



**Nawanje v Muchori (Suing as an Administratrix of the Estate of the Late John Muchori Baiya)
(Environment & Land Case 3 of 2017) [2025] KEELC 2917 (KLR) (12 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 2917 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 3 OF 2017
FO NYAGAKA, J
MARCH 12, 2025**

BETWEEN

AUGUSTINE BARASA KHISA NAWANJE PLAINTIFF

AND

EUNICE MUGURE MUCHORI DEFENDANT

**SUING AS AN ADMINISTRATRIX OF THE ESTATE OF THE LATE JOHN
MUCHORI BAIYA**

JUDGMENT

Introduction

1. The Plaintiff commenced this suit vide an Amended Plaint dated 9th October, 2018 against the Defendant seeking the following orders:
 1. A declaration that the land comprised in plot number 30 Nyasi Settlement Scheme measuring approximately 5 acres solely belongs to the plaintiff and the defendant has no proprietary interest in the said land hence its inclusion in the list of assets forming the estate of the late John Muchori Baiya is irregular, illegal, null and void.
 2. A permanent injunction to restrain the defendant, her agents, servants and or any other person acting for or on her behalf from entering, trespassing, transferring and or in any other manner interfering with the plaintiff's possession, ownership and/ or interest in the land comprised in Plot Number 30 Nyasi Settlement Scheme measuring approximately 5 acres title number (sic).
 3. Costs of the suit and interest.
 4. Any other order that this honorable court may deem fit to grant.



2. The Defendant filed an Amended Written Defence on 31st October 2018 where she denied the allegations in the amended Plaintiff and averred that she was the legal and beneficial owner of land title number Trans Nzioa/Nyasi/30.

The Plaintiff's Case

3. Augustine Barasa Khisa Nawanji testified as PW1. He adopted his written witness statement dated 9th February, 2022 evidence in-chief. He produced his identity card, birth certificate and an affidavit as P. Exhibit 1, 2 and 3. He testified that the Defendant the Administratrix of the Estate of John M. Baiya. He testified that he was the owner of land parcel No. Trans Nzioa/Nyasi/30 that is, formerly, plot No. 30 Nyasi Farm, having bought it from Stephen Fwamba Murunga on 9th February, 1980. He bought it together with his elder brother Richard Nawanje for Kshs. 25,000/-. The sum was paid in cash. They entered into an agreement on that date. It was witnessed by the area chief, Julius Wasilwa Nate. He produced the agreement dated 9th February, 1980 as P. Exhibit 4. He went on to add that his brother Richard Nawanje surrendered his share on 25th December, 1980-P. Exhibit 5.
4. He took possession of the land when he bought it. He was in occupation for 35 years. No one ever complained that the land was his/hers. After they bought the land, Mr. Fwamba gave him a receipt for Kshs. 395/=. It was dated 8th June, 1979. He paid a loan over it. It was a deposit of 10% with S.F.T. He was also given the charge documents. He marked for identification the copy of Receipt and Charge documents as PMFI-6 and 7. He continued to pay the loan to S.F.T. He remained with a balance of Kshs.44/= which he paid on 22nd March, 1990. He testified that he paid in Stephen Fwamba's name. The receipt was marked as PMFI-8. Mr. Fwamba did not sign the transfer forms. He (PW1) sued him in Kitale SRMCC No. 181 of 1991. The defendant was ordered to transfer the land to him. A decree was given. He produced the decree as P. Exhibit 9. The decree was to the effect that the land belonged to him and Mr. Fwamba was to transfer it to him in default which the Executive Officer was to sign documents in his favour. The Executive Officer signed the forms in April, 1991. He produced the transfer forms as P. Exhibit 10.
5. He took the transfer forms and decree to the Settlement Fund Trustees (S.F.T.) offices but the land was not transferred to him. He testified that the Court summoned the S.F.T. officer to explain why he did not effect the transfer. The officer did not attend Court. His advocate, J. M. Wafula, wrote to the Court asking for witness summons to him. The letter was dated 11/05/1993 and served on 14/05/1993. He testified that the court file went missing and all the original documents got lost. The witness produced as P. Exhibit 11 the letter to that effect. He testified that his then Advocates, M/ s Sichale & Co. Advocates, wrote a letter dated 9th December, 1994, demanding the documents. He produced the letter as P. Exhibit 12. The file was later found in 2016 at Nakuru (Law Courts) Archives. On 20th January, 2016, the Executive Officer wrote a letter requesting that the same be returned to Kitale. He produced the letter as P. Exhibit 13.
6. When he wanted to pay the balance of Kshs. 44/= to the S.F.T., he found that the amount had accrued to Kshs.7,000/=. He added that the Nairobi file disappeared and at that point, the S.F.T. Nairobi office stated that he could not transfer the land to himself since it had been transferred to John Muchori Baiya.
7. In 2015 a mob of people hired by John Muchori's evicted him and cut down his 680 banana stems and 250 coffee trees, which were about to flower. They also destroyed his forest of trees and fruits. He added that his borehole, zero grazing units, nappier grass, 2 permanent and a semi-permanent house were also destroyed. He produced the Agricultural Officer's report, photographs of the houses and a letter from the Forester to show the destruction. He produced them as follows:



