



Waithaka (Suing as the Personal Representative of the Estate of Martin Francis Thuku Waithaka (Deceased)) v Ouko & 3 others (Environment and Land Case Civil Suit E148 of 2021) [2025] KEELC 1327 (KLR) (12 February 2025) (Judgment)

Neutral citation: [2025] KEELC 1327 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E148 OF 2021
LN MBUGUA, J
FEBRUARY 12, 2025**

BETWEEN

**MARGARET NYAMBURA WAITHAKA PLAINTIFF
SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF MARTIN
FRANCIS THUKU WAITHAKA (DECEASED)**

AND

**ROSELYN DOLA OUKO 1ST DEFENDANT
AARON TAFARI OUKO 2ND DEFENDANT
ANDREW ATINDA OUKO 3RD DEFENDANT
NASHON KEBWARO OMWENGA 4TH DEFENDANT**

JUDGMENT

1. The plaintiff commenced this suit by a plaint dated 4.5.2020. In a nutshell, her case is that by an agreement for sale dated 30.3.1983, her husband Martin Thuku Waithaka (now deceased) purchased 2 separate plots measuring 2.5 acres each identified as plot “A” and “B” on the sketch of the subdivision plan of the late Jason Atinda Ouko’s parcel of land known as LR No.3589/6. She contends that her husband, Thuku surrendered 1 of the plots back to late Ouko, retaining the other plot, of which he sold one acre to Joseph Kamau Ngiria hence retaining 1.5 acres. This particular portion became the subject matter in High Court Civil Suit 673 of 1985 where the court affirmed that the late Thuku was its lawful owner.
2. It is her case that the late Ouko did not complete the transaction and that the 4th defendant has also emerged with claims of proprietorship of the same parcel and has trespassed upon that land.



3. She avers that on 19.6.2019, the administrators of the estate of the late Ouoko (1st-3rd defendants) wrote to her demanding immediate vacation of the suit parcel causing her loss and damage.
4. The plaintiff therefore prays for judgement against the defendants for;
 - a. An order of specific performance compelling the 1st, 2nd and 3rd defendants to complete the sale agreement dated 30.3.1983.
 - b. A permanent injunction against the defendants, their servants and or their agents or anyone acting on their behalf from entering, using, occupying, constructing on, developing or in any other manner whatsoever interfering with the plaintiff's right of occupation and quiet possession of the portion marked A on LR No.3589/6 and restore the property to its original state to the plaintiff's satisfaction.
 - c. A mandatory injunction to compel the defendants to remove any construction on the portion marked "A" on LR No.3589/6 and restore the property to its original state to the plaintiff's satisfaction.
 - d. General damages for trespass.
 - e. Costs of the suit.
 - f. Any further remedy that the court may deem fit to grant.
5. The suit is opposed by the 1st-3rd defendants vide their statement of defence dated 5.8.2021. While they admit that it was established in Civil Case 673 of 1985 that the late Ouko had sold 2 1/2 acres out of LR No.3589/6 to Thuku in accordance with the sale agreement dated 30.3.1983, they contend that the parcel which the plaintiff is attempting to lay claim to is different from the property sold to Thuku by Ouko.
6. They also contend that failure to complete the subdivision process is inadvertent, occasioned by numerous suits by parties trying to dispossess them of LR No.3589/6 among other factors.
7. The suit is also opposed by the 4th defendant vide his statement of defence and counterclaim dated 11.11.2021. He avers that he has occupied his plot LR No.3586/53 which he purchased from Ouko in 1993 together with the adjacent plot LR No. 3581/51 and concurs with the 1st-3rd defendants to the extent that the plaintiff was sold a different portion by late Ouko.
8. He contends that the 1st-3rd defendants also continue to threaten him with eviction which actions have caused him to suffer loss and interferes with his use and right to property and his quiet possession.
9. He counterclaims for orders that;
 - a) The Plaintiff's suit against the 4th Defendant be dismissed with costs and the Counterclaim admitted as prayed.
 - b) A declaration be issued and is hereby issued that the 4th Defendant is the lawful and legal owner of land Reference 3589/53 derived from the sub-division of land reference No. 3589/53.
 - c) A permanent injunction be and is hereby issued prohibiting the Plaintiff, the 1st, 2nd and 3rd Defendant herein, either by themselves, their agents and/or any other person acting on their behalf from interfering with the 4th Defendant's possession and occupation of Property Land Reference No. 3589/53.



