



Kadzinga & another v Cabinet Secretary for Land, Housing & Urban Development & 6 others; Kadzinga (Plaintiff to the Counterclaim); Mwanduka & 5 others (Defendant to the Counterclaim) (Environment & Land Petition 4 of 2020 & Environment & Land Case 181 of 2020 (Consolidated)) [2025] KEELC 1020 (KLR) (5 March 2025) (Judgment)

Neutral citation: [2025] KEELC 1020 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION 4 OF 2020 &
ENVIRONMENT & LAND CASE 181 OF 2020 (CONSOLIDATED)**

SM KIBUNJA, J

MARCH 5, 2025

BETWEEN

MBAJI MUTA KADZINGA PETITIONER

AND

**CABINET SECRETARY FOR LAND, HOUSING & URBAN
DEVELOPMENT 1ST RESPONDENT**

DIRECTOR OF LAND ADJUDICATION & SETTLEMENT. 2ND RESPONDENT

LWAMBI MADZUNGU LWAMBI 3RD RESPONDENT

MWANDUKA NDUNE MWANDIKA 4TH RESPONDENT

**AS CONSOLIDATED WITH
ENVIRONMENT & LAND CASE 181 OF 2020**

BETWEEN

MWANDUKA NDUNE MWANDUKA PLAINTIFF

AND

MBAJI MUTA KADZINGA 1ST DEFENDANT

KARISA MWAMBANYAMA 2ND DEFENDANT

LAND REGISTRAR KILIFI 3RD DEFENDANT

AND



MBAJI MUTA KADZINGA PLAINTIFF TO THE COUNTERCLAIM

AND

**MWANDUKA NDUNE MWANDUKA DEFENDANT TO THE
COUNTERCLAIM**

HARRISON MADZUNGU LWAMBI DEFENDANT TO THE COUNTERCLAIM

**DIRECTOR OF LAND ADJUDICATION & SETTLEMENT DEFENDANT
TO THE COUNTERCLAIM**

LAND REGISTRAR KILIFI DEFENDANT TO THE COUNTERCLAIM

NATIONAL LAND COMMISSION ... DEFENDANT TO THE COUNTERCLAIM

ATTORNEY GENERAL DEFENDANT TO THE COUNTERCLAIM

JUDGMENT

1. Mbaji Muta Kadzinga, the petitioner and 1st defendant in the suit, filed the petition dated 22nd April 2013, seeking for:
 - a. Declaration that subsequent proceedings after Land Case No. 10 of 1979 were all res judicata, as the judgement in that case affected the heirs, legal representatives and assigns including the petitioner and 3rd respondent, who were the plaintiff and defendant in that case.
 - b. Declaration that the 4th defendant has no locus to object to the registration of the petitioner as proprietor of parcel number 221.
 - c. A declaration that the minister erred both in law and fact by determining the dispute between the petitioner and 3rd respondent in respect of parcel number 221 yet there was a judgement by a competent court which had not been set aside or appealed against.
 - d. Mandatory injunction against both the 3rd and 4th respondents to remove any structures on, and to vacate parcel number 221, and stop interfering with the petitioner's quiet enjoyment, use and occupation of parcel number 221.
 - e. Order directing the 1st and 2nd respondents to ensure the petitioner is registered as proprietor of parcel number 221.
 - f. Declaration that the petitioner's rights to parcel number 221 have been infringed/breached.
 - g. Costs of the petition.

The petitioner avers that Muta Kadzinga, his father, filed Land Case No. 10 of 1979 against Kabuga Mwanduka, 3rd respondent's father, over the land in dispute. The court visited the land on 2nd October 1979, which was then not adjudicated. The court delivered its judgment on 21st May 1980, directing the 3rd respondent's father to surrender the disputed parcel of land, to the petitioner's father. The disputed land was later adjudicated, and became plot 221, Mwawesa Adjudication Section. That during adjudication, a dispute arose between the petitioner and 4 others on one hand and 4th respondent, that was ruled in their favour. The 4th respondent filed an objection No. 20 against the petitioner and 3 others, being Arbitration Board Land Adjudication case no. 29/84/85 that was decided in the petitioner's favour. The 4th respondent appealed in case No. 69 of 2007 to the Minister



in respect of plots numbers 219, 440, 1825 as well as plot 221 where the finding was in favour of the 4th respondent for plots 440, 1825 and 221, that was determined in favour of the 4th respondent, for plot numbers 440, 1825 and 221. That another objection number 439 for parcel 221 which was heard by Land Adjudication officer with case numbers 197 and 20. That the petitioner lost in case No. 197 of 1997 but was able to succeed in case No. 20 of 1997. That the 4th respondent who filed appeal No. 69 of 2007 had no claim over parcel 221. Both objection No. 20 of 1997 and No. 20 were over parcel 221 and that he succeeded in the latter, as it was res judicata the court decision, but lost in the former, which he claimed the Land Adjudication office should not have entertained as the 4th respondent had no claim over that land. That he lost his appeal No. 1 of 2009 against the 3rd respondent, yet the 3rd respondent never gave evidence. In the said appeal 1 of 2009, the Minister reversed the decision of appeal 69 of 2007 yet the parties were different.