1. The Crop Assessment Report dated 6th October, 2015 produced as P. Exhibit 14 and photographs produced as P. Exhibit 15.
 2. Photographs at pages 37-39 produced as P. Exhibit 15(a) - (i)
 3. Report dated 14th June, 2017 produced as P. Exhibit 16
 4. Report dated 12th March, 2017 produced as P. Exhibit 17.
8. His further testimony was that he reported the problem to the Lands Office. One, Mr. Caleb Mui of Lands and Settlement Officer in Nairobi, ordered for a ground report to be done. He produced the report dated 16th May, 2016 as P. Exhibit 18. The findings were that the development on the land was his and that John Muchori never settled on the land. The report confirmed that the family of John Muchori had paid the loan owing. The lands office concluded that the matter be referred to court.
 9. He filed Kitale ELC No. 126 of 2015 against the people who forcefully buried Stephen Fwamba Murunga's body on 3rd October, 2015 on his land. After the case, the court ordered for exhumation of the body and its burial in a public cemetery. He produced the judgment in ELC No. 126 of 2015 as P. Exhibit 19. He testified that he did not enjoin the Defendant in the case since she only showed up after the death of Fwamba and after the conclusion of the case.
 10. He testified that the transfer of the land from Stephen Fwamba to John Muchori was unlawful since the land belonged to him. The court order in Kitale SRMCC No. 18/1991 was never set aside or reviewed. He explained that when he went to the SFT, he found documents in favour of John Muchori. He produced the Charge (to SFT) as P. Exhibit 20, the Application for Consent P. Exhibit 21 and the transfer Form as P. Exhibit 22.
 11. He added that there were Summons for Rectification of Grant in Succession Cause No. 123 of 1996 in respect of the Estate of John Muchori. In the application, the applicant was praying that the suit land be included as part of the Estate of John Muchori (deceased). He produced the Summons for Rectification and Certificate of Grant as P. Exhibit 23 and the Certificate of Confirmation of Grant as P. Exhibit 24.
 12. The application for rectification was made on 25th June, 2016. The Defendant interfered with the suit land in 2015. Further, as at 19th December, 2016, the land was registered under S.F.T. He produced a search dated 19th October, 2016 as P. Exhibit 25. The title deed had been issued to the Defendant on 20th February, 2017. He produced a Copy of Title as P. Exhibit 26.
 13. When referred to DMFI-2 in comparison with DMFI-3 he testified that the sale agreement showed that Fwamba sold the land to John Muchori on 12th June, 1991. He further testified that the transfer form showed that it was done on 11th June, 1991 which was before the land was sold. His answer to that was that it confirmed fraud. He was further referred to DMFI-4 and 5 - (an Application for consent to the Land Control Board). On it he testified that consideration was for Kshs. 100,000/= and that the sale agreement was for Kshs. 15,000/=. He testified that the two documents (DMFI-4 and 5) contradicted with the sale agreement.
 14. His further testimony was that DMFI-5 was another consent to the Saboti Land Control Board (L.C.B.) which differed with the agreement. About DMFI-6, the Transfer dated 11th June, 1991, he further testified that it referred to a Charge dated 31st December, 1977. He added that the Charge the Defendant filed as DMFI-3 is dated 4th June, 1993, confirming that the two documents do not tally. PW1 was also referred to DMFI-12 where he testified that the same was a copy of a title deed issued to the Defendant on 20th February, 2017. He added that at that time, the suit herein was in court.