- d) That a mandatory injunction be and is hereby issued directing the Land Registrar to remove any caveat registered with respect to Land Reference No. 3589/53 and a Certificate of Title be issued to the 4th Defendant with respect to the property.
- e) The cost of the suit.
- f) Any further relief that this Honourable court may deem fit.

Case for the plaintiff

- 10. The plaintiff, Margaret Nyambura Waithera, PW1, administrator of the estate of Francis Thuku Waithaka was the sole witness in her case. She adopted her witness statement dated 26.4.2021 as her evidence. She produced documents from her bundle dated 4.5.2021 as P. Exhibit 1-5.
- 11. She states that by an agreement for sale dated 30.3.1983, her late husband Thuku purchased 2 separate plots measuring 2.5 acres and identified as plot "A" and "B" on the sketch of the subdivision plan of the late Jason Atinda Ouko's parcel of land known as LR No.3589/6 for ksh.500,000/= of which he paid a deposit of ksh.100,000/= and the balance of Ksh 400,000/= was to be paid upon completion.
- 12. She contends that her late husband surrendered 1 of the said plots to the late Ouko in order to meet planning conditions imposed by the City Council of Nairobi for subdivision of LR No.3599/6 and retained 1 portion, of which he later sold an acre thereof to one Joseph Kamau Ngiria, thus he remained with a 1.5 acre plot which he took possession of in 1983.
- 13. She avers that her late husband was always ready to pay the balance of the purchase price, adding that under clause 1 of the agreement for sale, the vendor was required to carry out the subdivision and he warranted that the deed plans would be available within 6 months from the date of the agreement. That completion was to be within 60 days of issue by the survey department of the deed plans in respect of the plots being sold, but the vendor (Ouko) did not complete the subdivision of the property till he died on 2.2.1996.
- 14. She avers that on 15.2.1985, Joseph Kamau Ngiria filed the case High Court Civil Suit no. 673 of 1985 against her late husband for alleged trespass on his property and the late Ouko was enjoined as a 3rd party where he filed a defence affirming that the late Thuku was the lawful owner of the land measuring 2.5 acres and the position was confirmed by Shields J in his judgement in the matter.
- 15. That in the case Elc 493 of 2011, Karen Kwamboka v Roselyne Ouko & 2 others, the court directed the defendants to co-operate with the director of surveys to have the property subdivided and individual titles issued for the portions created therefrom based on the subdivision scheme earlier prepared by the vendor.
- 16. She states that to protect his interest in the suit land, her late husband placed a caveat over the suit plot in 2008 and on 18.11.2008, the land registrar notified him that the caveat would be removed in 45 days unless extended by the court, prompting her to file the case Elc 616 of 2018 seeking extension of the caveat but the suit was dismissed when her husband died.
- 17. She states that on 19.6.2019, the administrators of the estate of Jason Ouko wrote to her threatening to evict her.
- 18. She contends that herself and her family have been in exclusive possession and occupation of the suit property since year 1983 when they erected a barbed wire fence around the property.
- 19. In cross-examination by counsel for the 1st and 3rd defendants, PW1 stated that they have an unpaid balance of the purchase price, the same being Ksh. 400,000/= adding that she did not have receipts of



- payment of ksh.100,000/= that had been paid by her late husband. She further stated that she had not erected a permanent house on the suit plot, but has put up a fence and had poured materials on the plot. She had no utility bills.
20. She stated that in 2011, she learnt that the 4th defendant who is also claiming the same plot had started erecting a permanent house thereon and her late husband had put a caveat when the developments commenced. She further stated that plot “A” and LR 3589/53 refer to the same plot, but she had no evidence to that effect and she did not have specific documents to show the actual measurements of the said plot
 21. On cross-examination by counsel for the 4th defendant, PW1 stated that from 1983-2018 when her late husband died, there is nothing to indicate that he had written to the late Ouko indicating his willingness to finish the transaction adding that her late husband did not file suit against Ouko.
 22. She also stated that her late husband was buying portion “A” and “B”, but the sketch she availed at page 3 of her trial bundle did not have the said markings.
 23. She stated that on the ground, the 4th defendant has occupied parcel 3589/51 and they even welcomed him to the area as they (plaintiff) had occupied plot 53 before him.
 24. In re-examination, PW1 stated that as per the sale agreement between late Atinda and Late Thuku, the balance of the purchase price was to be paid upon completion by the vendor but completion was not done and to date, no titles have been issued adding that the late Ouko never demanded the balance of the purchase price though they have always been willing to pay the same.
 25. She clarified that she took possession of the suit parcel by erecting a fence and had been grazing thereon and had never had a dispute with the late Ouko.

