



**Okhatietie v Mbayi & another (Environment and Land Appeal
E006 of 2023) [2025] KEELC 4374 (KLR) (28 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 4374 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E006 OF 2023**

A NYUKURI, J

MAY 28, 2025

BETWEEN

JOSIAH OLUCHINJI OKHATIETIE APPELLANT

AND

ROSE AMEYO MBAYI 1ST RESPONDENT

MOSES MAPESA MUSASIA 2ND RESPONDENT

JUDGMENT

Introduction

1. This appeal by Josiah Oluchinji Okhatietie is a challenge against the judgment of Honorable E. Wasike, Principal Magistrate delivered on 11th July, 2023 in Butere CMC ELC Case No. 21 of 2020 wherein the learned trial magistrate dismissed the appellant's (defendant's) counter claim for adverse possession and allowed the respondents' claim thereby declaring the subdivision of the parcel of land known as Marama/Lunza/627 into parcel Nos. 2955-2958 (suit property) as unlawful, null and void and reverting the title to the late Luseno Mapesa's name. The court also granted the respondent an order of permanent injunction restraining the appellant from dealing with the suit property. In addition, the court granted the respondents an order of eviction against the appellant. Costs were also awarded to the respondents.

Background

2. By a plaint dated 12th August, 2020, the plaintiffs who are the respondents herein sought against the defendant who is the appellant herein, the following orders:
 - a. The Honorable court do term the process of subdivision of L/P No. Marama/Lunza/627 into four(4) portions L/P Nos. Marama/Lunza/2955, 2956, 2957 and 2958 as illegal or null and void ad further issue an order compelling the land registrar – Kakamega to transfer L/P Nos.



Marama/Lunza/2955, 2956, 2957 and 2958 back to the original L/P No. Marama/Lunza/627 and remain registered under the names of the original owner, the Late Luseno Mapesa.

- b. The Honorable court do issue a permanent injunction restraining the 1st defendant, their servants, agents or whomsoever claims from them from dealing in any manner with the former L/P No. Marama/Lunza/627 and further issue an eviction order directing the 1st defendant to move out of the former L/P No. Marama/Lunza/627.
 - c. Costs of suits and interest at the court's rate.
 - d. Any other relief the Honorable Court may deem fit to grant.
3. The plaintiffs averred that the parcel of land known as Marama/Lunza/627 was registered in the name of the late Luseno Mapesa whose estate they administered being his widow and nephew respectively. They stated that the suit property belonged to the late Luseno Mapesa and his late brother William Musasia Mapesa who was survived by a family. They stated that the 2nd plaintiff placed a caution on the suit property on 30th October, 2006 but that the 1st defendant, without the consent of the late Luseno Mapesa tried to subdivide the suit property. That the 1st defendant filed Butere Civil Case No. 96 of 2009 seeking to remove the caution on the suit property but the suit was dismissed on 12th October, 2009.
 4. They maintained that the 1st defendant fraudulently and without authority or consent of the cautioner fraudulently subdivided the suit property into parcel Nos. 2955-2958.
 5. In a defence and counterclaim dated 19th August, 2020 and amended on 28th September 2020 and later on 16th April, 2021, the 1st defendant denied the plaintiff's claim. He confirmed that the suit property was originally owned by the latter and stated that he bought a portion thereof from the Late Luseno Mapesa with the plaintiff's knowledge, as the 1st plaintiff was a witness to the agreement. He further averred that his suit concerning the 2nd plaintiff's caution was dismissed as the defendants had no capacity to be sued which led to them being cited in Citation Cause No. 418 of 2018 prompting them to file Succession Cause No. 97 of 2019.
 6. He denied subdividing the suit property fraudulently and maintained that the same was done by the Late Luseno Mapesa while he was still alive. He further averred that he had been farming on the suit property since he purchased it in 2004. He further stated that the Late Luseno Mapesa obtained a consent from Butere Land Control Board. He denied encroaching on the suit property and averred that the plaintiffs had been hiring goons with intention to harm him in several life threatening instances.
 7. In the counter claim, the 1st defendant sought the following orders:
 - a. That the 1st defendant is the owner of L.R No. Marama/Lunza/2957 by adverse possession.
 - b. Kshs. 355,000/-
 - c. Costs
 - d. Costs and Interests.
 8. The suit was heard by way of viva voce evidence. The plaintiffs presented seven witnesses while the defendant presented two witnesses.



