decree in Malindi ELC Case Number 7 Of 2014 as well as a grant of letters of administration issued in 2019 and confirmed in 2020; that consequently the first entry in the register in favor of the plaintiff and in the names of the Administrators of the estate of James Opiyo Opondo could only have been possible on 20th June 2019 or thereafter; that contrary to that position, the Green Card shows that the register was opened on 28th January 2014 in the name of the side Opondo as Entry No 1, and another, Entry Number 2 reflecting that title was issued on 31 January 2020. It is submitted that these entries conflict with the amended plaint that states that the plaintiff's husband had no title and that the plaintiff acquired title in 2022 by way of transmission on the basis of proceedings in the ELC case and the Succession Cause; that Entry Number 2 in the green card was backdated and was issued long after the defendants had obtained title in 2014.
36. Counsel for the defendants also submitted that in any event the judgment obtained in the plaintiff's favor in Malindi ELC Case Number 7 Of 2019 was appealed and vacated in Civil Appeal Number 139 Of 2019 on 18th February 2022 and thus its judgment and decree ceased to have effect. Consequently, the plaintiff's title issued on the basis of that decision also became null and void pursuant to the appeal decision. In any event counsel further submitted, the plaintiff contradicted herself in terms of reliance on a green card with an entry dated 28 January 2014 in favor of her husband when it is disputable that there was no such a title during the pendency of Malindi ELC Case Number 7 Of 2014 which was determined in 2019. The defendants relied on *Ben Shadrack Kitwanga Versus Michael Aringo and 2 Others 2021 eKLR* where it was found that once a title has been issued to one party a second title issued over the same land is a nullity and confers no rights. The case of *Chemei Investment Limited Versus Attorney General and Others 2005 eKLR* was cited for the proposition that the Land Registrar lacks authority to issue a second title over land that is already lawfully registered. In the present case the Land Registrar was faulted by the two defendants for opening a new register and registering the property again despite the defendant holding title issued earlier.



3rd Defendant Submissions.

37. The 3rd defendant never filed any submissions in the suit.

Analysis And Determination

38. In the present case the plaintiff claims that the suit land was purchased by her late husband in 1996 from Walter John who had purchased the same from Juma Dzombo whom the plaintiff states was the original owner.
39. On the other hand, the 1st and 2nd defendants claim that they purchased the same land from Mbudzia Ngoka and Chirunge Dzombo Ngoka.
40. Juma Dzombo, Mbudzia Ngoka and Chirunge Dzombo Ngoka never testified at the trial of the matter.
41. The plaintiff called DW2 one Juma Mwanzije Lugwe as her sole witness. Juma gave evidence stating, among other things, that he was the nephew of Juma Dzombo and that he lived about 200 metres away from the suit land.
42. The defendants on the other hand did not have any witness from the locality around the suit land.
43. It is common ground that:
- a. The parties are claiming one and the same parcel of land;
 - b. That there were proceedings relating to the suit land, the oldest dating back to the year 2001 in matters before the Land Disputes Tribunal, the Magistrate's court the High Court and the ELC;
 - c. There are several decisions over the suit land 2 made by the Land Disputes Tribunal, one by the ELC. and one by the Court of Appeal;
 - d. The plaintiff has a title deed issued in the year 2020 and the 1st and 2nd defendants have a title deed issued in the year 2014;
 - e. The plaintiff has a green card that reflects her late husband as the first registered owner while the defendants have none.

Issues for Determination.

44. The issues that arise for determination in the present matter are therefore as follows:
- a. Is the suit here in contravention of the exhaustion doctrine?
 - b. Which of the two titles held by the opposing parties in this case is valid?
 - c. What orders should issue.
45. Regarding issue no (a), it is common ground that the suit land is located in Kawala B Adjudication Section. Both parties allege to have purchased the suit land before title was issued. This court agrees that from the evidence adduced both the plaintiff and the 1st and 2nd defendants either directly or through their representatives were involved in the disputes relating to the suit land prior to the issuance of title to it.
46. It is appropriate to examine those cases herein in so far as they are relevant to the issue of the exhaustion doctrine.