2. In his response, the 4th respondent filed the affidavits sworn on the 20th January 2013 and 23rd March 2022, inter alia deposing that the petitioner had no legal capacity to this petition as the 1979 case judgment he relies on was between the petitioner's father and his father; that on filing an appeal against that decision, they were informed through the gazette notice that all land disputes would be handled by the Land Adjudication and Settlement office; that when the Land Adjudication and Settlement officers came on site in 1984, they held that all appeals were to await objection dates as the matter was alive in court; that there was no committee or board hearings regarding plot Nos. 219 and 220 in which the petitioner had issues with him; The 4th respondent was adamant that plot 221 belongs to the 3rd respondent while petitioner is living on plot 220, measuring 3.5 acres and plot 219 measuring 2 acres, and that plot No. 218 is in his name. that plot Nos. 218, 219, 220, 221, 1825 and 440 were awarded to him, and that the petitioner's plot No. 220, measuring about 3 ½ acres lies within his plot No. 218, which is about 16 acres. That plot No. 218 borders plot No. 221 on one side. That plot No. 219 was granted to one Karisa Mwambanyama's father, through the adjudication process. That simply put, he had no claim on plot No. 221.
3. The 2nd respondent filed the list of documents dated 26th May 2023 and a witness statement by John Karanja dated 1st August 2023.
4. No replies were filed by the 3rd respondent, but the court has noted from the certificate of death in the 4th respondent's list of documents dated 4th March 2019, that the 3rd respondent had passed on 16th July 2013.
5. Mwanduka Ndune Mwanduka, the plaintiff and 4th respondent in the petition, commenced the suit through the plaint dated 28th July 2020, against Mbaji Muta Kadzinga, the petitioner, Karisa Mwambanyama, and Land Registrar, Kilifi, seeking for orders:
 - a. That the court do issue a permanent mandatory injunction removing the 1st and 2nd defendants from plot no. 219 measuring 2 acres and plot 220 measuring 3 ½ acres which are in the midst of plot 218.
 - b. That the court be pleased to order the Land Registry to rectify the apparent error on the face of the record with regard to the appellate process undertaken in so far as plot number 221 is concerned to read the proper plot no. 220.
 - c. That the Land Registrar be ordered to issue the Title deeds to the plaintiff over the plot no. 218, 219 and 220 in so far as the adjudication process is complete.
 - d. That the costs of this suit be provided for.



The plaintiff averred that plot Nos. 219, 220, 1825 and 440 all emanated from plot No. 218 and have been in occupation of his grandfather, father and himself. That after consolidation and adjudication he was left with plot Nos. 218, 440 and 1825. That plot No. 220 which belongs to the 1st defendant [petitioner], measures 3 ½ acres, and lies within his plot No. 218, which measures 16 acres. That plot No. 218 borders that of 3rd respondent, deceased, and plots belonging to one Mwandani Mwasangu, on side, and Munga Mvuko and Mcharo Mzombo on the other side. That Mcharo Dzombo, had claimed a portion of 4 acres from plot No. 218, but after adjudication that portion was awarded to the plaintiff under plot 1825. That Karisa Mwambanyama, 2nd defendant, had claimed 2 acres under plot No. 219 that is inside plot No. 218. The he had appealed over the Kaloleni court decision in the 1979 case awarding the 3 ½ acres to the 1st defendant in 1984, but the High court informed the parties that all disputes had been referred to the Land Adjudication and Settlement Office. That there were no committee hearings in regards to plot Nos. 220 and plot 219, but his objection to plot No. 220 was disallowed, and when he appealed to the Minister, he was successful but there was an error made with reference to plot No. 221 instead of plot 220. That 2nd defendant occupies part of his plot No. 219, measuring 2 acres which he also claims to own.