Plaintiffs' evidence

9. PW1 was Rose Ameyo Mbayi the 1st plaintiff. From her witness statement, her testimony was that she was the widow of the late Luseno Mapesa who was the original owner of the parcel of land Known as Marama/Lunza//627. That her late husband was to share equally the said land with the heirs of his brother the late William Musasia Mapesa. That the latter was survived by Moses Musasia, Nicholas Musasia, Dorine Musasia and Mary Musasia.
10. According to PW1, Josiah Oluchinji Okhatietie the 1st defendant, was to use two acres of the suit property to plant sugarcane for three (3) harvests in consideration of having paid the medication of PW1 in 2004 when she fell sick. Further, that the 1st defendant took advantage of Luseno Mapesa's illiteracy and PW1's sickness to register his name in the sugarcane harvest contract between Mumias Sugar Company and the contract holder indicating that he was the contract holder of the two acres of the suit property and also on the remaining parcel of the suit property.
11. That the 1st defendant further leased part of the suit property to Washington Khwale and one Anekeya without the consent of Luseno Mapesa. That PW1 and her husband realized that the 1st defendant was planning to sell the suit property and that their nephew one Moses Mapesa Musasia placed a caution on the suit property on 30th October, 2006. That this prompted the 1st defendant to file Butere Civil Case No. 96 of 2009 for removal of the caution but that the suit was dismissed on 12th October, 2009.
12. She stated that she was appointed as administrator of the estate of Luseno Mapesa together with Moses in Butere Succession Cause No. 97 of 2019. She claimed that the 1st defendant had fraudulently subdivided the suit property into four partitions being parcel Nos. Marama/Lunza/2955, 2956, 2957 ad 2958 and had parcel 2957 registered in his name without the consent of the cautioner or beneficiaries of the estate of Luseno Mapesa. She complained that the 1st defendant had encroached onto the suit property and cultivated crops thereon without authority. She maintained that the subdivision was illegal and that it ought to be cancelled and the original number to revert to the name of Luseno Mapesa. Further that the 1st defendant be restrained from interfering with the suit property and be evicted from it.
13. On cross-examination, she stated that the 1st defendant never leased the suit property as she worked with him to cultivate sugarcane thereon. She maintained that both signatures on the agreement produced by the appellant were forgeries as she never signed the agreement. That her husband could only enter into a land sale agreement after informing her. She stated that the 1st defendant had been farming on the suit property since 2004. She stated that Washington Khwale was her brother and that he leased her land to the 1st defendant. Further, that she was not aware Washington approached the 1st defendant to sell the suit property.
14. PW2 was Moses Mapesa. His testimony was that he was a nephew of PW1 and Luseno Mapesa who died on 19th November, 2008. That his uncle was the original owner of the suit property, which he was to share with the survivors of PW2's father the late William Musasia Mapesa. He stated that he was informed that a stranger, the 1st defendant had encroached on the suit property claiming to have bought it. That on 30th October, 2004, he successfully placed a caution on the suit upon realizing that the 1st defendant was trying to subdivide the property without the consent of Luseno Mapesa. He further stated that the 1st defendant's suit for removal of caution being Butere Case No. 96 of 2009 was dismissed on 12th October, 2009. That together with PW1 they were appointed as administrators of the estate of Luseno Mapesa vide Butere Succession Cause No. 97 of 2019 after being cited in Citation Cause No. 418 of 2018. He stated that the 1st defendant encroached on the suit property.