47. In Land Disputes Case No 14 Of 2001 the parties were Walter John Odiero versus Noordin Abdul Bhaijee. In the proceedings held on 19th April 2001. Walter John's claim was that the land had been sold to the defendant notwithstanding that it had earlier on been sold to him (Walter). Walter John stated that he purchased the suit land measuring 2.5 acres from Katana Ngoka and Kiranzi Dzombo for Kshs 14,000/-. He stated that the defendants had commenced fencing 2 months prior to the hearing. The defendant in that case (the 1st defendant herein) stated that he purchased the suit land from Mbudzya and Kirunga Dzombo in March 1996 and in 1997 he came with a surveyor and beaconed the land; the beacons were later uprooted but he replaced them.
48. Two interesting statements were made by DW2 in those proceedings, that Walter John used to deal with Juma Dzombo, and that when the defendant therein paid for the land the children of Juma Dzombo took some money to the chief which was to be paid to Walter John.
49. On cross-examination by the tribunal he admitted that Walter John had been resident on the premises for about 4 years. Despite asserting that Walter John was supposed to be paying yearly rent, he was not aware of any amount so paid. The verdict of the tribunal awarded the defendant the suit land on the basis that he had produced the documents evidencing purchase of the suit land.
50. In the Committee proceedings in LC Case No 19 heard on 23/7/2010 the parties were Damaris Nondi Vs Saifudin Abdul Hussein Bhaijee (who was represented by Chilunga Dzombo Ngoka and Abdalla Mbudzya Ngoka. In that case the plaintiff stated that her late husband purchased the land in 1989 from John Joseph Walter for Kshs 250,000/=. She cleared the outstanding debt of Kshs 50,000/- owed by her late husband to Walter John. However, when she went to the suit land she was confronted by the defendants who claimed to have purchased the suit land. It was during those proceedings that the plaintiff brought up the issue of alleged illegal recording of the defendant's name during demarcation while the claimant's house was still standing on the land. In the same case one Francis Juma (who may be the same as Juma Lugwe, PW2) testified that the land had been sold to Walter John and he (Francis) had written down the agreement between Walter and Juma Dzombo in 1988-1989, and that Walter John had completed payments for the land to his uncle.
51. On the other hand, the defendant's representatives claimed that the land was clan land which had been sold to the defendant for Kshs 150, 000/= in 1996. They however admitted that they did not consult Walter John and implicitly admitted there was a house thereon while they were reselling it to the defendant. They also admitted that Walter John appeared in the sketch map that had been drawn by the DO and had planted cassava and sisal on the land.
52. After hearing both sides the Land Committee found that James Opiyo Opondo purchased the suit land from John Joseph Walter Odiwuor in 1989 and that the debt of Kshs 50,000/- was still withheld due to either lack of documents for the land or as security till title documents were issued to the plaintiff. The Committee observed that the claimant's first witness was a close neighbour. However, the Land Committee also made observation that the sale between Walter John and James Opiyo could be dubious because Walter John failed to testify before it, and the Committee expressed suspicion that that failure to testify was borne of the knowledge that the Land Disputes Tribunal had already ruled against him in 2001. On 27/7/2010, it thus declined to grant the claimant the suit land and gave her notice of 14 days right of appeal to the claimant.
53. The claimant pressed on and filed Mombasa ELC Case No 100 Of 2010 which was transferred to Malindi and resolved under the number Malindi ELC Case No 7 Of 2014. On 20/9/2019, the court in that case found for the claimant (who is the plaintiff herein) that the suit land is part of the estate of her late husband and enjoined the defendants from interfering with it or even obtaining title to it. In Civil Appeal No 139 Of 2019 the respondents in Malindi ELC Case No 7 Of 2014 appealed the ELC