Case for the 1st-3rd defendants

26. The 2nd defendant Aaron Tafari Ouko (DW2) testified as the sole witness in the case of the 1st-3rd defendants. He adopted his witness statement dated 5.8.2021 as his evidence in chief. He produced 8 documents from their list dated 5.8.2021 as D. Exhibit 1-8.
27. He states that he is aware that in Civil Case 673 of 1985, it was established that the late Thuku purchased 2 1/2 acres out of LR No.3589/6 from the late Ouko in accordance with the sale agreement dated 30.3.1983, and that the late Thuku returned 1 of the parcels measuring 2 1/2 acres he intended to purchase.
28. He avers that the parcel which the plaintiff is attempting to lay claim to is different from the property sold to the late Thuku by the late Ouko adding that the said parcel was declared to belong to the late Ouko, in the case ELC 397 of 2011 and is also in dispute in ELC 416 OF 2018 between the 4th defendant and the late Ouko, that it was the subject matter in ELC 1028 of 2016 between Marcella Omwenga and the estate of Ouko and was equally a subject matter in ELC 616 of 2008, between late Thuku and the Estate of late Ouko where the court dismissed the suit for want of prosecution.
29. He states that there is confusion with regard to the parcel the plaintiff lays claim to, thus she is a trespasser or intends to illegally dispose the estate of Ouko.
30. In cross-examination, DW2 stated that he was aware that the late Thuku purchased 2 1/2 acres from his father late Ouko, sold an acre and remained with 1.5 acres.



31. He admitted that as per paragraph 25 and 40 of his affidavit sworn on 13.9.2019 at page 35 of the 1st-3rd defendant's bundle, his father sold plot 53 to Thuku. Thus to him, plot 53 is the one which was sold to Thuku Waithaka.
32. In cross examination by counsel for the 4th defendant, DW2 stated that he is currently occupying plot 53 but has nothing to show that it is plot 53 that was sold to Waithaka.
33. In re-examination, DW2 reiterated that he is in occupation of plot 53 and that there is a watchman and he has built a house for them.

Case for the 4th defendant

34. The case of the 4th defendant was advanced by two witnesses, the first one being Fackson Kagwe (DW1). He adopted his affidavit sworn on 18.6.2012 as his evidence in chief and produced the original copy of a deed plan marked "FWK C" at page 26 of the 4th defendant's bundle as an exhibit. In his affidavit, DW1 avers that the late Ouko appointed him to act for him regarding all conveyancing matters pertaining to parcel LR No.3589/6 and furnished him with a list of buyers which was received by his firm on 1.11.1994 and that it listed the 4th defendant and Mrs. Marcella Omwenga as the purchasers for subplots No.7 & 8 adding that their names appear on the subdivision scheme plan.
35. He avers that the late Ouko deposited with him copies of transfers for parcels LR No.'s 3589/51 & 53 which were duly executed by him and stamped.
36. In his oral evidence, DW1 presented the original transfer for plot LR 3589/51 and 53 with deed plans attached and told the court that both transfers were prepared by Yuvinalis Okubo, Advocate.
37. In cross-examination by counsel for the plaintiff, DW1 stated that he is aware that the late Ouko sold plots to late Thuku Waithaka as per the sale agreement produced, adding that he also saw the proposed subdivision plan of 1976 for 12 portions, meaning that the late Ouko was selling plots as at 1976.
38. Referred to minute No.3 of minutes dated 25.11.1995 which meeting was held at his office, he stated that it reads; ... "they were all aware he was not in a position to do so because he sold the subplots in 1976." He stated that in that meeting, Mr Ouko was saying that he had sold 12 sub plots and once you sell a plot, you cannot re-sell the same thing but Mr. Ouko sold plot 7 & 8 to the 4th defendant.
39. Referred to the transfer of 26.6.1993, he stated that it was only signed by the 4th defendant, that late Ouko did not sign it adding that he did not know that the late Ouko had admitted that the late Thuku owned the suit land as per his affidavit of 13.8.1985.
40. In re-examination, DW1 stated that he did not prepare the agreement between Waithaka and Ouko and he never saw any transfer in favour of Waithaka.
41. The 1st-3rd defendants adopted the cross-examination of DW1 conducted in ELC 416 /2018, a case which is heard alongside the instant suit. During the said cross-examination, DW1 stated that the list of buyers annexed to his affidavit was availed to him by the late Ouko who had instructed him to sign documents on his behalf but he did not have written authorization to that effect.
42. That the said list does not specify particular land parcel, has no name of late Ouko nor his signature and the names appearing at No. 7 and 8 are "Omwenga" "Omwenga" respectively, they are not complete names.
43. DW1 also stated that plot 7 and 8 became LR 3589/51 and 53 after survey, adding that he received a transfer with a deed plan attached but he did not witness execution of the said transfers, he was not