15. On cross examination, he stated that he did not have proof to show that the suit property was to be subdivided between the two brothers. That in 2004, he was in college and was not aware of any agreement. He claimed that the 1st defendant had leased the suit property for five years and that there is a sugarcane contract to that effect. He averred that there was no agreement between the 1st defendant and the late Luseno Mapesa. He claimed that the 1st defendant used the land up to 2008 and disappeared, only to resurface in 2020 with a title deed. Further that he was not aware if his father had signed the transfer forms and that he died in 2008. That Washington Khwale was PW1's cousin and that he was an arbitrator in the dispute. That Washington is the one who asked the 1st defendant to lease the land.
16. PW3 was Washington Sylvanus Ashiali Khwale. He stated that on 20th September, 2006 the 1st defendant leased 8 ½ acres of sugarcane to him at a consideration of Kshs. 255,000/- whereof he paid Kshs. 50,000/-. That on 23rd October, 2006 PW1 informed him that the 1st defendant has leased her land to him without paying Luseno Mapesa. That she also informed him that the 1st defendant had transferred 8 ½ acres into his name and sold 1 ½ acres to Martin Mwale. That on 3rd November, 2006 he convened a meeting in his house with the parties to resolve the matter, where the 1st defendant and Martin Mwale pleaded guilty and Luseno Mapesa forgave them. He stated that on that day the 1st defendant agreed to return all land transfer documents to Luseno Mapesa through PW3 on 6th November, 2006 and to surrender the documents to Butere Land Control Board Chairman for cancellation. That on 6th November, 2006 the 1st defendant returned all the land transfer documents to Butere Land Control Board Chairman who cancelled them and gave them to PW3. That he was shocked to learn that the 1st defendant obtained title in 2019. That in the meeting, the 1st defendant had produced an agreement between the survey office and the 1st defendant dated 19th May, 2004 signed by the latter and the father of Luseno Mapesa one Moses Mapesa Shibaro who had died over 20 years before the date of the alleged agreement.
17. In cross examination, he stated that PW1 was his cousin. That he did not know that the suit property belonged to Luseno Mapesa before leasing. He claimed that the 1st defendant brought him a sugar cane leasing contract. He stated that he arbitrated the dispute and that at that time he was the elected area Councilor. That the 1st defendant agreed to having stolen the suit property and also agreed to return back the documents. That the Chairperson (D.O) of the Land Control Board cancelled and rubber stamped the cancellation of the documents. That the 1st defendant and Martin gave him copies of their Identity Cards and Pin Certificates.
18. PW4 was Martin Abuko Mwala. He stated that on 1st March, 2006 he purchased land measuring 1 ½ acres from the 1st defendant at a consideration of Kshs. 140,000/-. That the 1st defendant had told him that he bought the land from Luseno Mapesa. That thereafter 1st defendant informed him that the consideration paid was for purposes of commencing succession proceedings.
19. That PW4's request to meet Luseno Mapesa was not acceded to by the 1st defendant who was evasive. That his land was demarcated and that the 1st defendant attended the Land Control Board. That the 1st defendant showed him mutation forms and consent to transfer signed by the Board. That as he waited to be issued with title, on 5th November 2006 Mr. Washington Khwale summoned him together with the 1st defendant on allegations of fraudulent transfer of land. That at the home of Washington Khwale he was informed that the 1st defendant had taken more land than what was agreed between him and Luseno Mapesa.
20. That he was to take three acres from Luseno Mapesa but that he had fraudulently taken eight acres. He claimed that he was given the option of surrendering everything or risk jail term of 15 years and summary dismissal by the Teachers Service Commission. That he therefore accepted to surrender



everything and gave all documents to Washington Khwale. He averred that the 1st defendant was also told to surrender everything or face a jail term. That he chose to surrender everything and was asked to report to the District Officer's office in four days. That at the D.O's office the matter was arbitrated upon and a consent arrived at, which was signed. That as Mr. Luseno was ill at the time, he did not attend the meeting. That the 1st defendant declined to sign the arbitration consent. That Washington undertook to refund the witness the sum of Kshs. 96,000/- so that the 1st defendant is not sued. That he later learnt that the 1st defendant had transferred part of the suit property to himself.

21. On cross-examination, he stated that the transaction commenced in 2005 but that the land was shown to him in 2006. That the 1st defendant told him that he will apply for a special Board meeting and that he also showed him mutation forms. That PW3 was known to him in November 2006 during arbitration of the dispute. That the mutation forms had been signed during Mr. Luseno's lifetime.
22. PW5 was Charles Manyasa Musasia. His evidence was that PW2 was his brother. That the suit property belonged to his grandfather Musa Mapesa Shibayoro, the father of William Mapesa and Luseno Mapesa. That later his grandfather and father died. That Luseno Mapesa undertook Succession proceedings in regard to the estate of his grandfather. That they live on the entire parcel including the parcel where the 1st defendant holds title. That they have lived on the suit property all their lives. That Luseno Mapesa leased land to the 1st defendant when PW1 was sick. That he was aware that PW2 placed a caution on the suit property and the 1st defendant's suit to remove the caution was unsuccessful. That he gave evidence in that case when the 1st defendant had alleged having paid consideration of Kshs. 500,000/-.
23. On cross-examination, he stated that he denied allegations that the suit property had been subdivided into four portions and that he did not know the title of the land occupied by the 1st defendant. That the 1st defendant had leased the land for three harvests of sugarcane. He conceded that he had no agreement for lease and did not know how long the 1st defendant had been on the land. That in 2009, they got order for 1st defendant to vacate the land. That the agreement for lease of sugarcane was between the 1st defendant and Luseno Mapesa. That he did not witness PW1 signing the agreement.
24. The witness further stated that the consent given by the D.O was for lease of land. That his grandfather went to the D.O to complain against actions of the 1st defendant. He denied having been reported to the police for malicious damage to the 1st defendant's crops.
25. PW6 was Aggrey Alukaka, in-Charge Civil Registry Butere Law Courts. He produced the trial court file in Butere CC 96 of 2009. He stated that the 1st defendant's suit was dismissed with costs on 12th October 2009. In cross-examination, he stated that the Plaintiff had sought for removal of caution.
26. PW7 was Harrison Anungo. His testimony was that PW2 was his brother's son. That he was Clan brother of Luseno Mapesa. That he knew the 1st defendant because he went to the home of Luseno Mapesa to treat his wife PW1 using traditional medicine. That Luseno Mapesa's payment for the same was to lease the 1st defendant a portion of his land. That the agreement was oral. That he was a witness in the Butere case. In cross examination he stated that the 1st defendant was his uncle. That Luseno Mapesa never sold his land to the 1st defendant. That he was not aware that the 1st defendant was a traditional doctor. That the 1st defendant had grown sugarcane on most of the land. That he was aware the 1st defendant had been using the land and his sugarcane had been harvested recently. That marked the close of the plaintiff's case.