15. Upon cross-examination by Ms Arunga for the Defendant, PW1 stated that he resided in Nyasi Farm but not on the suit land. He added that he lived on a small plot since 1980 to 2018. He testified that the colonial owner who used to own a large parcel of land in that farm, subdivided it into 43 plots of 5 acres each for his workers. Stephen Fwamba was the “mzungu’s” (white settlers) dairy worker. When the mzungu left, he never left any house on plot 30.
16. The witness confirmed that he never resided on Plot 30. Further, he did not know if Stephen Fwamba was taken over as a farm worker of John Muchori Baiya. He stated that he bought the land with his brother Richard Nawanje. When referred to P. Exhibit 4, he stated that the signature on the seller’s part was his, with the witnesses as Charles Wanjama and Richard Nawanje. His brother was a witness and not a buyer. He confirmed that the Chief did not stamp but only signed on the agreement. He stated that Richard Nawanje surrendered the gift (land) to him. He acknowledged the gift agreement did not have his identification but only had his signature. He stated that he normally writes his name as a signature.
17. He stated that Stephen Fwamba gave him the receipts he used to pay to S.F.T. The originals were (produced) in ELC No. 126 of 2015. He confirmed that he paid the loan of Kshs. 2,600/= in Stephen Fwamba’s name in 1990 as advised by Mr. Koskei, the S.F.T. officer. When referred to a receipt dated 12th June, 1991 he confirmed that the same was for plot No. 30 in the name of John Muchori. Further, he had paid Kshs.5,000/= on account of Stephen Fwamba. He was also referred to P. Exhibit 9 about which he stated that he had sued Stephen Fwamba in 1991 and a decree dated 5th December, 1992 issued which he took to the land’s office.
18. Upon being referred to DMFI-4 and 5 (application to the L.C.B. that is DMFI-4 dated 12th June, 1991 and the transfer of 116/1991) he stated that by the time the decree was obtained, the transfer had already been done to John Muchori. He added that the transfer was paid on 24th July, 1991. The two documents were signed by someone he did not know. He was not sure if it was Stephen’s thumbprint. He stated that the agreement of 12th June, 1991 and the L.C.B. differed. He admitted that when he got the decree in 1992, he had not done a search at the S.F.T. The decree was not accepted by the S.F.T. By the time he took it there, he had not known that the land was transferred.
19. He admitted that Stephen Fwamba had not signed the transfer forms to him since the same was signed by the Executive Officer. The court file disappeared in 1992 and was traced in 2016. He added that this was about 23 years later. The decree was in the file. He did not apply to open a skeleton file when the file disappeared. He filed Kitale No. 126 of 2015 but he had not known that the land had been transferred to John Muchori. He added that the case did not involve the family of John Muchori since he had not known them.
20. PW1 was referred to DMFI-3 and 5, being the Charge documents and Transfer. He stated that from the Charge, the principal sum was to be paid in instalments and that the borrower was to pay interest calculated at the rate aforesaid from 6th December, 1977. He was also referred to DMFI-6 to which he stated that the transfer confirmed that the Charge was from 31st December, 1977. He added that both DMFI-4 and DMFI-6 have the same date and that the documents produced were stamped in the land’s office. He referred to P. Exhibit 18, to which he stated that the Land Adjudication Officer showed that the land was transferred to John Muchori Baiya on 4th July, 1991 vide Land Control Board Consent No. 21499. He stated that the settlement officer confirmed that Appendix E was signed in favour of John Muchori Baiya. He further stated that the officer also confirmed that John Muchori’s family was the one that completed the S.F.T. payments in 4th May, 2016 by payment of Kshs. 7,760/=.



21. He stated that he was present when the land officer visited the ground. The land officer did not indicate that he (PW1) paid some money. He did not know the person who evicted him from the land. He stated that he reported the damages to the police. He did not press charges. Stephen Fwamba left for Uganda in 1990 soon after he sold the land to him. He took possession after Stephen Fwamba sold him the land. He denied having forcefully taken possession in 2016 after Fwamba died. He was not aware that John Muchori was claiming the land, by the time he filed the suit in 2016.
22. His evidence was that the Defendant has been using the land for the last three years. He stated that she registered herself as the owner on 20th February, 2017. He was referred to P. Exhibit 10 to which he stated that compared to DMFI-4 and 5 at that time, the land had been transferred to John Muchori. That Fwamba had already signed the transfer form in favour of John Muchori.
23. Upon re-examination, PW1 stated that P. Exhibit 25, showed that the land was still in the name of S.F.T. as at 19th December, 1991. About P. Exhibit 10, he stated that the transfer was signed in April, 1992. The Title Deed was issued on 20th February, 2017. The report showing that the land was transferred to John Muchori was false. He denied that the family of Muchori paid the balance on 4th May, 2016. PW1 insisted he was not supposed to register the sale agreement. About the lost court file, he did not apply for a skeleton file since he had only reported to the court, and it was not his duty to do so. When he paid the loan, the receipt was not issued in his name since the allotment letter was in the name of Fwamba. P. Exhibit 4 - the Agreement showed that the buyers were himself and Richard Nawanje Richard.
24. PW2, Julius Nate Wasilwa, testified by first adopting his written witness statement dated 9th February, 2023 as his evidence in-chief. He was a retired Chief. He added that P. Exhibit 4 was done in his then office where he signed as a witness.
25. Upon cross-Examination by Arunga, he confirmed that he drafted the agreement. That the buyers were the Plaintiff and Richard Nawanje. He further confirmed that there were other people present. At the execution part, the Plaintiff signed and Richard was indicated as a witness. He admitted that from the agreement, the two were buyers. He stated that he signed it.
26. Upon re-examination, he stated that he was the one who drew the agreement and signed it. The Plaintiff and Richard Nawanje came before him to enter into an agreement. Richard Nawanje wrote on the agreement in his own hand. From the agreement, both Richard and Augustine were buyers. He clarified that the two buyers were buying the land from Stephen Fwamba and who was present. He stated that he thumb-printed the agreement. After the agreement, the Plaintiff took possession of the land and he has since been staying on the land.
27. One, Stephen Leshan testified as PW3. He stated he works at Kitale Law Courts, attached to the ELC Court. He testified that the file in Kitale ELC No. 126 of 2015 contained the original exhibits filed by the Plaintiff in the matter. It contained two original receipts, P. Exhibit 3 and 4, respectively. Further, P. Exhibit 3 was dated 26th March, 1990, being No. 396007. There was a payment of Kshs. 2,600/= . P. Exhibit 4 being No. 509859 for Kshs. 395/= was dated 8th June, 1979. The same was for payment of land deposit for plot No. 30, Nyasi Settlement Scheme. He produced receipts marked as PMFI-6 and 8 produced as P. Exhibit 6 and 8. He also produced the court file as P. Exhibit 27.
28. Upon cross-examination, he confirmed that the receipts were in Stephen Fwamba's name. He admitted that the Plaintiff's name did not appear on them.