given any agreements for sale and was not given any acknowledgement for payments by late Ouko, but he confirmed to him verbally that payments for the plots were fully made.

44. He also stated that by the time Ouko died, he had not been given the land control consents for the transfers and that he did not witness any payments by the purchasers.
45. DW1 also revealed that he was paid fees to prepare the affidavit and ksh.25,000/= to attend court and did not seek approval from administrators of the estate of Ouko who was his client and their relationship ended when he died.
46. In re-examination, DW1 stated that the map at page 3 of the plaintiff's list of documents is a sketch thus the other map annexed to his affidavit would take precedence.
47. He stated that he never got any transfer document from Mr. Ouko in favour of late Thuku. He also contended that as between a sale agreement and a transfer, it is a transfer which shows disposition of land.
48. The 4th defendant Nashon Kebwaro Omwenga testified as DW3. He adopted his witness statement dated 30.6.2022 as his evidence in chief. He produced 7 documents in a list dated 30.6.2022 as Exhibit 1-2 and 4-7. He states that he is aware that the late Ouko subdivided his land LR No.35899/6 into more than 50 plots and a sub-division scheme was registered against the subdivided plots. That he purchased parcels LR No.3589/51 and 3589/53 and the late Ouko executed transfers in his favour on 26.6.1993 of which he lodged them together with all the other necessary documents at the lands registry and has enjoyed possession for over 30 years, adding that the portion being claimed by the plaintiff is not the one he occupies.
49. He also avers that before the death Ouko died on 2.2.1996, no dispute had ever arisen regarding his occupation of LR No.3589/51 and 3589/53 and neither has the plaintiff nor her late husband ever laid claim over the suit property against him when the late Ouko was alive.
50. He contends that the 1st-3rd defendants who are administrators of the estate of the late Ouko continue to illegally harass and threaten him with eviction and have made attempts to forcefully enter into his land.
51. In cross-examination by the plaintiff, DW3 stated that he had no sale agreement for parcel 53, what he has is a transfer proving he purchased the land adding, that in suit 416 of 2018 where he is the plaintiff, he is claiming the same parcel by way of adverse possession.
52. The cross-examination of DW3 by the 1st-3rd defendants was adopted as recorded in the suit 416/2018 on 28.4.2023. In the matter, the witness (read DW3) stated that he paid the late Ouko in full for the suit parcel as evidenced by the transfer, but he did not have an acknowledgement receipt /banking slip.
53. That he had paid late Ouko ksh.10,000/= by the time he took possession and the balance of ksh.390,000/= was paid by installments.
54. He averred that when he took possession of LR 3589/51 on the basis of a sale agreement, there were no buildings/improvements thereon and that the transfers were signed by late late Ouko at the office of Yuvinalis Okubo who was his lawyer.
55. He also stated that though annexure 'FWKE' is christened prospective buyers and it is dated 14.11.1994, he had paid the purchase price by then.
56. In re-examination, DW1 reiterated that he purchased the suit parcels and has been there for over 30 years.



Site visit

57. On 24.10.2023, just after the close of the parties case, the parties agreed to a site visit which was conducted by the Deputy Registrar of the court and a report was filed on 4.12.2023.

