



**Nzai & another (Suing as Administrators of the Estate of Kaingu Kombe Nzai) v Ngala
(Environment & Land Case 88 of 2017) [2025] KEELC 3760 (KLR) (8 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 3760 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 88 OF 2017**

EK MAKORI, J

MAY 8, 2025

BETWEEN

JAMES KAZUNGU KAINGU 1ST PLAINTIFF

RACHEL KACHE KAINGU 2ND PLAINTIFF

SUING AS ADMINISTRATORS OF THE ESTATE OF KAINGU KOMBE NZAI

AND

SAMUEL CHAI NGALA DEFENDANT

JUDGMENT

1. The lawsuit was initiated by a plaint dated 24th March 2017, in which the Plaintiffs seek the following reliefs:
 - a. An obligatory injunction, mandating the Defendant to vacate the Plaintiffs' land titled No. Kilifi/Ngerenyi/912, Kilifi County.
 - b. A permanent injunction, prohibiting the Defendant, along with his agents, servants, employees, or any other individuals claiming under his authority, from trespassing, entering, or otherwise interfering with the Plaintiff's parcel of land titled No. Kilifi/Ngerenyi/912.
 - c. Any additional or further orders that the court may consider appropriate to issue in the interest of justice.
 - d. Costs associated with this lawsuit.
2. The Defendant filed a defence dated 12th June 2017, and by counterclaim dated 12th June 2017, amended on 26th January 2023, sought the following reliefs:
 - a. A declaration that six acres of land within Title No. Kilifi/Ngerenyi/912 is the property of the Defendant.



- b. An order that the six acres of land within Title No. Kilifi/Ngerenyi/912 is to be subdivided and registered in the name of the Defendant as the absolute owner thereof.
 - c. The costs of this suit and any applicable interest calculated at court rates.
 - d. Any additional relief that this court may deem appropriate.
3. The first and second Plaintiffs provided testimony as PW1 and PW2 and formally adopted their respective written witness statements dated 12 February 2024 as their testimonies in chief. The Plaintiffs presented exhibits numbered 1 to 16, as detailed in their list of documents dated 24 March 2017, and exhibits numbered 17 to 23, as contained in the Plaintiffs' supplementary list of documents dated 12 February 2024.
 4. The Plaintiffs presented a singular witness, Jane Sidi Chokwe, who testified as PW3, affirming her testimony as well.
 5. A crucial aspect of the Plaintiffs' suit is that the 1st Plaintiff is the legally registered owner of the contested property, specifically land title Kilifi/Ngerenyi/912, which measures approximately 3.9 hectares. He inherited this property from his deceased brother, Kenga Kombe Kilinga, who passed away on May 27, 1993, at Koyoni-Ngerenya, following Kilifi SRM's court land Succession cause No. 9 of 1994, concerning the estate of Kenga Kombe Kilinga.
 6. The Plaintiffs' position is that the Defendant encroached upon the contested property following the death of Kenga Kombe Kilinga, leading the Plaintiffs to submit complaints to the Chief's Office in Ngerenya. Despite a written notice issued by the Chief to the Defendant, instructing them to vacate the contested land within three months from July 1, 1997, the Defendant neglected and/or refused to vacate the property.
 7. The Defendant has persistently occupied the contested land without any legitimate claim and has subjected the Plaintiffs to threats of physical harm whenever the Plaintiffs access the parcel of land. Consequently, the Plaintiffs seek an order for a mandatory injunction compelling the Defendant to vacate the suit land. Unless the Defendant is obligated by a court order to vacate the disputed land, the Plaintiffs will continue to suffer losses and damages; there is a hindrance to peacefully possessing and enjoying their duly registered property.
 8. Conversely, the Defendant testified as DW1 and adopted his written witness statement dated 12 June 2017 as his testimony in chief. Based on the evidence, he presented exhibits Nos. 1 to 5, which are attached to his list of documents dated 24 August 2017.
 9. The Defendant's testimony significantly asserts a purchaser's interest in the suit property, claiming he purchased the land from the deceased Kenga Kombe on July 17, 1997, and was put in possession. The succession conducted by the Plaintiffs over the deceased's property failed to acknowledge their overriding interest in the suit property by purchase.
 10. From the materials and submissions presented by the parties, the court frames the following issues to determine this suit:
 - a) Whether the Defendant trespassed onto the suit land.
 - b) Whether there was a valid agreement to sell 6 acres of the suit land to the Defendant.
 - c) Who shall bear the costs of the suit and counterclaim?