Defendant's Case

29. The Defendant, Eunice Mugure Muchori, filed an Amended Defence dated 31/10/2018 in which she denied the allegations of the Plaintiff. She testified as DW1. She adopted her written witness statement dated 29th October, 2020 as her evidence in-chief. She was the 2nd wife of John Muchori Baiya. It was her testimony that Ruth Njeri Muchori was the 1st wife but that she had passed away.
30. Further, when her husband died, she obtained Letters of Administration in Eldoret HC Succession Cause No. 126/1996. She produced the documents filed on 2nd November, 2020 attached to the list dated 29th October, 2020 as D. Exhibit 1-17. Stephen Fwamba was her milkman for over 5 years. When the President (of Kenya) told Ugandans to go back to their country, he asked her what he would do about the land. They agreed with her husband that they would go to the Land Control Board to sell the land to her husband.
31. She and her late husband paid Stephen the purchase price while her husband was alive and he (Stephen) left for Uganda. Stephen had a parcel of land known as Trans Nzoia/Nyasi/30, approximately 5 or 4 acres. After he left, her husband died after a while. She went to use the land after some time. Her husband completed the payments with Stephen Fwamba. She could not recall if she had made payments to S.F.T. after the death of her husband. Ultimately, she got to register the land in her name. She had never met the Plaintiff nor agreed over the sale of the land.
32. She testified further that she was not aware whether Stephen Fwamba and the Plaintiff had sold to each other the land. Again, if there were cases in court, her husband was not a party. When referred to paragraph 7 of the Plaintiff of which stated that Stephen Fwamba died and the neighbours brought his body to her land, she stated that it was exhumed from it (land). She was further referred to paragraph 9 of the Plaintiff of which she testified that she was not aware that the Plaintiff has been on the land for 35 years.
33. DW1 was shown P. Exhibit 18. About it, she testified that there were two houses, one being for the mzungu. Further, she testified that the Plaintiff never occupied the land. It was her testimony that she also leased out the land. She found a well dug on the land. She testified further that she and family came to obtain the title later after her husband and Stephen Fwamba had signed papers. She denied using fraud to obtain the suit land. Further, all the neighbors know the land as "shamba ni ya kikuyu".
34. Upon cross-examination, DW1 confirmed that she was the administrator of the late John Muchori's Estate. She had forgotten to include the suit land in the succession cause in Eldoret since she had a lot on her mind. She included the land on 24th November, 2016. When referred to D. Exhibit 1 she stated that the amendment was pursuant to P. Exhibit 23 - the application of June, 2016. She was further referred to P. Exhibit 23 and she confirmed she had not brought anything to show the plot was registered in her husband's name at death. She was issued with the title directly from the S.F.T. in 2017. She was referred to P. Exhibit 25 official search of which she confirmed that it was not the same as her D. Exhibit 15 dated 17th January, 2018. She was illiterate. Her late husband bought the land on 12th June, 1991. She did not know how much her husband paid Fwamba, but he told her that he had completed the purchase. She did not know if the Plaintiff had bought the land from Fwamba in 1980. She went on that Fwamba owned the land. She did not know if he gave the original receipts to the Plaintiff. She was referred to D. Exhibit 1 about which she confirmed that the agreement stated Kshs.5,000/= and balance later. She was also referred to D. Exhibits 2 and 6 of which she admitted that the dates of agreement and transfer were 12th September, 1991 and 11th June, 1991 respectively. She was referred to D. Exhibit 4, 5, and 6 that is the Application for L.C.B. and Transfer, and stated that the amount was Kshs.100,000/= while the agreement was for Kshs.15,000/=. On being referred