1st defendant's evidence

27. DW1 was Josiah Oluchinji Okhatietie the 1st defendant. He stated that the 1st plaintiff witnessed a sale agreement between himself and the late Luseno Mapesa and that he was the registered proprietor of the parcel of land known as Marama/Lunza/ 2957. That on 16th May 2004 he entered into a land sale agreement with Luseno Mapesa together with the seller's wife PW1. That they agreed to sell him part of the suit property. That after paying the agreed amount, the couple agreed to take part in the transfer process. That they applied for consent and attended Butere Land Control Board meeting on 13th February 2006 and obtained consent to subdivide the land on 16th February 2006. That mutation forms were prepared and registered at the Land's office on 21st March 2006. That Mr. Luseno Mapesa signed and surrendered all the necessary documents for transfer including his Pin certificate, passport photo, National Identity cards.
28. That he delayed in completing the transfer process due to financial constraints, but that the same was completed in 2019. That since 2004 he had been farming on the land and that on diverse dates he has been attacked and almost killed by the plaintiffs who hire goons to harass him and take away his building materials.
29. He also stated that Mr. Luseno Mapesa subdivided the suit property during his life time in March 2006. That the plaintiffs had barred him from harvesting his crops on the suit property and that they harvested his maize on the suit property. That they had denied him access to his land to top dress his sugarcane which was planted through a loan from West Kenya Sugar Company. That his groundnuts, beans and sweet potatoes were ready to harvest and he feared that the plaintiffs would harvest the same. That the plaintiff stole all his building materials in 2020 prompting him to report to Butere Police Station.
30. On cross-examination, he stated that he knew Luseno Mapesa who died in 2018. That his original sale agreement was left with the plaintiff. That he had four witnesses but three of them had died. That he moved into the land 18 years ago and took possession thereof after purchase. That he moved into the land when the deceased was alive before he died five years later. That due to the hostility, he had not put up any structure on the land but was using the land for farming. He stated that in 2020 when he began constructing on the land the plaintiff's children chased him out of the land. He insisted that he bought the land stating that he was not leasing it out. That he transferred the land into his name.
31. It was his further testimony that the deceased transferred the land in 2006. That the deceased signed the application for Land Control Board consent. That they attended the Board. That PW1 was aware and had given her consent. That mutation forms were signed by the deceased who also signed the transfer forms. That he paid the consideration of Kshs. 580,000/- in full in 2008. In re-examination, he stated that PW1 signed the sale agreement. That he used the land with no objection until the death of the deceased when PW1 started claiming the land.
32. DW2 was Joseph Omusembi Okhatietie. His testimony was that he was DW1's brother. That he witnessed his brother purchase land from Luseno Mapesa and PW1 on 16th May 2004, at a consideration of Kshs. 580,000/-. That in 2020, the plaintiff mobilized goons who went on the 1st defendant's land with machetes and stones chasing away the plaintiff. That they stole building materials, harvested DW1's crops and fed their animals with DW1's crops. In cross-examination he stated that he witnessed the agreement in issue and signed the same. That PW1 was Luseno Mapesa's witness. That he saw the 1st defendant handing over the money to the sellers. That marked the same of the 1st defendant's case.



