



**Mwatela & another v Kalama & 3 others (Civil Suit E170 of 2015)
[2025] KEELC 1254 (KLR) (6 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1254 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
CIVIL SUIT E170 OF 2015
EK MAKORI, J
MARCH 6, 2025**

BETWEEN

PROF JOSPHAT KAZUNGU MWATELA 1ST PLAINTIFF

JOSEPH ZIRO MWATELA 2ND PLAINTIFF

AND

GRACE KATEMBE KALAMA 1ST DEFENDANT

GEORGE KALAMA MWATELA 2ND DEFENDANT

ISAACK KALAMA MWATELA 3RD DEFENDANT

BENJAMIN KALAMA MWATELA 4TH DEFENDANT

JUDGMENT

1. By an amended plaint dated 29th September 2015, the plaintiffs instituted this suit claiming to be the rightful owners of the parcel of land known as title No. Kilifi/Jimba/68 by virtue of being the heirs of the late Ziro Mwatela Mwarabu, the registered proprietor.
2. Evidence was led that the land is registered in the name of the late Ziro Mwatela Mwarabu. The certificate of search and a letter dated 25th April 2013 from the Ministry of Lands state that the parcel of land was registered in the name of Ziro Mwatela Mwarabu on 18th June 1979, and a title deed was issued on 16th December 1981.
3. On the other hand, the defence led evidence that in the early 1960s, the suit land was initially allocated to the late Moses Kalama Mwatela, the defendants' father herein, who took actual and exclusive possession of the suit land with his family and has resided on it for over six decades. Moses Kalama, with the assistance of his family, developed the land extensively by planting coconut trees, cashew nuts, and mango trees, and establishing a permanent homestead. All this while, the plaintiffs' father, Ziro



Mwatela, was settled elsewhere at Madzayani and sometimes later at Matsangoni until he was evicted and sought refuge from his biological brother - Kalama.

4. The defence further averred that, as a gesture of trust, love, and brotherhood, Moses Kalama accommodated his brother Ziro Mwatela on a portion of the suit land known as Kilifi/Jimba/68 when Ziro faced difficulties. He further allowed Ziro Mwatela to build a home on the far end of the property. Additionally, out of family loyalty, Moses schooled Ziro's son (the 1st plaintiff) and financed his education to the University.
5. The defence asserts that, after the 1st plaintiff secured employment at the National Housing Corporation as a surveyor in the late 1980s, he abused the trust placed in him by colluding with his father to fraudulently register the suit land in his father's name, contrary to the longstanding occupation and equitable ownership by Moses Kalama's family.
6. Following this unlawful registration, the plaintiffs sought to dispossess the defendants of the suit land, culminating in the present suit. The defendants assert that the plaintiffs' title was procured through fraudulent misrepresentation, and it should be defeated by overriding equitable interests.
7. In the alternative and counterclaim, the defence postulates that the long stay in the suit property has extinguished the plaintiffs' title by operation of the doctrine of adverse possession.
8. The court directed parties to file written submissions. They complied.
9. From the materials placed before me, the issues that fall for the determination of this court is whether the plaintiffs have proved their claim against the defendants to warrant the orders sought in the plaint, whether the defence mounted by the defendants is sustainable and whether the counter-claim is merited and should be upheld and who should bear the costs of this suit.
10. The plaintiffs submit – correctly - that Section 24 of the *Land Registration Act* No 3 of 2012 states that the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.
11. Section 25 of the said Act further provides that 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 the 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 —to encumbrances charges or leases shown on the register and the overriding interests as stated in Section 28 of the Act.
12. Plaintiffs rightly state that the statute, therefore, mandates the courts to consider a title document as prima facie evidence of ownership to land and conclusive evidence of proprietorship to land that can only be challenged on the grounds stipulated above.
13. The defendants assert that Ziro Mwatela Mwarabu colluded with the lands office to have the property registered under his name. It is a trite law that he who alleges it must prove. Section 107(i) of the *Evidence Act* provides that:

“Whoever desires any court to give Judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
14. This provision of the *Evidence Act* is particularly relevant in this case as it places the burden of proof on the party making the allegations, in this case, the defendants.



15. The plaintiffs proceeded to submit that the Court of Appeal inferred in the case of Charles Karathe Kiarie & 2 others v Administrators of the Estate of John Wallace Mathare (Deceased) & 5 others [2013] eKLR, that fraud is a question of evidence. All the necessary documentation must be provided to substantiate the allegation of fraud. Fraud is an allegation that has to be proved as held in the Paul Muira & another v Jane Kendi Ikinyua & 2 others [2014] eKLR where the court cited with approval the Court of Appeal case of Musonga v Nyati [1984] KLR 425 and in Koinange and 13 others [1986] eKLR 23 where it was observed that the standard of proof for fraud is higher than a balance of probabilities.