6. The 1st defendant, [petitioner], opposed the plaintiff's claim through the amended defence and counterclaim dated 12th May 2022 averring that though the plaintiff and himself were not parties in Kaloleni Land Case No. 10 of 1979, the plaintiff never appealed against the said decision, and that there was no communication from the High court that matters had been referred to the Land Adjudication & Settlement Office. That in view of the existence of ELCPET. No. 4 of 2020, this suit is subjudice, and should be struck out. In his counterclaim, the 1st defendant sought for the following orders:
 - a. A declaration that the plaintiff is the owner of plot no. Kilifi/Mwawesa/221 and that the 4th defendant do cancel the Title Deed issued to the 2nd defendant and issue a title deed to the plaintiff in the counterclaim.
 - b. An order of permanent injunction against the defendants, their legal representatives, assigns, heirs and hirelings not to interfere with the plaintiff's peaceful occupation of the suit land being plot Nos Kilifi/Mwawesa/220 and 221 and/or any portion thereof.
 - c. A mandatory order compelling the 1st and 2nd defendants, their legal representatives, assigns, heirs and hirelings to demolish at their own costs an buildings or developments on the plaintiff's suit land and/or portion thereof and to give vacant possession of the same to the plaintiff.
 - d. Costs of the suit and counterclaim.

He averred that he is the owner of plot No. Kilifi/Mwawesa/ 221 and plot No. Kilifi/Mwawesa/220, which were one plot before demarcation. That plot No. 221 was unlawfully allocated to the 2nd defendant by the 3rd defendant and title deed issued by the 4th defendant. That the 2nd defendant subdivided plot No. 221 and gave a portion to the 1st defendant.

7. The 2nd to the 6th defendants did not file a defence. The 2nd defendant however filed a list of documents and witness statement dated 8th May 2024.
8. In his reply and defence to the counterclaim, 26th November 2023 the plaintiff averred that plot No. 221 was properly awarded to the 2nd defendant to the counterclaim, who has however failed to subdivide it, and transfer his portion to him.
9. The record confirms that 28th July 2022, ELCPET. No.4 of 2020 was consolidated with ELCC No. 181 of 2020, and directions that hearing be through viva voce evidence given.



10. During hearing, Mwanduka Ndune Mwanduka, the plaintiff in ELC No. 181 of 2020, who is the 1st defendant in the counterclaim therein, and 4th respondent in ELCPET. No. 4 of 2020, testified as PW1. He adopted his statement dated 28th July 2020 and list of documents also filed on even date. He also relied on his reply to the petition dated 23rd March 2022 and list of documents dated 4th March 2019. He reiterated his pleadings and stated that his original parcel was plot No. 218, before subdivision, and stated that the disputes in his case are about plot Nos. 219 and 220, which are currently in possession of the 2nd and 1st defendants respectively. That parcel No. 221 belongs to Lwambi Madzuga, the 3rd respondent in petition ELCPET No.4 of 2020 but was given to him instead of plot 220 after he defeated him on the appeal over plot No. 220. That after writing to Mr. Lwambi Madzuga to hand over plot No. 221, the said Lwambi filed an appeal and won. That on plots Nos. 218, 1825 and 440, he was told to wait until this suit is determined. He made it clear that he is interested in plot Nos. 220 and 219 and that the 2nd defendant should leave his plot No. 440 and go to his own plot. He also stated that he did not participate in the dispute over plot No. 220 until during the appeal to the Minister and despite winning he was awarded plot No. 221 instead. On cross-examination by Mr. Odhiambo for 1st defendant, (petitioner), he admitted that there was a case No. 10 of 1979 in Kaloleni between his father, Kabugo Mwanduka, and the petitioner's father, Muta Kazingo, and that the dispute was over land in Mwalilo village, but did not agree that the said Muta Kazingo had won, insisting that the court told them to go and resolve their dispute before the elders. He also admitted that one Mwambanyama Karisa; father to the 2nd defendant, was a witness in the suit. That the land subject matter of the dispute in the Kaloleni court was much larger than plot Nos. 220 and 218, which are just subdivisions of the disputed parcel in that case. On cross-examination by Mr. Nyange counsel for the 2nd defendant he disagreed that his objection cause was dismissed for being res judicata, but agreed that he did not appeal. He stated that despite the said Muta Kazingo winning the said suit of the original parcel, he has a right to appeal. He admitted that he has not filed any survey report showing the status or use of the concerned plots that he had mentioned in court. He further stated that in appeal No. 69 of 2007, he had sued the petitioner and the 2nd defendant, over plot No. 221 but later on stated that it was for plot No. 219. He agreed that plot No. 218 was the suit property in case No. 10 of 1979. He also admitted that he did not have title for plot No. 218. At this point, the testimony of PW1 became incoherent and contradictory without specific details. He told the court that he was a witness in appeal No. 1 of 2009 and the suit property was plot No. 221. That he won a case involving plot No. 218 filed by the 2nd defendant, and also won a case over plot No. 219. He further mentioned that the 2nd defendant won another case and that he filed an objection over plot Nos. 219, 221, 1825 and 440 which he lost and that he filed appeal No. 69 of 2007 and won. He stated that he did not appeal No. 69 of 2007. In further cross-examination by Mr. Waga, state counsel, he faulted the Land Registrar for issuing him with title to plot No. 221 instead of plot 220. That he did not write any letter to ask the Land Registrar to issue him with title to plot No. 220, but did so orally. In re-examination, he stated that appeal No. 1 of 2009 was between the petitioner and the 3rd respondent in ELCPET. No. 4 of 2020, where he was a witness. Further that his appeal was for plot No. 221 but was instead given plot No. 221 and that appeal No. 69 of 2007 was over plot Nos. 219, 221, 440 and 1825. He explained that appeal No.69 of 2007 was for plot No. 220 but instead he asked for plot Nos. 219, 221 440 and 1825 and was awarded plot Nos. 221, 440 and 1825. He also explained that appeal No. 69 of 2007 involved the 2nd defendant and three others. That they had tried to appeal case No. 10 of 1979, but the High Court dismissed their appeal and told them to follow the adjudication process. He reiterated that his claim is over plot No. 220, that he prays to be awarded to him.
11. Mbaji Muta Kadzinga, the petitioner who is the 1st defendant in ELCC No. 181 of 2020, and plaintiff in the counterclaim therein, testified as DW1. He adopted his statement dated 5th March 2019, and list of documents dated 8th February 2019. He testified that he has title to plot No. 220, and disputed