decision of 20/9/2019. The Court of Appeal on 18/2/2022 held that the Malindi ELC Case No 7 Of 2014 had been filed without the Land Adjudication Officer's consent contrary to Cap 284 and that the suit was thus a nullity and all the orders in favour of the plaintiff in the present case were set aside. It is therefore clear that any action undertaken pursuant to the orders in Malindi ELC Case No 7 Of 2014 is illegal null and void having been swept away by the Court of Appeal decision. The present suit was filed after the Court of Appeal decision, on 28/8/2023. The plaintiff acquitted herself by expressly disclosing the fact in paragraph 10 of the original plaint.

54. The present suit was filed long after the decision of the Committee, and it is premised on the claims of both trespass and fraud against the defendants.
55. With the setting aside of the ELC decision in Malindi ELC Case No 7 Of 2014, all parties reverted back to their status before the date of the filing of that suit. That status was that the decision of the Committee delivered on 27/7/2010, having been undertaken in accordance with Cap 284, remained valid. It is the existence of that decision that the 1st and 2nd defendants have relied on to claim that the plaintiff has by bringing the present suit contravened the exhaustion doctrine.
56. The Court of Appeal decision was issued on 18/2/2022 approximately 18 months before the present suit was filed on 28/8/2023. The plaintiff having participated in that appeal must be deemed to have known of its outcome even at the time of the filing of the present suit; she indeed admits it at paragraph 10 of the original plaint as stated herein before. By the time of the presentation of the original plaint herein the plaintiff had no orders either emanating from the Court of Appeal or the ELC which could eclipse the effect of the Committee orders issued on 27/7/2010. The Court of Appeal having set aside the decision of the ELC made in Malindi ELC Case No 7 Of 2014 on the grounds that the court lacked jurisdiction, consequently, all the proceedings and orders made in that suit including the injunctive orders barring the defendants from procuring title to the suit land were effectively rendered null and void by the Court of Appeal decision. *Macfoy vs. United Africa Co. Ltd* [1961] 3 All E.R. 1169 held as follows:

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

57. Even while the plaintiff believed it was valid, the injunction order issued in Malindi ELC Case No 7 Of 2014 was null and void ab initio. It is as though the ELC case had never been filed in the first place. Thus, doubtful nature of the merits of the plaintiff's claim of fraud in the present suit premised on the fact that the defendants admittedly obtained title to the suit premises while that act was still enjoined in Malindi ELC Case No 7 Of 2014 is of secondary consequence herein; the important issue here is that of whatever effects the Court of Appeal decision had on the parties' rights, the momentous one was that they were left only with the Committee decision to rely on. Without any appeal against that decision of the Committee to the Minister, an adjudication register is forwarded to the Land Registry for issuance of title. It would appear that despite the haziness of detail as to whether the Director of Land Adjudication and Settlement sent any particular letter forwarding the defendant's details for registration, the absence of an appeal made the defendants entitled to be registered as the proprietors of the suit land. The foregoing are the circumstances that have prompted the defendants to claim that the doctrine of exhaustion bars the present suit.