- to D. Exhibit 3 and 6 being the Charge document and the Transfer respectively she stated that she was illiterate hence could not know its contents or understand it. Her late husband signed the offer on 8th June, 1993 but that he bought the land in 1991 from Fwamba. She admitted she was not on the land in 2015 but took occupation in 2016 after destroying Augustine's buildings. She admitted that she never applied to review the judgment in favour of the Plaintiff.
35. On re-examination, DW1 stated she did not reside on the land but she had been using it. She had been leasing it for more than five years. She also stated that P. Exhibit 3 and D. Exhibit 6 were dated 31st December, 1977. She added they corresponded. She added that when she swore the Affidavit in respect of the Succession Cause the land was yet to be transferred to her husband. Further, the letters D. Exhibit 3, 6, and 7 showed that Fwamba transferred the land to her husband. Stephen never signed a transfer in favour of the Plaintiff. She was referred to D. Exhibit 2, 4 and 5 of which she stated she did not know the person who filled the figures on documents D. Exhibit 4 and 5.
36. Regarding the burial case of the Plaintiff over Fwamba death, she came to know about it way long after it was concluded. She added that the Plaintiff never involved her husband in the case. She added she came to learn about the destruction of the houses after Fwamba's death. She stated that the neighbors were the ones who brought the houses down. She also stated that the Plaintiff did not reside on the land.
37. The Land Registrar, NAOMI ROP, testified as DW2. She stated that she had the (office) file for land parcel No. Trans Nzoia/Nyasi/30 and the green card. It was her testimony that the Defendant was the registered proprietor on 20th February, 2017. She further testified that the 1st entry was that of the Settlement Fund Trustee dated 18th November, 2005. She testified further that it then moved from S.F.T. to the Defendant. She testified that there were no encumbrances against the land. She testified that there was a restriction registered on the propriety section placed on 16th May, 2017 but not on encumbrance section. She testified that it prohibited any dealings until ELC No. 3/2017 was determined. She produced a certified copy of the green card as D. Exhibit 18.
38. On cross examination, DW2 confirmed that the Defendant was registered as owner on 20th February, 2017. She stated that in the year 2017, the lands office got a discharge from S.F.T. She further stated that the register was first opened on 18th November, 2005.
39. The Land Adjudication and Settlement Officer, Trans Nzoia County, CRECENTIA ATIENO NYANGO, testified as DW3. She testified that she had been the said officer since 2019. She testified further that the file relating to land parcel No. Trans Nzoia/Nyasi/30 showed that the land was initially allocated to Stephen Fwamba in 1978. The Settlement office had copies of the Charge but no letter of allocation. Fwamba paid a 10% deposit and later paid an additional Kshs. 5,000/= on 12th June, 1991. Further, thereafter he requested to have the land transferred to one John Muchori Baiya. The parties signed a transfer form, Appendix E which was produced as D. Exhibit 6. The parties went to the Land Control Board and a consent issued on 3rd July, 1991. It was her testimony that the S.F.T. office then issued a charge in favour of John Muchori since the land still had a balance of the loan with S.F.T. She testified further that John Muchori paid the balance of the loan to S.F.T. and was finally discharged. She added that the payments were made to the S.F.T. in Nairobi on 4th June, 1993, as per D. Exhibit 12 on 4th May, 2016 and 1990 for Kshs. 7,200/= and Kshs. 2,600/= respectively as per D. Exhibit 13 and 14. After he (Muchori) cleared the fee, the land was discharged on 20th February, 2017 in favour of Ruth Njeri Muchori and the Defendant as Administrators of Muchori's Estate. It was her testimony that by then the land was not yet transferred to the Administrators' names hence the receipt was issued in his name. She added that after discharge of the land the title was issued by the Land Registrar. She produced a certified copy of file as D. Exhibit 19.



40. Upon cross-examination, DW3 confirmed that there was no sale agreement between Stephen Fwamba and the Plaintiff. She stated that the document dated 9th February, 1980 (P. Exhibit 4) was between Stephen Fwamba and Richard Nawanje and Augustine Nawanje. She stated that according to the document, the seller was selling plot No. 30 in Nyasi Scheme with the agreed price of Kshs.25,000/= . The document was witnessed by one Julius Nate. There was a temporary injunction placed on the file in respect of SRM's Court 181/1991 at Kitale dated 19th August, 1991. The order restrained the Defendant from interfering, charging or dealing with any way with plot No. 30 Nyasi Farm until this case was heard. The defendant was Stephen Fwamba. She stated that the decree was issued on 5th December, 1992. She admitted that there was a transfer signed by the Executive Officer in favour of the Plaintiff around April, 1992 which was received on 30th October, 2015. She stated that the transfer and the decree were already in the file. DW3 stated that the form signed by the court was not the right one used to transfer land in S.F.T. She added that there was no communication to the court that the form was not the right one they use.
41. On re-examination, she stated that the order dated 19th August, 1991 and a decree dated 5th December, 1992 were in the file of S.F.T. She stated that Stephen Fwamba transferred the land to John Muchori Baiya on 11th June, 1991. She also stated that by the time the orders were issued, the land was already transferred to John Muchori.

Submissions

42. Counsel for the Plaintiff filed his submissions dated 30th September, 2024. He gave a summary of the case and identified three issues for determination. The first issue was whether the Plaintiff proved his case on a balance of probabilities. While submitting in the affirmative, he submitted that the Plaintiff purchased the suit land vide an agreement dated 9th February, 1980 executed before the area chief. He paid in full and took possession of the land. The Plaintiff, at the time of purchase, was with his brother Richard Nawanje who later surrendered his share in the suit land to the Plaintiff as per the agreement dated 25th December, 1989. The agreement complied with Section 3(3) of the *Law of Contract Act*. The ground report dated 16th May, 2016 confirmed that there was an agreement over the suit land between Stephen Murunga and the Plaintiff and another person.
43. The Plaintiff has been in continuous uninterrupted possession of the suit land for more than 35 years since 1980 to 2015 when the Defendant's agents forcefully evicted him from the land. There was documentary evidence of the developments the Plaintiff had done on the land which evidence was not controverted. She relied on Section 107 of the *Evidence Act*. Stephen Fwamba refused to sign the transfer documents prompting the Plaintiff to file a civil suit Kitale SRMCCC 181 of 1991 in which a decree was issued directing the executive officer to sign the transfer forms in favour of the Plaintiff. He added that Stephen Fwamba never appealed the said decision. She submits that the Plaintiff never included John Muchori in the case since he was not aware that Stephen was planning to sell him the land. Counsel submits that the reason why he never transferred the suit land in his name since 1991 was that he faced challenges in implementing the decree issued, since the settlement officer declined to register the Plaintiff as the owner, and also that the file disappeared in 1992. The file contained the Plaintiff's original documents, hence he was unable to settle the balance of Kshs. 44/= in time. The file was retrieved in 2016. When the Plaintiff was about to pay the balance, he found that it had accrued to Kshs. 7,000/= . The Plaintiff was again informed not to pay since the land was already in John Muchori's name. Stephen Fwamba went missing until 2015 when he resurfaced and died. He was buried on the Plaintiff's land but later exhumed vide orders in Kitale ELC 126 of 2015. The Plaintiff only learnt in 2016 that Stephen had transferred the land to John in 1991.