that it formed part of parcel No. 218, stating that it came from plot No. 221. He narrated how the court in Kaloleni case No. 10 of 1979 came to the suit property, made a sketch, showing plot Nos. 220 and 221, which were one parcel then. That the case was decided in their favour and no appeal has been preferred to date. That his father had a claim against the 3rd respondent over plot No. 221, and after his death, he filed an objection at the arbitration board and won. Strangely he the matter went before the chief where he and the 3rd respondent were parties and he lost. He filed an appeal with the Minister who also ruled in favour of the 3rd respondent. He insisted that the 3rd respondent and the plaintiff, illegally subdivided his land. That he has no claim over plot Nos. 1825, 440 and 219, and only wants Nos. plot 221 and 1826, even though there was no dispute taken to the Lands office about it. On cross-examination by Mr Nyange for 2nd defendant, he denied claiming plot No. 1826 but admitted that the 2nd defendant owns plot No. 220. On cross-examination by Mr. Waga for the state, he reiterated that plot No. 221 belonged to his father, and that when the plaintiff's family encroached thereon, they went to court and it was found in their favour. However, upon adjudication the said land was awarded to the plaintiff's father. That when his father died he took over and filed an objection which he won. That an appeal was filed about 10 years later and the plaintiff won the appeal before an unspecified commission. On cross-examination by Mr Akanga for the plaintiff, he testified that when his father won in case No. 10 of 1979, the land in dispute had no reference number. He further agreed that all the plots mentioned in this case came from plot No. 218, which is 16 acres, and that plot No. 220 is 2 acres, while No. 221 is 5 acres. He also agreed that during adjudication he was given plot No. 220, and the 3rd respondent plot No. 221, but denied there being a letter from the then District Commissioner that all appeals over parcel Nos. 220 and 221 be heard together. He stated that the appeal over plot No. 221 was heard separately, where the plaintiff was a witness in support of the 3rd respondent. Further, he narrated that despite the plaintiff winning the appeal, he was awarded plot No. 221 instead of plot No. 220. He explained that he used to live on plot No. 221, before adjudication but after adjudication, he was given the 2 acres where his homestead was, and thus wishes the plaintiff not to succeed in his suit. On re-examination, he reiterated that he claims plot No. 221 as his father lived on it, and that according to the sketch map he produced, plot No. 221 is part of the land awarded to his father by the court in case No. 10 of 1979. He testified that he had planted mango trees on plot No. 221, which are still there. That the plaintiff brought a suit claiming plot No. 221 which was dismissed, because it had already been decided in case No. 10 of 1979, and there is no pending appeal.