33. The 2nd defendant did not present any evidence. Upon consideration of pleadings, evidence and submissions, the trial court found that the 1st defendant could not purport to claim adverse possession over the parcel of land. No. 2957 which he allegedly purchased. The court further found that as the 1st defendant was only farming on the land and “never settled on the land, he was not in actual occupation of the same and so he did not prove the doctrine of adverse possession. The court having found that the 1st defendant failed to prove his contention he proceeded to dismiss the same. The court also found that the claim for special damages of KShs. 355,000/= was not substantiated during defence hearing. The court found that the Plaintiffs had proved their case and allowed it.
34. Aggrieved with the trial court’s judgment, the appellant herein who was the 1st defendant in the lower court appealed against the judgment vide Memorandum of Appeal dated 17th July 2023 citing the following four grounds of appeal:-
- a. That the learned magistrate erred in law and in fact by failing to recognize a copy of the sale agreement presented in this court as a genuine agreement entered despite being aware that the author of the agreement died long time ago who could have shed light on what happened.
 - b. That the learned magistrate erred in law and in fact by failing to put into account that the owner of this parcel sold his parcel to the appellant in his lifetime, signed all the transfer documents in his life time died, the appellant has been in possession of this parcel for over 20 years now and it has taken the respondents 20 years after his demise to institute this suit.
 - c. That the learned magistrate erred in law and in fact by failing to award the appellant the counterclaim he was claiming against the respondents despite the respondents having disobeyed the court order that was issued by this Honourable Court, destruction of property that was proven by the agricultural officer’s report showing total biasness.
 - d. That the learned magistrate erred in law and in fact by ignoring the land title deed the appellant is holding which is a genuine title deed issued by the Registrar Kakamega Lands offices.
35. No orders were sought in the Memorandum of Appeal dated 17th July 2023 filed by the appellant.
36. The appeal was canvassed by way of written submissions. On record are submissions filed by the appellant dated 4th October 2023 and those filed by the respondents dated 15th December 2023.

Appellant’s submissions

37. Counsel for the appellant submitted that the appellant was registered proprietor of parcel No. Marama/Lunza/2957 upon entering an agreement for sale with Luseno Mapesa the registered proprietor thereof. Counsel submitted that the vendor executed all transfer documents including application for consent, transfer and mutation forms. Counsel argued that the appellant having produced copies of sale agreement, Land Control Board Consent application, letter of consent, mutation, copies of identity card and title deed demonstrated that the process that followed issuance of his title was not fraudulent or tainted with forgery. Counsel argued that the process was above board.
38. Reliance was placed on Section 26 (1) of the *Land Registration Act* and the case of Esther Ndegi Ndiru & Another v. Leonard Gatei [2014] eKLR for the proposition that absolute and indefeasible ownership of land cannot be challenged. Counsel contended that there was no evidence to show that the appellant’s process of obtaining title was not above board.
39. On whether the appellant was entitled to the orders sought, Counsel submitted that since there was no evidence of impropriety or foul play on the part of the appellant he had acquired good title because



Luseno Mapesa was capable of passing good title. Counsel maintained that there was evidence that the appellant and Luseno Mapesa entered into a land sale agreement and that he paid the entire consideration. Counsel submitted that there was no coercion or undue influence and that there was no evidence that the suit property was ancestral land and that the 2nd respondent had no business interfering in his uncle's business.

40. It was submitted that under Section 73 of the *Land Registration Act*, cautions can be removed from title. Counsel argued that the 2nd respondent was summoned twice by the Land Registrar in vain and so there was no fault when the Land Registrar removed the caution. Counsel maintained that the 2nd respondent had no lawful interest in the suit property to lodge a caution thereon. Counsel also argued that the criminal case was instituted nineteen (19) years after the appellant had bought the suit property.
41. Counsel further submitted that the trial magistrate was wrong in his failure to consider the copy of the agreement, the same having been entered into twenty (20) years ago. Further that both the seller and witnesses had long died. That the owner of the land kept the original agreement as the same was handwritten and that the appellant was shocked when the trial court sought to see the original agreement.
42. It was argued that PW3 produced documents allegedly cancelled by the Chairman Land Control Board and that the latter was not called to confirm that evidence. Counsel also argued that the Land Registrar was never summoned to testify on how he issued the title deed.
43. Regarding the appellants counterclaim, counsel submitted that the appellant presented evidence to show that the respondent stole his building materials as seen in his application dated 10th September 2020 which application was allowed with costs yet that claim was not considered by the trial court.