44. She further argues that the question begs as to why the Defendant failed to take possession of the land until 2016 before processing of the suit land. The Defendant got registered as the owner of the suit land through transmission on 20th February, 2017 when the case was already in court. The inclusion of the suit land into the Estate of John Muchori was illegal and irregular since the land did not form part of his Estate.
45. The second issue was whether the transfer of the suit land into John Muchori's name and finally into the Defendant's name was illegal and/or fraudulent. Submitting in the affirmative, counsel argued that Stephen transferred the suit land to John when the same did not belong to him since he had already sold the land vide an agreement dated 9th February, 1980. Stephen transferred the land when there was a decree in force declaring the Plaintiff as the owner of the suit land. That there was uncontroverted evidence that the Plaintiff has been in possession of the land for more than 35 years. He further submits that when the Defendant petitioned for letters of administration, the suit land had not been included in the list until 24th November, 2016 when the certificate of confirmation was rectified. By the time Stephen made the agreement dated 12th June, 1991 to John Muchori, Stephen did not own the land since he had already sold the same to the Plaintiff on 9th February, 1980. He added that the sale agreement was dated 12th June, 1991 while the transfer was dated 11th June, 1991 thus confirming there was fraud. Counsel also submits that the transfer of the LCB consent showed that the purchase price was Kshs. 100,000/= while the agreement was Kshs. 15,000/= thus contradicting each other. Further, there was fraud in the Charge dated 4th June, 1973 yet he was said to have purchased the land on 11th June, 1991. He added that the transfer was purportedly signed on 11th June, 1991 two years before the letter of offer on 4th June, 1993. Counsel submits that the judgment in ELC 126 of 2015 was never set aside. He urged the court to find that the Plaintiff was the rightful owner of the suit land.
46. The final issue on the orders to be issued was her submission that the Defendant held the suit land in trust for the Plaintiff. Counsel relied on Sections 25 and 26 of the [Land Registration Act](#) and submitted that the Defendant fraudulently acquired the land.
47. Counsel for the Defendant filed her submissions dated 9th August, 2024 where she gave a background of the case and identified five issues for determination. It is noteworthy that the submission was incomplete. They were not signed either. Thus, they amounted to nothing. This Court needs not comment on or summarize them at all. It is this court's view that that does not prejudice the client's position in determination of the matter since submissions constitute a "marketing language" of the parties putting forth their respective positions and views as was stated by the Court of Appeal case in Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another [2014] eKLR.

Analysis and Determination

48. This court has carefully considered the pleadings and the evidence on record and is of the view that the issues for determination are:
 - a. Whether there was a valid sale agreement between the Plaintiff and Stephen Fwamba.
 - b. Whether the Plaintiff has proved his case to the required standard.
 - c. Whether the Plaintiff is entitled to the orders sought.
 - d. Who should bear the costs of the suit?



a. Whether there was a valid sale agreement between the Plaintiff and Stephen Fwamba.

49. It was the Plaintiff's case that together with his brother Richard Nwanje, purchased the suit land from Stephen Fwamba on 9th February, 1980 at an agreed consideration of Kshs. 25,000/= . It was his case that he paid the full consideration in cash, but Stephen Fwamba refused to sign the transfer forms. PW1 testified that his brother gifted him his share. Upon cross-examination, PW1 admitted that his brother was a witness and not a purchaser. In the case of *National Bank of Kenya Ltd V Pipe Plastics Sam Kolit (K) Ltd* (2002) EA 503(2011) eKLR the court of Appeal held that:-

“ A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved.”

50. I have keenly perused the sale agreement dated 9th February, 1980 and it is outrightly clear that the same raises some doubt. To begin with, the seller's signature seemed to have a thumbprint and initials “LHT,” which was never explained by the Plaintiff. Even assuming that it was a thumbprint, there were other discrepancies that raise serious doubts over the authenticity of the agreement. One, the Plaintiff stated that he and his brother bought the land from Stephen Fwamba. The agreement indicated that the said brother was a witness and not a buyer. Again, the Plaintiff stated that his brother gave him his share of the land as a gift. There was no transfer document to evidence that fact. Also, if indeed the two parties brought the land from Stephen Fwamba and paid in full, then both would have been parties in the Kitale SRMCC 181 of 1991. Section 3(1) of the *Law of Contract Act* requires transactions on land to be evidenced in writing.