12. Karisa Mwambanyama, the 2nd defendant in ELCC No. 181 of 2020 testified as DW2. He adopted his statement dated 8th May 2024 and list of documents of even date. He stated that his father testified in case No. 10 of 1979 in favour of the petitioner's father. He stated that the land then had no reference number and that the Land Adjudication & Settlement in that area started in 1984. He narrated that the plaintiff was registered with plot No. 218, which consists of plot Nos. 219 and 220. Further, that plot No. 219 is where his father's house stands, while plot No. 220 was given to the petitioner. That he had sued for part of plot No. 218 in another case where it was decided that he gets plot No. 440. That the plaintiff then sued him for plot No. 219, but he did not succeed. Thereafter, the plaintiff also sued him for plot No. 440 but did not succeed. The plaintiff being dissatisfied appealed over plot Nos. 219, 440 and 221, which appeals were also dismissed. The plaintiff then objected over plots Nos. 219 & 440 that belong to him, and plot No. 221 belonging to the petitioner, and No. 1825 belonging to another person. That in the verdict he was awarded plot No. 219, while the other three parcels were awarded to the plaintiff. He informed the court that he has a title deed for plot 219. On cross-examination, by Mr Odhiambo, he testified that plot No. 218, had not been registered by the case No. 10 of 1979. That after adjudication, the plot in the said case was registered as plot Nos. 221 and 220. He told the court that the 3rd respondent was a witness in the said case, and that the plaintiff has no right to a claim of plots Nos. 219, 220, 221, 440 and 1825, because they all came from plot No. 218. On cross-examination by Mr. Waga he stated that his father died in April 1983, and that in August 1983 he was issued with a



notice to vacate after the plots were adjudicated. He admitted that plot No. 218 is the mother of all the other disputed plots/titles. That the plaintiff had no land in that area, but after adjudication he was issued with plot No. 218. He recommended that a fresh adjudication be done based on each party's usage of plot No. 218. On cross-examination by Mr. Akanga he stated that plot No. 219 that he uses is about 3 ½ acres, and does not belong to the plaintiff. He stated that plot No. 221 was not excised from plot No. 218, and that disputed that plot No. 440 was not given to the plaintiff on appeal, insisting it was in his name. That plot No. 218 was came to being after adjudication in 1984. In re-examination, he stated that plot Nos. 219 and 440 are his, and he has been using them, and that he has never seen title for plot No. 218.

13. John Wachira Karanja, the Land Adjudication officer, Kilifi, testified as DW3. He relied on his statement dated 1st August 2023 and list of documents dated 26th May 2023. During cross-examination by Mr. Nyange, he was unable to confirm whether title had been issued in favour of plot No. 218 or to whom the owner belonged. He testified that going by appeal No. 69 of 2007, plot No. 440 belongs to the plaintiff, but later admitted that plot No. 440 was not mentioned in the proceedings. He further testified that the case over plot No. 221 was dismissed, and the plot remains with the 2nd defendant. On cross-examination by Mr. Odhiambo, DW3 testified that appeal No. 69 of 2007 was against the 2nd defendant and three others, who have not been disclosed. He admitted that proceedings did not deal with plot No. 220, and that the plaintiff was given an opportunity to give evidence and produce documents to support his claims during adjudication. Mr. Wachira admitted that case No. 10 of 1979 came up during objection proceedings and ought to have been considered, during adjudication. He expounded that after a Minister has made a decision on appeal, a dispute can only be taken to court to issue a further determination. He reiterated that he did not have documents showing who was the owner of plot No. 218 after adjudication. On cross-examination by Mr Akanga, in reference to a letter dated 5th January 2009 which talked about appeal Nos. 1 of 2009 and 69 of 2007, DW3 stated that appeal No. 1 of 2009 was dismissed, and that he cannot tell who is the registered owner of plot No. 220. He informed the court that he had titles for plot Nos. 221, 219 and 440 and that the plaintiff had written a letter to the Minister appealing over plot Nos. 220 and not 221. He also categorically stated that plot No. 218 was not mentioned in the two appeal proceedings and adjudication cannot be done afresh. On cross-examination by court he admitted that the last page of appeal No. 69 of 2007, belongs to appeal No. 1 of 2009. That they did not actually attach the last page of appeal No. 69 of 2007 but is on the same appeal attached in the 4th respondent's (plaintiff) list of documents dated 4th March 2014 as document No. 14. He elucidated that all the parties herein are living on parcel No. 218, and that their disputes are boundary conflicts, which the court can solve by ordering rectification of the boundary.
14. That upon closure of the parties' cases, directions on filing and exchanging submissions were given. The learned counsel for the plaintiff, 1st defendant, 1st, 2nd & 5th respondents filed their submissions dated the 6th October 2024, 13th January 2025, and 31st January 2025, respectively, while the 2nd defendant filed undated submissions. The court has given due considerations to the said submissions.
15. The issues arising for determination in the consolidated matters are as follows:
 - a. Whether the proceedings over disputes relating to the plots subject matter of the consolidated suits were res judicata in view of decision Kaloleni Case No. 10 of 1979.
 - b. What was the subject matter in the Kaloleni case No 10 of 1979, and what reference did it get after adjudication. If the reference given was plot No. 218, to whom was it awarded, and what were the resultant subdivisions thereof, if any, and what is the extent of ownership of each resultant subdivision.