Submissions

58. The court has considered written submissions filed by the respective parties herein. Vide submissions dated 15.11.2024, the plaintiff urges the court to find that the late Thuku purchased the suit land since the position is not contested by the administrators of the estate of the late Ouko. It is also submitted that contrary to the 4th defendant's assertion that the plaintiff's suit is barred by res judicata on the basis of ELC 616 of 2018 filed by late Thuku and which case was dismissed for want of prosecution, It is argued that a suit dismissed for the said reason cannot bar a further suit. To this end, the case of *Kenya Commercial Bank Limited v Orapa & another (Commercial Case E336 OF 2023)* [2024] KEHC 4130 (KLR) (Commercial Tax) (30 April 2024) was relied upon.
59. On reliance on the cases of Hellen Wanjiru Mwangi v Administrators to the Estate of Jason Atinda Ouko (Environment & Land Case 317 of 2011) [2020] KEELC 105 (KLR) (Environment and Land) (30 September 2020) as well as the case of Rose Waruinu Muthemba v Rosalyna Dola Ouko & 2 others [2020] eKLR, it is submitted that specific performance should issue since the suit property is well delineated and appears in the approved subdivision scheme prepared by the vendor.
60. The court is urged to award general damages for trespass assessed at ksh.500,000/= owing to the 4th defendant's admission to have trespassed on the suit property. The cases of Rhoda S.Kiilu v Jiangxi Water and Hydropower Construction Kenya Limited [2019] eKLR, Kenya Power & Lighting Company Limited v Fleetwood Enterprises Limited [2017] eKLR and Nakuru Industries Limited v SS Mehta & sons [2016] eKLR are relied upon.
61. The 1st-3rd defendants filed submissions dated 3.12.2024 where they argue that the plaintiff is seeking to enforce a sale agreement signed on 30.5.1983 , thus the cause of action being breach of contract lapsed on 30.5.1995 and even if the cause of action is to recover land, it ought to have been brought within 12 years .To this end, the case of Edward Moonge v James Lanaiyara & another [2019] eKLR as well as Gathoni v Kenya Co0operative Creameries Ltd[1982] eKLR are relied upon.
62. It is also argued that the counterclaim of the 4th defendant is unmerited in view of the fact that in the case Elc 416 of 2018, the 4th defendant who is the plaintiff asserts a claim based on adverse possession and in the instant matter, he alleges that he is a bona fide purchaser for value. It is pointed out that a claim for adverse possession cannot co-exist with a claim for a purchaser's interest. To this end, the case of Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 others [2009] eKLR is relied upon.
63. It is also pointed out that the 4th defendant was unable to demonstrate his claim that he has had any quiet possession of the suit land as the site visit report indicates that there are no structures on the suit land.
64. The 4th defendant filed submissions dated 10.12.2024 contending that he is the legal owner of parcel LR 2589/53 by virtue of the transfer executed in his favour on 26.6.1993 and the said transfer qualifies as a valid contract as it was signed by both parties adding that the court cannot re-write a contract for the parties. The case of Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited [2017] eKLR is cited among other authorities which the court has considered.
65. It is also submitted that the plaintiff is not entitled to an order of specific performance since she did not complete payment of the purchase price, hence a permanent injunction should not be issued.



Determination

66. It is pertinent to note that this file was heard alongside case No. ELC 416 of 2018 where some evidence in cross examination was adopted in this matter by the current 1st – 3rd defendants. In that regard, an order was made in case No. 416 of 2018 for the proceedings therein to be photocopied and to be placed in this suit. The basis upon which the two matters were heard together was that the parcel 3589/53 is a subject matter in both suits.
67. The plaintiff claims that her late husband, Martin Francis Thuku Waithaka purchased a 2.5 acres plot from late Ouko vide a sale agreement dated 30.3.1983. That the plot was hived from the late Ouko's parcel known as LR No.3589/6 and that it is clearly marked on a sketch map produced in evidence at page 3 of the plaintiff's bundle.
68. PW1 testified that her late husband paid ksh.100,000/= and the balance of ksh.400,000/= was to be paid upon completion but the late Ouko passed away before completion and his estate has threatened her with eviction. PW1 also led evidence that her late husband, Thuku sold an acre out of the suit plot to Joseph Kamau Ngiria and remained with 1.5 acres.
69. On his part, the 4th defendant claims to have purchased parcel LR 3589/53 from the late Ouko sometime in 1993 while Legal Representatives of the estate of Ouko(1st-3rd defendants) are also claiming the suit parcel. Therefore, as things stand, the suit parcel is claimed by 3 parties.
70. The 4th defendant and the 1st -3rd defendants contend that the plot claimed by the plaintiff is not the same as LR 3589/53.
71. The court has considered the evidence tendered. The evidence of PW1 that the late Thuku had purchased 2 ½ acre parcel hived from LR No.3589/6 is accepted by all parties. There seems to be no controversy that Thuku had sold an acre out of the said parcel to one Ngiria. The questions hence falling for determination are; Which is this suit parcel that plaintiff is claiming, (is it one and the same parcel as 3589/53?), Who as between the protagonists is entitled to the suit parcel?, which reliefs are appropriate in the circumstances.