51. In addition, it was the Plaintiff's case that he purchased the suit land with his brother Richard Nwanje, who in the same agreement signed as a purchaser and also as witness number two. It is my humble view that there remain glaring discrepancies in the sale agreement. It was the Plaintiff's case that Stephen Fwamba gave him the receipts he used to pay to S.F.T. On cross-examination, PW1 stated that he paid the loan of Kshs. 2,600/= in Stephen Fwamba's name in 1990 as advised by the S.F.T. officer. He also confirmed that the receipt dated 12th June, 1991 was for the suit land in the name of John Muchori. He stated that he had paid Kshs. 5,000/= on account of Stephen Fwamba, but he failed to adduce evidence to that effect. It was not explained why the Plaintiff would pay for the land to the S.F.T. in the original seller's name and yet claim that he had brought the land from him: except evidencing or an activity of fraud or furtherance thereof by the Plaintiff, his explanation that the S.F.T advised him to do so is not backed by written evidence since the transactions involved land. PW3 during cross-examination also confirmed that the receipts for the suit land were in Stephen Fwamba's name.

52. On whether the Plaintiff could right claim to have bought the land, he testified that he had paid to the SFT Kshs. 2600/= and remained with a balance of Kshs. 44/=. That he was told by the Settlement Officer to pay the balance when doing clearance. This Court finds that from the Plaintiff's evidence, if Stephen Fwamba had sold to him the land and he did not complete the payment, the offer to Fwamba Stephen lapsed. Put differently, the land having not been transferred to the Plaintiff all along, it remained the property of SFT, and it had the legal right to allocate it to anyone else. That is what it did to John Muchori Baiya. In any event, when the Estate of John Muchori Baiya followed the legally laid down procedures and obtained the land by due process, and was the first to complete that exercise, it became the lawful owner of the land. Its title could not be challenged successfully by the Plaintiff.

53. It is my view that in as much as the PW1 claimed that he paid the purchase price via cash, there was no evidence to prove the same. Furthermore, PW2, the chief, only testified that there was sale of the land but did not comment on how it was paid. The burden of proving that he paid Kshs. 25,000/= rested



on the Plaintiff, which I find he did not discharge. There was therefore lack of consideration for the sale, which vitiated the contract; hence, the same was rendered null and void.

54. In the case of *Esther Kabugi Njuguna Vs. Martha Chebet & 3 Others* [2020] eKLR Mutungi J observed thus;

“Having found and held that there was no proof of payment of the purchase price to the plaintiff and/or that the plaintiff had signed, the transfer of the suit land in favour of the 1st Defendant, it follows that the sale transaction was voidable on account of lack of consideration and that the transfer effected in favour of the 1st Defendant was ineffectual and could not confer any interest...”

55. Even assuming that the agreement was valid, there was no consent by the S.F.T. for the sale and transfer, particularly the land having been owned by the said S.F.T. or even the Land Control Board for the transfer of the same, since it was to be entered into or the sale thereof. Given the above, I find that there was no valid agreement between the Plaintiff and Stephen Fwamba.

b. Whether the Plaintiff has proved his case to the required standard.

56. It is trite law that he who alleges must prove as provided under Section 107(1)(2) of the *Evidence Act* which states that:

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

57. Further, Sections 109 and 112 of the same Act states;

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

58. In the Court of Appeal case of *Palace Investments Limited V Geoffrey Kariuki Mwenda & another* [2015] eKLR, the court held as follows:

Denning J, in *Miller V Minister of Pensions* [1947] 2 All ER 372, discussing the burden of proof, had this to say; -

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not. This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

59. It was the Plaintiff’s case that he took possession of the land after purchase and has lived for 35 years uninterrupted. He testified that Mr. Fwamba gave him a receipt for Kshs. 395/= which he had paid a loan over it being a deposit of 10% with S.F.T. PW1 testified that Mr. Fwamba gave him the charge documents, which he used to pay the loan to S.F.T. It was his case that he paid the balance of Kshs. 44 on 22nd March, 1990. It was also the Plaintiff’s case that Stephen refused to sign the transfer forms, prompting him to file a case where the court issued a decree that the executive officer of the court sign



the transfer forms. It was PW1's case that after the transfer forms were signed, he went to repay the balance, only to find that it had accrued to Ksh. 7,000/= and that the land had been issued to John Muchori. PW1 admitted that when he got the decree in 1992, he had not done a search at the S.F.T. and that the decree was never accepted by the S.F.T.