58. The doctrine of exhaustion is meant to sieve and direct disputes to their statutorily or constitutionally provided first port of call, and to keep them off the corridors of court litigation for as long as the prescribed mechanisms for their resolution have not been applied to them.
59. Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya, Al Ghurair Printing and Publishing LLC, Attorney General, Jubilee Party, Ekuru Aukot & Third Party Alliance, Samuel Waweru & Stephen Owoko Oganga [2017] KEHC 4663 (KLR) held as follows:
- “41. The issue of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks judicial review of that action without pursuing available remedies before the agency itself. The Court must decide whether to review the agency's action or to remit the case to the agency, permitting judicial review only when all available administrative proceedings fail to produce a satisfactory resolution.
42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in Speaker of National Assembly v Karume [1992] KLR 21 in the following oft-repeated words:
- “Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”
60. Samuel Kamau Macharia and another – v- Kenya Commercial Bank and 2 Others, Application No. 2 of 2011 (Supreme Court) held as follows:
- “(68) A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation....”
61. Kibos Distillers Limited & 4 others v Benson Ambuti Atega & 3 others [2020] eKLR (Court of Appeal) held that:
- “A party or litigant cannot be allowed to confer jurisdiction on a court or to oust jurisdiction of a competent organ through the art and craft of drafting of pleadings. Even if a court has original jurisdiction, the concept of original jurisdiction does not operate to oust the jurisdiction of other competent organs that have legislatively been mandated to hear and determine a dispute. Original jurisdiction is not an ouster clause that ousts the jurisdiction of other competent organs. Neither is original jurisdiction an inclusive clause that confers jurisdiction on a court or body to hear and determine all and sundry disputes. Original jurisdiction simply means the jurisdiction to hear specifically constitutional or legislatively delineated disputes of law and fact at first instance. To this end, I reiterate and affirm the dicta that in Speaker of the National Assembly v James Njenga Karume [1992] eKLR where



it was stated that where there is 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.”

62. Nicholus v Attorney General & 14 others; National Environmental Complaints Committee (NECC) & 5 others (Interested Parties) (Civil Appeal 42 of 2021) [2023] KECA 34 (KLR) (3 February 2023) (Judgment) held as follows:

“47. In Eaton Towers Limited (Eaton Towers Limited v Kasing’a & 5 others (Civil Appeal 49 of 2016) [2022] KECA 645 (KLR) (28 April 2022) (judgment)) this court strongly stated:

“40. We state categorically and without equivocation that the multifaceted nature of any petition, or suit for that matter, is not a basis to find a court to arrogate jurisdiction to itself. This court already made a finding on this issue and castigated such reasoning in *Kibos Distillers Limited & 4 Others -vs- Benson Ambuti Adega & 3 Others* [2020] eKLR; In the instant matter, the Learned Judge citing the case of *Ken Kasinga -vs- Daniel Kiplagat Kirui & 5 others*, [2015] eKLR, and other decisions from courts of coordinate jurisdiction held that where a claim in a petition or suit is multifaceted, a court can have jurisdiction despite existence of another forum, institution or agency that has been legislatively conferred with jurisdiction to determine the matter. With due respect, this is a wrong exposition of law. Such a reasoning implies that jurisdiction may be conferred through the art and craft of drafting of pleadings - that all that a litigant need to do is to draft pleadings such that claims are raised in a multifaceted way and thereby oust the jurisdiction of any specialized tribunal or agency. This promotes forum shopping.’

41. Despite acknowledging that the petition might as well have been filed as an ordinary suit, as counsel for the 1st respondent acknowledged, the Learned Judge held; [I]f I am to fail to address the issues in this petition, the recourse of the petitioner will be to file a new suit, which I would still have to hear. I am guided by article 159 of *the Constitution* to do justice without undue regard to procedural technicalities.’

42. This cannot be good law and it remains unacceptable for a court to consider that convenience is enough ground to confer jurisdiction. In as much as the Learned Judge, in his position at the ELC could hear both ordinary suits and constitutional petitions touching on land, he ought to have taken judicial notice of the fact that both avenues, though leading to his judicial ‘seat’, nonetheless confer separate jurisdictions with separate procedures that must strictly be adhered to. The notion that non-exhaustion of all prior forums does not strip the constitutional court of jurisdiction is erroneous and should not gain traction.”

63. R v. NEMA ex parte Sound Equipment Ltd (2011) eKLR held as follows albeit in respect of judicial review procedure:

“The principle [is that] where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining



whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it.”