- c. Who is the legal and beneficial owner of plot No. 221, and whether eviction orders should issue against the 3rd and 4th respondents.
 - d. Who bears the costs?
16. The court has carefully considered the pleadings in the consolidated suits, evidence tendered by all the parties/witness who testified, submissions by the learned counsel, the superior courts decisions cited therein, and come to the following determinations:

- a. In Rule 4 of *the Constitution* of Kenya (Protection) of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, a Petitioner is expected to the state the nature of injury he has suffered. In other words, the Petitioner has to show in which manner his rights have been violated. In the case of Anarita Karimi Njeru Versus The Republic of Kenya (1976-1980) KLR 1272, it was held that a petitioner must state his or her case with precision. In the instant petition the constitutional provisions alleged to have been violated are Articles 2, 19, 20, 21, 22, 23, 25 (c), 27, 40, 47, 50, 60 (1) (b) & (g), 61(2), 64, 165, 262 and section 19 of the 6th Schedule of *the Constitution* of Kenya. After perusal of the petition, the court has noted the petitioner has not particularized with precision how each of the rights mentioned were violated.
- b. The superior courts have time and again spoken against approaching the courts through petitions where an ordinary suit or other legislative dispute resolution mechanisms would have sufficed. In the case of Benard Murage versus Fine Serve Africa Limited & 3 others [2015] eKLR, the court opined as follows on the doctrine of exhaustion:

“Where there exists an alternative remedy through statutory law, then it is desirable that such statutory remedy should be pursued first.”

In the case of Speaker of the National Assembly versus James Njenga Karume [1992] eKLR, the court emphasized that where there is a clear procedure prescribed by *the Constitution* or by a statute for the redress of a particular grievance, that procedure should be strictly followed and exhausted, before invoking the constitutional jurisdiction of the court. for all intent and purposes, ELCPET No. 4 of 2020 was better placed to be handled in an ordinary suit than a petition. That as the petitioner has essentially raised the totality of his claims in the petition through the counterclaim filed in ELCC No. 181 of 2020, a determination of the issues in the suit will effectively result to a determination of the petition. I do not therefore, find any further purpose for the petition. The court therefore dismisses the petition.

- c. On ELCC No. 181 of 2020, filed by Mwanduka Ndune Mwanduka, as the plaintiff, the court has observed from the onset that the facts pleaded are in disarray and jumbled up to the point that no clear pattern or sequence of events can reasonably be formed. The testimonies provided by all the witnesses did not help either, as they told different versions, were full of inconsistencies and ambiguities, that are too many for the court to reiterate. However, the court has discerned or picked some common facts from the pleadings and testimonies, which is a good starting point, that may help the court come up with probable sequence of events.
- d. The court wishes to remind itself that this is a case where the dispute started before registration of titles. Section 25 of the *Land Registration Act* Chapter 300 of Laws of Kenya provides as follows:

“The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated



except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.”

The suit properties in dispute as pleaded by all the parties herein, are plot Nos. 218, 219, 220 & 221. Since the parties are bound by their pleadings, the court will ignore any claims for other plots not pleaded for like plot Nos. 222, 223, 440, 1825 and 1826 that were stated were introduced through the testimonies of the witnesses. As it currently stands, Karisa Mwambanyanya Maita, together with others hold title to plot No. 219, and the late Lwambi Madzungu holds title to plot No. 221.