The suit parcel

72. All the defendants admit that the late Ouko indeed sold a piece of land to the late Thuku, but the same is not parcel 3586/53. Indeed the agreement of 30.3.1983 between Thuku and Ouko identifies the plots being purchased as A and B. However, the said plots were hived off from the large parcel 3589/6 and the same were identified in a sketch subdivision. The person who was tasked by Ouko to oversee the subdivision of the big parcel was Dw1 and in his own testimony, he stated that parcels 7 and 8 are the ones which became parcel 53 and 51. From the foregoing analysis, it is clear that the numbering of the parcels could change. Thus the fact that what was in the agreement was plots A and B doesn't mean that the numbering remained as such. To this end, Dw1 did admit during cross examination that as per paragraph 3 in his minutes of 25.11.1995 (page 29 of his bundle), Ouko had been selling the land as far back as 1976. This buttresses plaintiffs claim that what was being relied upon to identify the suit parcel was the proposed subdivision sketch at page 3 of plaintiffs bundle.



73. The plaintiff has claimed that the parcel of land she is claiming is now identified as 3589/53. Dw2 who is expected to have shed light on the disputed parcel has given contradictory evidence. In his testimony during cross-examination, Dw2 stated that;

“I know Martin Francis Thuku Waithaka. I am aware that he purchased some land from my father. It was 21/2 acres and he then sold one acre so he remained with 11/2 acres. There is an approved subdivision plan for that land. I know the disputed parcel is No. 53”.

74. In his witness statement at Paragraph 7, Dw2 had stated that:

“The parcel which the Plaintiff is attempting to lay claim to is completely different from the property sold to the late Waithaka by the late Ouko in the Agreement dated 30th March 1983, and in essence the Plaintiff is illegally attempting to claim a different portion of the late Ouko’s property (a parcel declared to belong to the Estate of Ouko in ELC 397 of 2011)”

75. Still on cross-examination, Dw2 admitted to having sworn an affidavit at page 35 of his bundle of documents relating to ELC OS416/2018. At paragraph 25 thereof, Dw2 had stated as follows;

“I am aware that this particular portion of land i.e LR No. 3589/53 was the subject of a sale agreement dated 30th March 1983 between our father and one Mr. Martin Thuku Waithaka pursuant to which a sum of Kshs. 100,000 was paid; there was no way our father would have sold this particular portion having sold the same to another person”.

76. While at paragraph 40 he stated that;

“The contention that the Plaintiff has acquired the suit properties by way of adverse possession is totally disingenuous and outright dishonesty on their part; the Plaintiffs (Read 4th defendant) are engaged in an elaborate scheme hatched to avoid making payment of the balance of the purchase price in relation to Plot No. 51; as regards Plot No. 53, the Plaintiff were merely allowed to utilize the same and at no point was there an intention to have the same sold to them as it had already been disposed off to Mr. Waithaka a fact the Plaintiffs were well aware of being the brokers who were largely charged with searching for buyers”.

77. This far, it is crystal clear that the 1st -3rd defendants were well aware that the parcel of land purchased by Thuku was the one identified as 3589/53. In addition, it emerged during the site visit that the land is intact, only encroached upon by the 4th defendant with about 3-5 meters. Thus the suit parcel is No. LR 3589/53.

Who is entitled to the suit property?

78. This is a case where by the plaintiff is claiming the suit land through purchase, so does the 4th defendant. The 1st -3rd defendants are also claiming the suit land even though they have no counter claim. Thus as per the dictates of the law of evidence, a claimant is required to discharge the burden of proof. In the case of Samson S. Maitai & another V. African Safari Club Limited & Another [2010] eKLR, the court had this to say in relation to proof.

“Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute.”



79. From the evidence tendered herein, particularly the analysis on identification of the suit parcel, it is quite apparent that the suit parcel belongs to the plaintiff. Thus there is no basis upon which the 1st- 3rd defendants should be claiming the same property, noting that they didn't even lodge a counterclaim.
80. On the issue of the Counterclaim by the 4th defendant, the court takes notice that the said party is claiming the same same parcel in the case 416 of 2018 by way of adverse possession. Be that as it may, I note that the 4th defendant's evidence of ownership of the suit parcel is a transfer dated 26.6.1993. However, he did not produce a sale agreement that would indicate how much land he allegedly purchased from the late Ouko. That evidence is inadequate to the extent that it cannot stand alone to prove ownership.
81. The 4th defendant's witness, DW1- Fackson Kagwe admitted that the late Ouko had subdivided his land way back in 1976 and he had sold some portions thereof. This gives credence to the plaintiff's sketch map at page 3 of the plaintiff's bundle, that the suit land was identified on the basis of a sketch. The same witness told the court that he was aware that the late Ouko sold the parcel to late Thuku before the 4th defendant thus there would be nothing to sell to the 4th defendant.
82. The evidence of the plaintiff was that the 4th defendant has built on parcel 51. This evidence was confirmed by the site visit report which indicated that the houses on the east of the suit property stand on parcel 51 belonging to the 4th defendant. This far, I find that the 4th defendant has not proved his claim of ownership of the suit property 3589/53.
83. I find that the Plaintiff has proved that the late Thuku did his part under the agreement dated 30.3.1983 between him and the late Ouko. Further, the late Ouko acknowledged that he sold 2.5 acres to late Thuku in High Court Civil Suit 673 of 1985.
84. An argument has been advanced by the 4th defendant that the claim of the plaintiff is time barred, the agreement for sale having been made in 1983. However, this argument was not made a subject of contest in the pleadings or in the trial. Thus the 4th defendant is estopped from advancing such an argument at the platform of submissions, See Abraham Yattani Guyo v Qunche Woge [2020] Eklr. To this end, each party is bound by thier own pleadings, see Samson Emuru v. Suswa Farm Ltd (2006) Eklr.

The reliefs

85. The plaintiff contends that she has a balance owing to the estate of Ouko to the tune of Kshs. 400,000 which was to be paid upon completion. This evidence is in tandem with the agreement of 30.3.1983 which indicates that the balance of ksh.400 000 was to be paid on completion. Apparently the issue of completion fell on the vendor who didn't comply. The administrators of his estate (the 1st – 3rd defendants), have not given any tangible evidence on the steps they took to complete the transactions, despite their admission that Ouko sold the land to Thuku. In the circumstances, the plaintiff should pay the balance of the purchase price and in turn, the 1st-3rd defendants should complete the transaction.
86. I decline to grant any award for damages in view of the fact that the parties who entered into the agreement of 30.3.1983 who are Thuku as the purchaser and Ouko as the vendor did not finalize the transaction during their lifetime. It would be unconscionable to offload these shortcomings upon their descendants/beneficiaries, noting that Ouko died in 1996 while Thuku died in year 2018.
87. To this end, I enter judgment for plaintiff against the defendants in the following terms;
1. An order is hereby issued for the plaintiff to pay the sum of Ksh.400,000 to the 1st-3rd defendants within a period of 45 days. To this end, the 1st-3rd defendants are directed



to forthwith avail particulars of the account in which the plaintiff shall deposit the aforementioned amount.

2. An order is hereby issued directing the 1st- 3rd defendants to facilitate the transfer of the suit parcel 3589/53 to the plaintiff as the administrator of the estate of Thuku Waitthaka.
3. A permanent injunction is hereby issued against the defendants, their servants and or their agents or anyone acting on their behalf from dealing with or interfering with the plaintiff's right of occupation and possession of the suit parcel 3589/53.
4. Each party is to bear their own costs of the suit.

DATED, SIGNED AND DELIVERED AT NANYUKI THIS 12TH DAY OF FEBRUARY 2025 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Kahura for the Plaintiff

Ng'eno for the 1st – 3rd Defendants

Mugo for the 4th Defendant

Court Assistant – Nancy Mwangi