The 1st and 2nd respondents' submissions

44. Counsel for the 1st and 2nd respondents submitted that although the appellant contended that he purchased the suit property from Luseno Mapesa, there was no evidence of purchase as there was no sale agreement produced. Counsel argued that if there was a sale agreement in 2004, why then did the owner in 2006 request the appellant to surrender the parcel in an arbitration meeting held on 5th November 2006. Counsel argued that the deceased could not have executed transfer documents in 2006 when in that year he was demanding his land back. Counsel supported the findings of the trial court and argued that the appellant obtained title by fraud as there was no sale agreement, the subdivision was done without the owner's consent and that he failed to seek consent of the beneficiaries of the deceased estate.

Analysis and determination

45. The court has carefully considered the appeal, rival submissions filed by parties and the entire record. This being a first appeal, the duty of this court is to re-analyze, re-evaluate and re-assess the evidence tendered before the trial court and make its own independent conclusions bearing in mind that it had no advantage of seeing or hearing witnesses and therefore make due allowance for that.
46. The Court of Appeal discussed the duty of the first appellate court in the case of *Gitobu Imanyara & 2 Others v. Attorney General* [2016] eKLR, as follows;

“An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must consider



the evidence, evaluate it itself and draw its own conclusions, although it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

47. Having considered the grounds of appeal raised in the Memorandum of Appeal, my view is that the same raises two main issues for this court's determination;

- a. Whether the appellant's registration as proprietor of the suit property was obtained by fraud and or unlawfully.
- b. Whether the appellant proved his claim on the suit property by adverse possession.

48. It is not disputed that the suit property is registered in the name of the appellant in this case. Section 26 of the [Land Registration Act](#) provides for conclusiveness of title as follows;

Certificate of title to be held as conclusive evidence of proprietorship

- (1) 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.

49. It therefore follows that registration vests in a proprietor of land, absolute and indefeasible rights, unless there is evidence that such registration was predicated on fraud, misrepresentation, illegality, want of procedure or corruption, whether or not the registered proprietor was party thereto.

50. In the case of [Munyu Maina v Hiram Gathiba Maina, Civil Appeal No.239 of 2009](#), the Court of Appeal held that:-

We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.

51. Similarly, in the case of *Alice Chemutai Too – Vs – Nickson Kipkurui Korir & 2 Others* [2015] eKLR, the court held that:

It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part. I had occasion to interpret the above provisions in the case of *Elijah Makeri Nyangwara –vs- Stephen Mungai Njuguna*



& Another, Eldoret ELC Case No. 609 B of 2012 where I stated as follows:- "...it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent titleholder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally, or through a corrupt scheme. The titleholder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions. "I stand by the above words and I am unable to put it better than I did in the said dictum.

52. It is now trite that fraud must not only be specifically pleaded but must also be strictly proved, and the standard of proof for fraud in civil cases is higher than the standard required in ordinary civil cases of the balance of probabilities, but slightly lower than the standard of proof required in criminal cases of beyond reasonable doubt.
53. In the case of *Kinyanjui Kamau vs George Kamau* [2015] eKLR the court stated that:
- It is trite law that any allegations of fraud must be pleaded and strictly proved. see *Ndolo vs Ndolo* (2008)1KLR (G & F) 742 wherein the court stated that "... we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove the allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely; proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases.." In case where fraud is alleged it is not enough to simply infer fraud from the facts.
54. In the instant suit, the respondents accused the appellant of obtaining registration of the suit property by fraud and alleged specifically that the appellant took advantage of the fact that Luseno Mapesa was illiterate, sick and bed ridden and fraudulently subdivided the suit property and that at the time of registration, there was a caution registered on the title.
55. Order 2 Rule 10 of the Civil Procedure Rules requires a party pleading fraud to specify the particulars thereof. Although the respondents alleged fraud, no particulars of fraud were specified.
56. Regarding the respondents' complaint of fraud, they alleged that the appellant committed fraud in the subdivision of the parcel No. 627 by taking advantage of Luseno Mapesa who was allegedly illiterate, sick and bedridden. The evidence on record shows that subdivision of parcel No. 627 into four parcels was done in 2006 during the lifetime of Luseno Mapesa. To begin with, there was no denial that the mutations regarding the impugned subdivision were signed by Luseno Mapesa. No evidence was presented by the respondents to show that Luseno Mapesa was illiterate, sick or bedridden as claimed by the respondents or at all. Besides, the manner in which Luseno Mapesa was allegedly taken advantage of, was not specified in the pleadings and evidence. In addition, the respondent did not provide any evidence that created the nexus between Luseno Mapesa being illiterate, sick and bedridden and the alleged fraud against the appellant. In short, and for the above reasons, this court finds and holds that the respondents failed to prove fraud as against the appellant in the subdivision of parcel No. 627.
57. For a title to be protected under section 26 of the *Land Registration Act*, the registered proprietor must show lawful acquisition thereof and that no fraud, illegality, want of procedure or corruption was involved. The appellant is the registered proprietor of parcel No. 2957. The appellant claimed to have purchased the same and contended that he had acquired it under the doctrine of adverse