64. The defendant’s submission is that in accordance with the exhaustion doctrine, the court should not have been the first port of call after the Committee decision, and the plaintiff ought to have proceeded against the said decision by way of an appeal. In the light of the foregoing case law the submission is correct.
65. It is secondary that the plaintiff was not sitting idle as her entitlement in the form of a statutory period within which to appeal oozed away in that that she was busy following up on Malindi ELC Case Number 7 Of 2019. I have stated hereinbefore that the setting aside of the judgment in that case in the resulting appeal reverted the parties to their old positions created by the Committee decision of 27/7/2010. Since Malindi ELC Case Number 7 Of 2019 was effectively declared null and void, it is as though the present suit were the first case ever filed after that Committee decision. By it the court is asked to assume jurisdiction and determine the dispute herein notwithstanding that the plaintiff never exploited her right of appeal to the Minister. It is only after the outcome of such an appeal that she would have been entitled to lodge proceedings in court against the Minister’s decision. Consequently, in deference to the avoidance doctrine this court ought to down its tools in the present case.
66. What about the defendant’s counterclaim?
67. It is trite law that a counterclaim is a distinct suit, that is independent of the plaintiff’s claim. For that reason, I find that the dismissal of the plaintiff’s claim on the basis of the exhaustion doctrine does not lead to automatic dismissal of the defendants’ counterclaim. It still stands and this court must thus address it on its merits. However, this court has already answered prayer no
- (a) of the counterclaim by finding that the plaintiff’s suit herein is for dismissal. By virtue of the setting aside of the judgment in Malindi ELC Case Number 7 Of 2019, it is axiomatic that the title held by the plaintiff is of null and of no effect and thus any grant of prayers no
 - (b) and
 - (c) is just an academic exercise. What remains is prayer no
 - (d). It seeks as follows:

“The land register for Mariakani/ Kawala B/98 reflecting entries in favor of Saifudin Abdulhussein Bhajibai and Noordin Abdulhussein Bhajee be reinstated.”
68. Notwithstanding the demerits that felled the plaintiff’s claim, her evidence and submissions singled out one thing: that no green card in favour of the defendants was ever produced as evidence in court. Indeed, her submission was that the defendants had also failed to produce in court an extract or a certified copy of the green card as evidence.
69. This court has fully considered the evidence of the plaintiff. Seductive, enticing as it is, the court must bow to the dictates of the law. The court thus finds that the plaintiff’s case is in contravention of the avoidance doctrine and it is hereby dismissed. Her own green card which she produced never showed that the defendants were ever registered as owners before her deceased husband. In submitting that the defendants were guilty of fraud she stated that a title can be prepared from anywhere and it was incumbent upon the two defendants to produce an extract or a certified copy of a green card from



the land registry of a which they failed to do. On their part the defendants were silent regarding that statement both in their evidence and in their submissions.

70. It is the burden of the allegor to prove. Sections 107 and 108 of the *Evidence Act* provide as follows:

“ 107. Burden of proof.

1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden.

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

71. As per Section 107 (1) and (2) and 108 it was the burden of the 1st and 2nd defendants who desired the court to give judgment reinstating the land register allegedly opened in their names, to establish before court that such a register was opened in the first place, which they failed to do. Without casting any aspersions on the defendants’ title, this court has taken judicial notice of the so called “River Road titles” which is a byword for forged titles made not in the land registry but in the underworld of the backstreets in this country. It would be amiss for this court to even contemplate issuing an order that would validate a title that has not been demonstrated to have been issued on the basis of a land register. Consequently, I find that prayer no (d) of the counterclaim ought to be declined.

72. Having considered the circumstances of the present case in detail as seen in the court’s detailed analysis of the parties’ evidence, this court is persuaded that each party ought to bear their own costs of the suit and counterclaim. The consequence is that the whole counterclaim dated utterly fails.

73. The upshot of the foregoing is that both the plaintiff’s claim and the defendant’s counterclaim lack merit and they are hereby dismissed. The suit and the counterclaim were tried together and each party shall bear their own costs of these proceedings.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 28TH DAY OF MAY 2025.

MWANGI NJOROGE

JUDGE, ELC MALINDI.