- e. The genesis of this suit started in the years leading to 1979 where there are two parties namely, Muta Kadzinga and Kabuga Mwanduka, contesting over a portion of unreferenced land which resulted to Kaloleni Land Case No. 10 of 1979. In a recap of the said suit, Mr Muta stated that he inherited the parcel from his father Kadzinga Hare, although the first to acquire the said parcel was his grandfather Hare Lwambi. Mr Kabuga stated that he inherited the said parcel from his grandfather Bebaya Nia alias Nia Munyambu. After hearing the witnesses, the court found the defence witnesses to be unreliable and even called them liars while finding that the evidence by the plaintiff was solid. The learned magistrate thus rejected the evidence of the defence and found that the evidence of the plaintiff to be overwhelming and gave a verdict in favour of Mr. Muta Kadzinga. In the inspection notes which was after the site visit by the court on 2nd October 1979, the court noted that to the north was the homestead of one Mwambanyama, to the east of the land in dispute was the land that was being claimed by the plaintiff, but which defendant claimed belonged to Mwadzinga Lwambi. To the south of the suit land there was no dispute, while to the west the land adjacent belonged to Mwandani Kasangu & another. Within the suit land the plaintiff, Mr Muta, had built his homestead where he had been living for over 30 years which Mr. Kabuga disputed. There was an old lemon tree to the south of the homestead while to the west of the homestead was a shamba of Mr. Kabuga, which Mr. Muta stated had started that year, 1979. In the sketch map, there are no boundaries or acreage recorded as the parcel was un-surveyed and un-adjudicated at that time.
- f. The adjudication in that area was done in 1984, under Mwawesa Adjudication Section that was created pursuant to section 5 of the *Land Adjudication Act* Chapter 284 of Laws of Kenya and gazetted on 19th January 1984. The said notice demanded that any party to record their claim with six (6) months from that date, and that claims should not be taken to court. In the Land Adjudication Committee proceedings, Mr Muta Kadzinga contested against the late Lwambi Madzungu Lwambi and others, for a portion of plot No. 221. This claim was dismissed and plot No. 221 was declared to belong to Mr. Lwambi Madzungu Lwambi. However, Mr. Muta Kadzungu was not satisfied and went before an arbitration board, as provided by section 21 (3) & (4) and 22 of the *Land Adjudication Act* Chapter 284 of Laws of Kenya. This event commenced on 25th October 1994 by which time Mr. Muta had passed on and his son, Mbaji Muta Kadzungu, the 1st defendant, took over and prosecuted the case. The board found in his favour and awarded him plot No. 221. On the last page of that proceeding, it shows that plot No. 221 borders plot Nos. 218, 453 and 454.



- g. The adjudication proceedings involving the 2nd defendant over a portion of plot No. 218 filed on 11th December 1984, the court has noted that the plaintiff was a defendant, and the verdict was in favour of the 2nd defendant for a portion of plot 218. The adjudication proceedings between the plaintiff, authorized by one Ndune Mwanduka Nia, and the 2nd defendant filed on 21st May 1985 over a portion of plot No. 219, the committee held that the disputed portion to remain in plot No. 219 belonging to the 2nd defendant, and boundary was set and the rest of the portion be given a new plot number and to belong to Ndune Mwanduka Nia.
- h. In the adjudication committee hearings referred to above in (f) and (g), nothing came up during evidence to show that the suit land subject matter in Kaloleni case No. 10 of 1979 was adjudicated to be plot No. 218. That in the court's view, is why DW3 could not state with certainty who was the owner of plot No. 218. There is therefore, no basis to show that the suit land subject matter of the Kaloleni case No. 10 of 1979 was not plot No. 218 as had been claimed by PW1. It is the court's further finding that plot No. 218 did not give birth to all the other plots mentioned herein. As a matter of fact, Mwawesi Adjudication section was completed through a notice dated 15th June 2006, and it is unfortunate that DW3 did not avail to the court the concerned adjudication register, to show which plot was given to whom, and thereby assist the court in decided on the ownership of the disputed plots.
- i. There was no appeal filed to the arbitration board with respect to plot No. 218, and the question remaining to be answered then is to whom does the other portions in dispute belong to? Having established that plot No. 218 is not the original plot, which was subdivided into plot Nos. 219, 220 and 221, which are the suit properties herein, the court is left with only one duty which is to determine the extent of ownership of each title. The appeal case No. 69 of 2007 before the Minister made under section 29 of the Land Adjudication Act Chapter 284 of the Laws of Kenya, was in relation considering plots No. 219, 221, 440 and 1825. Only the first two plots are of relevance in this suit. The appellant was the appellant while the respondents were the 2nd defendant and three others who were unspecified. The then District Commissioner, one Muthama Wambua, confirmed that plot No. 219 belonged to the 2nd defendant, while plot No. 221 belonged to the plaintiff. The claim by DW3 that the verdict page of appeal No. 69 OF 2007 was the one in appeal No. 1 of 2009 proceeding that is also filed by the plaintiff, I find that to be a serious anomaly, because the same was reversing the decision of appeal No. 69 of 2007. Further, the verdict is 27th June 2007, which is the date it was heard and the coram recorded Mr. Muthama Wambua as the chairman, while in appeal No. 1 of 2009 the coram recorded Katee Mwanza as the chairman, and the verdict page is the one DW3 confused as the verdict page records Katee Mwanza as the chairman. It is clear the 1st defendant had appealed against the late Lwamba Madzunga Lwamba, over plot No. 221 which the chairman, Katee Mwanza, held that it remain in the name of the deceased, and reversed decision in appeal No. 69 of 2007 to the extent of plot No. 221 only. It is at this appeal that the plaintiff raised concerns with claiming that he had been misled to appeal against plot No. 221, while his intention was over plot No. 220, and despite that having been recorded, it had no effect towards the outcome. In the case of *Kivuva versus Kivuva & 2 others* [2025] KEELC 779 (KLR), the court held that the decision of the Minister is final as provided in section 29 (1) of the Land Adjudication Act Chapter 284 of Laws of Kenya.
- j. With respect to plot No. 221, the late Lwamba Madzunga Lwamba, after winning in appeal No. 1 of 2009, secured title and no orders can be issued, against his estate as it is not a party in this proceeding. The remaining title which is plot No. 220, and a portion of plot No. 218, that never had a dispute before the adjudication committee, and in relation to which no party herein