possession. The appellant produced a copy of a hand written sale agreement, which shows that he purchased 4 hectares from Luseno Mapesa. However, nowhere in the sale agreement is the payment of the consideration mentioned. That agreement therefore does not show that consideration was paid. This court is also alive to the judgment in Butere Case No. 96 of 2009, where the appellant sought for the removal of caution on the basis of his alleged purchase, the trial court found the appellant had not proved ownership of the suit property and held that that the plaintiff's claim that he purchased the suit property was not supported by a strong evidence as no written agreement was produced to show that there was such sale. It therefore appears that the appellant had no agreement to show the court in Butere case No. 96 of 2009. Therefore, the court is not convinced on the legality of the alleged purchase and there is no evidence of payment of the purchase price. In the premises I hold and find that the sale of the suit property was not proved. In that respect therefore, the appellant's registration which is based on allegations of purchase is not lawful as there is no proof of payment of consideration.

58. The respondents also argued that since there was a caution on the title of the suit property, the transfer of the same to the appellant was unlawful. It is not disputed that the 2nd respondent placed a caution on the suit property. From the evidence on record, as per the search certificate presented by the appellant in Butere Case No. 96 of 2009, there was a caution placed on the suit property dated 30th October 2006. His attempt to have the caution removed in 2009 was rejected by the court. The legality or otherwise of that caution is not subject of these proceedings. Therefore, the question is whether the appellant properly got himself registered as owner of parcel No. 2957 when there was a caution on the title No. 627 restricting registration of dealings thereon.

59. Section 73 of the *Land Registration Act* provides for removal of caution as follows;

Withdrawal and removal of caution

1. A caution may be withdrawn by the cautioner or removed by order of the court or, subject to subsection (2), by order of the Registrar.
2. The Registrar, on the application of any person interested, may serve notice on the cautioner warning the cautioner that the caution will be removed at the expiration of the time stated in the notice.
3. If a cautioner has not raised any objection at the expiry of the time stated, the Registrar may remove the caution.
4. If the cautioner objects to the removal of the caution, the cautioner shall notify the Registrar, in writing, of the objection within the time specified in the notice, and the Registrar shall, after giving the parties an opportunity of being heard, make such order as the Registrar considers fit, and may in the order provide for the payment of costs.
5. After the expiry of thirty days from the date of the registration of a transfer by a chargee in exercise of the chargee's power of sale under the law relating to land, the Registrar shall remove any caution that purports to prohibit any dealing by the chargee that was registered after the charge by virtue of which the transfer has been effected.
6. On the withdrawal or removal of a caution, its registration shall be cancelled, and any liability of the cautioner previously incurred under section 74 shall not be affected by the cancellation.

60. Therefore a caution placed on title may be lawfully withdrawn by the cautioner or removed by an order of the court; or may be removed by the registrar upon issuance of notice where no objection to the removal is received within the period specified in such notice; or if there is an objection to removal of



caution by registrar, it may be removed by the registrar upon hearing both parties; and the registrar may remove a caution 30 days after registration of transfer by charge in the exercise of their power of sale.