60. It is my humble view that the Plaintiff ought to have done due diligence prior to entering into the further transactions with Stephen Fwamba, if he did, regarding the alleged sale, and prior to suing and obtaining the court decree, so as to establish that the suit land was not available. I am of the view that PW1's evidence was marred with inconsistencies since he failed to establish how he paid for the land. Furthermore, the evidence by DW2 and DW3 cemented the same.
61. It is noteworthy that the Plaintiff put his effort into poking holes into the Defendant's documents forgetting that it was his case and not that of the Defendant. It was the Plaintiff who was to prove that he bought the land, and not the Defendant, to prove that the Plaintiff did not buy the suit land.
62. Furthermore, the Plaintiff stated that he sued Stephen Fwamba in Kitale SRMCC 181 of 1991 and obtained a decree in his favour. He produced evidence to that effect and called one Mr. Leshan, a court official in Kitale, who testified as much and produced the relevant file. He stated that Stephen Fwamba ought not to have sold the land to John Baiya because he (Plaintiff) had the decree in his favor. The Defendant discounted that by contending that by the time the decree was obtained, the land had been transferred to him.
63. Furthermore, the Plaintiff's claim of fraud at this stage is not only time barred but completely stale, pursuant to Section 26(1) of the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya which provides that actions based on fraud do not begin to run until after the fraud is discovered or could have been with reasonable due diligence been discovered. The reason for this view is that these claims cannot be raised this late in life because from the time the Plaintiff discovered or could have reasonably discovered that John Baiya was registered in the S.F.T as an owner to 2017 is a period of about 24 years. An action for fraud cannot be brought after such a long period of time.
64. The basis for the finding above is that he (PW1) testified that he entered into an agreement with Stephen Fwamba to buy his land. Then the seller gave him an unsigned allotment and transfer forms, hence he could not process the title in his name. After that, he sued him in Kitale SRMCC 181/1981 and obtained a decree – P. Exhibit 4 – in his favour, that case ordered that the Executive Officer execute the transfer documents. Following the decree, the Executive Officer signed the transfer forms, P. Exhibit 5 in his favour in April, 1992. On cross-examination, he added that he took to the land's office the decree dated 5th December, 1992. Also, he took the transfer forms and decree to the Settlement Fund Trustees (S.F.T.) offices, but was told that the land could not be transferred to him. The decree was not accepted by the S.F.T. On 15th May, 1993, the Court summoned the S.F.T. officer to explain why he did not effect the transfer.
65. Put differently, of curiosity is that as early as 1992 and even May 1993, when the Plaintiff went to the SFT offices to register the decree, he was informed that John Baiya had bought the land and it was already registered in the records in his (John Baiya's) name. It was the testimony of PW1 that was the reason why the decree could not be effected in his favour. He ought to have acted swiftly to confirm whether or not there was fraud and sue over it if it existed. He cannot raise the issue now.
66. On further cross-examination, he admitted that by the time the decree was obtained, the transfer (apparently, of the records in the S.F.T.) had already been done to John Muchori. It was paid on 24th July, 1991. Thus, by 1993 when his registration with the S.F.T as owner was refused or when he took the decree to register there and he was informed that it was not hence moved the court to summon



- the S.F.T. which explained why, he knew or ought to have known that for John Baiya to be registered as such, the transactions were done using documents obtained by John Baiya from Fwamba. And if there was fraud, then he should have challenged it immediately but not after the end of the limitation of actions.
67. Furthermore, the Plaintiff's argument that in 2017, when the registration of the land was made in favour of the Defendant, there was a decree it flawed in the sense that there was no valid decree in his favour capable of execution as at the time. On this issue, this issue court carefully considered the evidence presented by both parties on the issue. Indeed, there existed Kitale SRMCC No. 181 of 1991 in which the Plaintiff herein was the Plaintiff therein. The Plaintiff's own testimony is that the S.F.T. Officials were summoned on 15th May 1993 to explain the reason for failure to register the decree. After that, the Court file disappeared until 2016, when on 20th January of the year, the Executive Officer called in writing for the file from the Nakuru Archives, as per P. Exhibit 13. First, from the said testimony, the Court file never disappeared. It was only taken to the archives. The Plaintiff did not do due diligence to find out where the file was. Secondly, from May 1993 to January 2016, it was 24 years from when the decree should have been last executed to when it was sought to be executed.
68. The Plaintiff could not rely on a stale decree to impugn the title of the Defendant. In terms of Section 4(4) of the *Limitation of Actions Act*,
- “An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.”
69. In addition, having already established that the sale agreement between the Plaintiff and Stephen was invalid, I find that the Plaintiff was never conferred with the interest in the suit land to begin with. Additionally, the Plaintiff's contention that Stephen Fwamba transferred the land when there was a decree or order of the Court is neither here nor there for the reason that it was the Plaintiff's own evidence that he never found Stephen. Therefore, whatever transactions Stephen had with John Baiya, they were done innocently or without the knowledge of any order barring him from carrying them out. That meant that John Baiya was an innocent purchaser of the land for value. Again, the Plaintiff slept on his rights in the sense that when he realized that the land was sold to John Baiya, he did not apply to enjoin him as a Defendant or Interested party in his Kitale SRMCC No. 181 of 1991 or sue him separately. He is estopped from raising a claim against the Estate of the late John Baiya over two decades later.
70. Lastly, the Plaintiff raised the claim that he has resided on the suit land for 35 years. First of all, it is my humble view that he did not prove the claim to the required standard. In any event, even if he did, this Court finds that to the extent that the land was in the name of the S.F.T., it was public land which the Plaintiff could not lay claim over, by way of adverse possession or bar to a claim for recovery.
71. In view of the same, I find that the Plaintiff failed to prove his case to the required standard of probabilities.



c. Whether the Plaintiff is entitled to the orders sought.

72. Having established that the Plaintiff failed to prove his case on a balance of probabilities, he is therefore not entitled to the orders sought in his amended plaint dated 9th October, 2018. The upshot of the foregoing is that the Plaintiff's case is hereby dismissed with costs to the Defendant.

73. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED VIA THE TEAMS PLATFORM THIS 12TH DAY OF MARCH, 2025.

HON. DR. IUR F. NYAGAKA

JUDGE

From 08:50 AM in the presence of,

Mr. Teti Advocate for the Plaintiff

Ms. Arunga Advocate for Defendant