11. Learned counsel for the Plaintiffs, Mr. Kinaro, submits that, based on the evidence adduced by the Plaintiff, both oral and documentary, it is evident that on the balance of probabilities, the 1st Plaintiff has demonstrated that he is the rightful legal owner of the suit property, which was transferred to him by the Government of Kenya through the Settlement Fund Trustees (SFT) following due process. The 1st Plaintiff has established, through the evidence on record, the process by which he registered as the proprietor of the suit property. The court is tasked with considering and evaluating the evidence submitted by the Plaintiffs and concluding that they have sufficiently proved their case on the balance of probabilities and granting the orders sought in the Plaint dated 24th March 2017.
12. Mr. Kinaro identifies discrepancies within the sale agreement dated 17 July 1987. According to him, this agreement was executed one month after the event, contradicting the assertion that it was dated 17 June 1987, as argued in the Defendant's counterclaim and witness statement. During cross-examination, counsel avers that the Defendant acknowledged that the aforementioned sale agreement was not witnessed by Njoroge Nyaga, advocate, as indicated on the face of the agreement, nor was it signed by Henry Mwachitu and Baraka Yeri, whose names appear as witnesses on the sale agreement. The parties did not appear before Njoroge Nyaga, advocate, and were unfamiliar with him; however, the sale agreement erroneously claims that Mr. Njoroge Nyaga witnessed it. Furthermore, the agreement was executed at a cybercafé in Kilifi town, rather than in an advocate's office. The sale agreement was registered as a document on 31 May 2017, which occurred long after the Defendant had been served with a summons to enter an appearance in this suit, to which he complied on 25 June 2017. The registration of the sale agreement, nearly 30 years later, was purportedly prompted by a desire to lodge a caveat on the title held by the Plaintiff. The Defendant did not produce the original sale agreement dated 17 July 1987 during court proceedings when requested in cross-examination. In his examination-in-chief, the Defendant stated that he was shown Defense exhibits no. 2 (receipt dated 6 October 1988), Defense exhibit No. 4 (letter dated 27 July 1990), and Defense exhibit No. 1 (a copy of a list of settlers) by the Vendor before the alleged purchase of the six acres central to the counterclaim.
13. Mr Kinaro asserts that, however, during cross-examination, it was revealed that the receipt dated 6 October 1988 did not exist on 17 June 1987, when the Defendant allegedly purchased the six acres. Similarly, the letter dated 27 July 1990 was likewise non-existent on 17 June 1987 at the time of the reported purchase of the six-acre suit land. The list of settlers submitted as evidence lacks a date. Consequently, due to the inconsistencies in the Defendant's testimony regarding the acquisition of the six acres in question, it is asserted that the Defendant has not met the burden of proof on a balance of probability to establish the lawful acquisition of the claimed six acres in this suit. The court should scrutinize and assess the evidence presented by the Defendant, ultimately concluding that it fails to substantiate the Defendant's claim on a balance of probability, thereby warranting the dismissal of the counter-claim with costs.
14. Mr. Shujaa, representing the Defendant, asserts in his submissions that the evidence presented demonstrates that the 1st and 2nd Plaintiffs are the administrators of the estate of Kaingu Kombe Nzai, who was registered as the owner of the suit land on 28th August 2006.
15. Counsel asserts that the evidence further substantiates that the late Kaingu Kombe Nzai inherited the disputed land from his deceased brother, the late Kenga Kombe, who was the original allottee of the disputed land pursuant to court order issued in Kilifi SRM Succession Cause No. 9 of 1994, along with a letter dated 2nd October 1996 authored by the District Land Adjudication & Settlement Officer, which notified the Director of Settlement that Kaingu Kombe Nzai should be registered as the owner of the disputed land following the court order issued in the Succession Cause.