61. It was therefore upon the appellant to demonstrate that the caution placed on parcel No. 627 was lawfully removed pursuant to provisions of section 73 of the *Land Registration Act*. There being no evidence that the caution by the 2nd respondent was lawfully removed as per provisions of section 73, and there being no evidence of payment of the purchase price, I find and hold that the transfer of the suit property to the appellant was unlawful and failed to meet the threshold for protection of title set out in section 26 of the *Land Registration Act*.
62. On the question of whether the appellant acquired title to parcel No. 2957 by adverse possession, it is trite that adverse possession is a claim by a trespasser upon having occupied the land owned by another person without the owner's permission and peacefully and as of right for a continuous and uninterrupted period of 12 years.
63. The doctrine of adverse possession is governed by provisions of the *Limitation of Actions Act*. Sections 7, 13, 17 and 38 of the *Limitation of Actions Act* Cap 22 Laws of Kenya are some of the statutory provisions upon which the doctrine of Adverse Possession is anchored. The said provisions provide as follows;

Section 7 states as follows;

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

Section 13 provides as follows;

1. A right of action to recover land does not accrue unless the land is in the possession of some persons in whose favour the period of limitation can run (which possession is in this Act referred to as Adverse Possession), and, where under Sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in Adverse Possession on that date, a right of action does not accrue unless and until some person takes Adverse Possession of the land.
2. Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in Adverse Possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes Adverse Possession of the land.
3. For purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with Section 12(3) of this Act, the land in reversion is taken to be Adverse Possession of the land.”

Section 17 provides that;

“Subject to Section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.”

Section 38(1) and (2) provides as follows;



1. Where a person claims to have become entitled by Adverse Possession to land registered under any of the Acts cited in Section 37 of this Act, or land comprised in a lease registered under any of these Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.
 2. An order made under sub-section (1) of this Section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.”
64. The import of the above provisions is that on the expiry of 12 years, a person who has disposed the true owner of their land may apply to this court for an order that he be registered as owner thereof.
65. The principles of establishing adverse possession are now well settled. In the case of *Mbira vs. Gachuhi* [2002] IEALR 137, the court held as follows;
- “.....a person who seeks to acquire title to land by the method of Adverse Possession for the applicable Statutory period must prove non-permissive or non-consensual actual, open, notorious, exclusive and Adverse use by him or those under whom he claims for the statutory prescribed period without interruption.”
66. Similarly, in *Mtana Lewa vs. Kahindi Ngala Mwangandi* [2015] eKLR, the court described adverse possession in the following terms;
- “ Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the Adverse Possession is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the *Limitation of Actions Act*, which is in these terms;
- “ An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”
67. Essentially, for a person to claim to be entitled to land under the doctrine of Adverse Possession he/she must demonstrate that they have occupied or possessed the land in issue peacefully, openly, continuously, without force, publicly, without the owner’s permission and not in secrecy for a period of over 12 years. The claim must be against the title holder and the adverse possessor’s claim ought to have been hostile to the title holder.
68. In the instant case, land parcel No. 627 was registered in the name of the late Luseno Mapesa and was subdivided in the year 2006. The appellant is the registered proprietor of parcel No. 2957 which he now seeks ownership by adverse possession. It appears to me that the appellant is seeking adverse possession of the land registered in his name. A claim for adverse possession ought to be against another person who is the registered owner thereof. I do not think that a person can properly seek adverse possession for land already registered in their own name. Besides, it was the appellants evidence that his presence on the suit property was characterized with threats, and intimidation and that in 2020, he was chased



away from the suit property. That, in my view demonstrates that the appellant never occupied the suit property in peace. The respondents have been trying to get the appellant out of the land all along. In the premises, the appellant failed to prove his claim of adverse possession. In addition, there was no evidence of continuous occupation of the suit property for uninterrupted period of 12 years. For those reasons, I find and hold that the appellant failed to prove his claim of the suit property based on adverse possession and the trial court was right in arriving at that conclusion.

69. In view of the fact that the suit property was registered in the name of the late Luseno Mapesa, the appellant having failed to prove lawful purchase or transfer, and having failed to prove his claim of adverse possession, it follows that the same ought to revert to Luseno Mapesa (deceased). As the appellant's claim for special damages of Kshs. 355, 000/= in regard to his crops is predicated on the validity of his ownership of the suit property, the appellant having failed to prove lawful ownership thereof, that claim must fail.
70. For the reasons above, I find and hold that the trial court had no basis to hold that there was fraud in the subdivision of the suit property. However, as the appellant failed to prove his claim of adverse possession, the trial court was right in reverting the suit property to the estate of Luseno Mapesa and granting orders sought by the respondents. In the premises, I find no merit in this appeal, which I hereby dismiss. In view of the circumstances obtaining in this appeal, I order that each party shall bear its own costs of the appeal.
71. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA IN OPEN COURT/VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM THIS 28TH DAY OF MAY, 2025

A. NYUKURI

JUDGE

In the presence of;

Mr. Josiah Oluchinji Okhatietie the appellant in person.

Ms Mukhwana for the respondents

Court Assistant: M. Nguyai