“Allegation of fraud must strictly be proved, and though the standard of proof may not require proof beyond reasonable doubt, it ought to be more than a balance of probabilities. The onus of discharging this burden is on the party alleging the fraud.”

16. The Principal Land Adjudication and Settlement Officer Malindi, who testified as DW7, took the court through the initial ownership entries, which showed that the suit property was in the name of Kalama Mwatela, which was later cancelled and replaced with Ziro Mwatela. This testimony is significant as it raises questions about the validity of the title deed in question.

17. The officer admitted that under the SFT regime, for a title to be issued, there had to be a letter of offer, proof of payment of the SFT dues, a Discharge of Charge, and ultimately the issuance of title. This was not the case regarding how Ziro Mwatela obtained the title subject to the current suit as that process was not strictly followed.

18. The defendant too did not show that Kalama Mwatela fulfilled those requirements.

19. This leads to the conclusion that the fraud alleged by the defendants was not fully proved to the required standards.

20. The conclusion I can draw is that Ziro Mwatelas' title, looking at it from the lens of the root of the title, is shaky on account of the acquisition processes under the SFT, were not fulfilled, and given the discrepancies disclosed by the Principal Adjudication and Settlement Officer Malindi—DW7.

21. The defendants have made comprehensive arguments regarding the constructive trust established over the title in issue by the Kalama family's long-term residence on the property in question and the overriding interest that has arisen from it. They contend that evicting the defendants would be unjust and contrary to principles of equity. This assertion is closely linked to their extended property occupancy, which has lasted more than 60 years.

22. The defendants have submitted that all claims for land recovery must be brought within twelve years under the *Limitation of Actions Act*. The plaintiffs' claim has been extinguished by the effluxion of time, regardless of whether it is based on the date of title registration or actual occupation. Section 7 of the *Limitation of Actions Act* (Cap 22 of the Laws of Kenya provides that actions to recover land cannot be brought after the expiry of twelve (12) years from the date the right of action accrued:

“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.”

23. According to the defendants' assertions and the available records, the plaintiffs' title allocated to their father was obtained in 1981. Nevertheless, the plaintiffs did not file the current lawsuit until 2015, 34 years after the purported acquisition of the title. During this period, the plaintiffs remained silent and inactive for over three decades, permitting the defendants to occupy, develop, and reside on the



land without disturbance. The plaintiffs' cause of action originated in 1981 upon acquiring the title, which is impeachable by the principles of adverse possession. Section 17 of the [Limitation of Actions Act](#) stipulates:

“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.”

24. In *Githu v Ndeete* [1984] eKLR - cited by the defendant the Court of Appeal held that:

“The mere fact of registration of land in the name of a proprietor does not extinguish the rights of other persons who may have the land, if the proprietor does not take action within the statutory period.”

25. In *Mbira v Gachuhi* [2002] 1 EALR 137, the court stated:

“A person who occupies land openly, continuously, and without permission for a period exceeding the statutory limitation period acquires rights which are indefeasible, unless the owner of the land takes legal action within the limitation period.”

26. In light of the [Limitation of Actions Act](#)'s provisions and adverse possession doctrine, it is evident that the plaintiffs' suit is time-barred. The plaintiffs' rights, if any, were extinguished long ago due to their failure to act within the prescribed 12-year period. The defendants' long-standing occupation and development of the suit land affirms their legitimate claim and extinguishes any title the plaintiffs may claim to have.

27. Given what I have and having found that the processes of acquisition of the suit property by the father of the plaintiffs is shaky and that the plaintiffs have been in occupation of the suit property for over six decades, the plaintiffs have acquired an overriding interest on the suit property under the eyes of equity, a constructive trust can be gleaned based on the facts of this case. It will not be germane to evict and uproot the defendants from the suit property, besides the prolonged stay accords the plaintiffs to claim the suit property under the doctrine of adverse possession.

28. My final orders will be that the plaintiff's suit is hereby dismissed with costs. And that the defendants counterclaim hereby succeed to the extent that:

- a. The defendants have acquired title to the portion of land parcel No. Kilifi/Jimba/68 they occupy through constructive trust and/or adverse possession.
- b. An order be and is hereby issued directing the Land registrar to cancel title No. Kilifi/Jimba/68 and the same be registered in the names of the defendants, plaintiffs in the counter-claim
- c. Costs to the defendants /plaintiffs in the counterclaim.

DATED, SIGNED, AND DELIVERED AT MALINDI ON THIS 6TH DAY OF MARCH 2025.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Mote, for the Plaintiffs

Mr. Matini for the Defendants



Happy: Court Assistant