produced any document of title over to ownership or entitlement over the same. The only document that would have greatly assisted the court is the adjudication register or testimony by the Land Registrar, on who is the registered owner/proprietor of the same. The parties herein left the court to speculate on ownership of the same. That as speculation would not read to doing justice to either of the parties, and considering the court's overriding duty under sections 1A, 1B and 3A of the Civil Procedure Act chapter 21 of Laws of Kenya, and Article 159(2)(c) & (d) of the Constitution the court is of the view the issue of ownership on the said parcels can be determined by the Land Registrar, Kilifi in accordance with the official adjudication register. It is also not lost on this court that there has been an issue of encroachment of boundaries by the parties involved herein, and it will be fair and just to order that the Land Registrar do conduct a boundary dispute on plot No. 220, and demarcate the boundaries in respect of the plaintiff and the 1st defendant with respect to the said plot under the powers of sections 18 and 19 of the Land Registration Act Chapter 300 of Laws of Kenya. The same shall apply mutatis mutandis between the plaintiff and the 2nd defendant with respect to plot No. 218

- k. Under section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya, the costs follow the event unless otherwise ordered by the court on good grounds. In view of the outcomes in the consolidated suits, I find it is only logical that parties bear their own costs.
17. From the foregoing determinations on the consolidated matters, the court finds and orders as follows:
- a. The petitioner has failed to establish his claim in ELCPET. No. 4 of 2020, to the standard required by the law and it is hereby, dismissed.
 - b. The plaintiff, and counterclaimant in ELCC No. 181 of 2020 have both failed to prove their respective claims to the standard required of balance of probabilities, and their suits are therefore, dismissed.
 - c. Each party to bear their own costs in both ELCPET. No. 4 of 2020 and ELCC No. 181 of 2020.
 - d. However, the court has observed from the testimony of DW3 that there exist boundary disputes over plot Nos. 218 & 220, that have apparently not been resolved through these litigations. That in view of assisting the parties' concerned have the matter settled without the need of filing fresh litigations that would delay resolution, the court on its own motion finds it just and equitable to order as follows:
 - a. That the parties' dispute over ownership of plot No. 220, and a portion of plot No. 218, be determined by Land Registrar, Kilifi, based on the Adjudication Register for Mwawesi Adjudication Section, and the Land Registrar to file their report with the court within the next ninety (90) days.
 - b. That the Land Registrar, Kilifi do conduct a boundary dispute resolution hearing in respect of plot No. 220 and reposition/fix the boundaries thereof between the plaintiff and the 1st defendant and file their report with the court in ninety (90) days.
 - c. The Land Registrar, Kilifi do conduct a boundary dispute resolution hearing between the plaintiff and the 2nd defendant over plot No. 218, and do reposition/fix the boundaries thereof, and file their report with the court in ninety (90) days.
 - d. The parties to each plot to share the applicable fees payable to the Land Registrar equally.



e. Each party to bear their own costs in respect to the hearings before the Land Registrar.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 5TH DAY OF MARCH 2025.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:

Plaintiff : Mr Akanga

Petitioner : Mr Odhiambo

Defendants : Mr Odhiambo For 1st Defendant

Taabu For 2nd Defendant Only.

Shitemi – Court Assistant.