16. The Defendant also presented an extract of the nominal roll of the Settlement Scheme, which displays the list of settlers in the Ngerenyi Settlement Scheme and indicates Kenga Kombe as the allottee of parcel No. 912. Additionally, the Defendant produced a receipt for loan repayment made to the Settlement Fund Trustees (SFT) for the suit land in the name of Kenga Kombe, dated 6th October 1988 (Defendant's exhibit No. 2). The bundle of receipts submitted by the Plaintiffs as exhibits No. 8, 9, and 10 pertains to loan repayments made to the Settlement Fund Trustees by Kaingu Kombe Nzai after the transmission of the suit land into his name, pursuant to the order made in the aforementioned succession cause.
17. According to counsel, the evidence demonstrates that the suit land was transferred to the late Kaingu Kombe Nzai upon transmission pursuant to the succession cause, resulting in his registration as the owner of the suit land on 28 August 2006. The Defendant testified that the late Kenga Kombe had sold him 6 acres of the suit land on 17 July 1987 for a price of Ksh. 30,000 before his demise; however, he passed away before the subdivision of the 6 acres of land could be executed and transferred to him. The Defendant produced a copy of the sale agreement as Exhibit No. 3. The Defendant asserts that he took possession of the 6 acres of land in 1987, erected his houses, constructed a borehole on the suit land, planted various trees, and has owned the suit land continuously since that time. The Defendant submitted photographs of the suit land as evidence of the developments he undertook on the suit land.
18. Considering the opposing factions regarding a sale agreement between the Defendant and the deceased Kenga Kombe, I believe the sale was executed in 1987, leading to the Defendant's possession of the six acres. The validity, nature, and form of the aforementioned agreement could have been scrutinized at that time, during the lifetime of the deceased Kenga Kombe and his father, Kaingu Kombe Nzai, who is also deceased. The Defendant explained that this is how he acquired possession of the six acres. Evidence presented by the Defendant regarding that agreement of sale has not been dislodged, despite the inconsistencies pointed out by the Plaintiffs.
19. I concur with Mr. Shujaa, representing the Defendant, that the sale agreement satisfied the stipulations of Section 3(3) of the *Law of Contract Act*, Chapter 23 of the Laws of Kenya, in that the agreement pertaining to the disposition of the six acres of land was not only documented but also signed by both parties, with their signatures duly attested by a witness. As a demonstration of the performance of the agreement, the Defendant was put in possession of the six acres of land, maintained possession, and established his residence thereon.
20. The Plaintiffs contended that Kenga Kombe passed away on May 27, 1993, and that the Defendant unlawfully encroached upon the disputed land after his demise. In their respective testimonies, the Plaintiffs recounted that their deceased father visited the contested land eight days following Kenga Kombe's death and discovered a structure under construction. Upon inquiring with neighbors, it was learnt that the Defendant was responsible for the construction. The identities of the neighbors were not disclosed, nor were they called to substantiate the Plaintiffs' testimony. It is apparent from their testimonies that neither the Plaintiffs nor PW3 witnessed this event. Consequently, their testimony on this matter is entirely hearsay. Assuming it is accurate that the Plaintiffs' father visited the disputed land eight days after Kenga Kombe's death and discovered the Defendant constructing a house on the land, he would have taken immediate action to halt the construction. However, the letter from the area Chief to the Defendant demanding a cessation of the construction was written on July 1, 1997, four years after Kenga Kombe's death. After the Plaintiffs' father had initiated and completed the succession proceedings at Kilifi, the letter identifies Kaingu Kombe Nzai as the owner of the disputed land.
21. The Defendant testified that, after the demise of Kenga Kombe, his sibling, Kaingu Kombe Nzai, visited the disputed land in 1995 and requested the Defendant to delineate the boundaries of the



remaining six acres. The Defendant complied with this request, and Kaingu Kombe Nzai disposed of a portion of the residual land to a third party, the late George Stephen Bahati. Thus, the allegation that the Defendant encroached upon the disputed land following the death of Kenga Kombe appears to be an afterthought. Furthermore, the evidence indicates that when the Plaintiffs became involved, they were required to reach an agreement with the family of the late George Stephen Bahati, who owned the remaining parcel of land, to subdivide the six acres into two parcels, as substantiated by the agreement dated 21st August 2020. This substantiates that the family of the third party was also in possession of a portion of the disputed land.

22. Based on the evidence presented, the Defendant's entry onto the subject land was in accordance with the sale agreement established between himself and the late Kenga Kombe. When the Plaintiffs' father became involved, the Defendant was already in possession and actively occupying the subject land. The Defendant had taken possession of the six acres of land as part of the performance of the sale agreement and maintained both actual and constructive possession of these six acres. Consequently, the Defendant held equitable rights over the land, binding on the Plaintiffs' father; therefore, the Defendant cannot be characterized as having encroached upon the subject land.
23. The late Kaingu Kombe Nzai initiated his succession cause in 1994. By then, the Defendant had already established an interest in the six acres of land. He testified that Kaingu Kombe did not inform him of the ongoing succession proceedings, which would have allowed him to secure his interests in the subject land.
24. I am inclined to agree with this assertion by the Defendant. In light of the aforementioned evidence, the late Kaingu Kombe Nzai should not have inherited the entirety of the parcel of land. He was aware that the deceased had sold 6 acres of the disputed land to the Defendant, who was in actual possession; consequently, he was not entitled to inherit the 6 acres that had already been transferred to the Defendant. His registration of the entire disputed land was acquired through misrepresentation and the failure to exclude the 6 acres of land in favour of the Defendant. It is apparent that the Plaintiff's father, being cognizant of the historical context of the suit land, took advantage of the non-registration of the 6 acres of land in favor of the Defendant and registered himself as the sole proprietor of the entire suit land. The late Kaingu Kombe Nzai knowingly misrepresented the truth regarding the suit land at the time of the succession cause and concealed that 6 acres of the land he inherited from the deceased had already been sold to the Defendant.
25. I fully concur with the Defendant's assertion that the Plaintiffs' father holds the six acres of land in constructive trust on behalf of the Defendant, as established in the case of *Macharia Mwangi Maina & others v Davidson Mwangi Kagiri* [2014] eKLR. In this case, the Court determined that the purchasers of the suit land, who had been placed in possession by the vendor, were safeguarded by Section 30(g) of the Registered *Land Act*. The vendor's actions created an overriding interest in favor of the purchaser concerning the suit land. Furthermore, the vendor established an implied or constructive trust in favor of the purchaser. The purchaser's rights constituted equitable rights binding on the land, and the absence of any reference to the trust's existence in the register did not impede the enforceability of the trust. While the late Kaingu Kombe Nzai is officially recognized as the proprietor of the disputed land, this registration is contingent upon the interests of the Defendant, who was in possession of the six acres of land at the time of registration.
26. Section 30(g) of the Registered *Land Act*, Chapter 300 of the Laws of Kenya (repealed), under which Kaingu Kombe Nzai was registered, was enacted as follows:



‘Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted in the register; -

(g) The rights of a person in possession or actual occupation of land which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed.’

27. The Defendant’s ownership of the six acres of land was based on a sale conducted by the original allottee, Kenga Kombe, from whom the late Kaingu Kombe Nzai inherited his interests. By accepting the full purchase price from the Defendant and providing him with vacant possession of the six acres of land, the late Kenga Kombe established a constructive trust in favor of the Defendant, which does not require registration in the land register of the property under dispute.

28. In this regard, the decision cited by Mr. Shujaa—*Isack M’Inanga Kiebia v Isaya Theuri M’Lintari & another* [2018] eKLR is pertinent. Trusts, including customary trusts, are considered overriding interests within the purview of Section 28(b) of the [Land Registration Act](#) and do not require notation in the register.

29. The absence of consent from the Land Control Board should not undermine the interests of the Defendant. It was the contractual obligation of the vendor, Kenga Kombe, and following his demise, his successors in title, specifically the Plaintiff’s father, Kaingu Kombe Nzai, to secure the requisite consent.

30. as accurately referenced by Mr. Shujaa, in the matter of *Aliaza v. Saul* [2022] KECA 583 KLR, the Court of Appeal rendered the following decision:

“In my view, from the time the appellant entered the first of the two parcels of the suit land in 2002 and into the subsequent portion that he purchased in 2004, a constructive trust in his favour was created in respect of the land. Such trust, as was found by the Court in the case of *Macharia Mwangi Maina*, became an overriding interest over the suit land. The failure on the part of the respondent to obtain the necessary consent from the Land Control Board within the required period of six(6) months to enable the appellant transfer the suit land into his name does not render the transaction void. Equity and fairness, the guiding principles in Article 10 of *the Constitution*, require that the [Land Control Act](#) be read and interpreted in a manner that does not aid a wrongdoer, but renders justice to a party in the position of the appellant.”

31. A similar position was reiterated in the matter of *Jonathan Kaposhi v Colleta Mbatha Maweu & 4 others* [2021] eKLR, wherein the court articulated as follows:

“From the foregoing, it is quite obvious that whether one looks at this case from the perspective of constructive trust and proprietary estoppel (Article 10(i)(b) as read with 10(2)(b) of *the Constitution* or that of overriding interests under Section 30(g) of the Registered [Land Act](#) Cap.300 (now repealed) and 28 (b) of the [Land Registration Act](#) No3 of 2012, there is only one conclusion, namely, that the Defendants now own the parcels that they occupy after having been put in that possession by the Plaintiffs father. The Defendants possession of their respective parcels is superior to the title held by the Plaintiff.”

32. The absence of consent from the Land Control Board should not impede the registration of the Defendant as the owner of the 6-acre Title No. Kilifi/Ngerenyi/912. The Defendant lawfully acquired



this property from the uncle of the Plaintiffs before the registration of their father as the proprietor of the disputed land.

33. The conclusion is that the Plaintiffs are not entitled to vacant possession of the disputed land or the order of permanent injunction as asserted in the plaint. Therefore, the Plaintiffs' case is dismissed with costs. Conversely, the Defendant has substantiated his counterclaim and judgment as specified in the amended counterclaim is hereby allowed with costs.

DATED, SIGNED, AND DELIVERED VIRTUALLY IN MALINDI ON THIS 8TH DAY OF MAY 2025.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Kinaro for the Plaintiffs

Mr. Shujaa for the Defendant

Happy: Court Assistant

