



REPUBLIC OF KENYA



**KENYA LAW**  
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**Sikuku v Chemtai (Land Case Appeal E005 of 2023)  
[2025] KEELC 3755 (KLR) (8 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 3755 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
LAND CASE APPEAL E005 OF 2023**

**EC CHERONO, J**

**MAY 8, 2025**

**BETWEEN**

**JOHN SIKUKU ..... APPELLANT**

**AND**

**ESTHER CHEMTAI ..... RESPONDENT**

*((being an appeal arising from the judgment of Hon. M. MUNYEKENYE  
SPM delivered on 11-01-2019 in SPM-ELC NO. 14 of 2019))*

**JUDGMENT**

1. The Appellant, John Sikuku had sued the Esther Chemtai, the Respondent herein at Kimilili in SPM-ELC NO.14 of 2019 (herein referred to as the “former suit). Vide a plaint dated 16<sup>th</sup> April 2019, the Appellant sought an order of a permanent injunction restraining her, her agents and/or servants or whosoever from interfering with peaceful user and enjoyment of his rights as owner of land parcel NO. Ndivisi/Ndivisi/1XX4. The plaintiff/Appellant also sought for costs of the suit.
2. The defendant/respondent filed a statement of defence dated 26<sup>th</sup> April 2019 denying the plaintiff/Appellant’s claim and put him to strict proof thereof.
3. The parties filed compliance documents under order 11 of the *Civil Procedure Act* and thereafter fixed the matter for hearing where the plaintiff/Appellant called three witnesses while the defendant/Respondent testified alone.

**Plaintiff’s Case.**

4. John Sikuku Wasiwa (PW1) Was sworn and identified himself as a resident of Bochi area in Bungoma Central. He referred to his witness statement dated 16/04/2019 which he adopted as his testimony-in-chief. He stated that he lives in portion of land comprised in land parcel NO. Ndivisi/Ndivisi/1XX4 measuring four and a half acres which he purchased from one John Murumba Wasike in 1999



at a consideration of Kshs. 330,000/= . He said that without any colour of right, the defendant/ Respondent entered into unutilized part of his land on 24/02/2019 and that in 2009, the said John Murumba died. He referred to his list of documents dated 16/04/2019 containing five items but the 5<sup>th</sup> item is indicated as photographs but the same were not annexed thereto. He therefore produced only four items as P-Exhibits 1, 2, 3 and 4.

5. On cross-examination, the plaintiff/Appellant stated that the suit land parcel NO. Ndivisi/ Ndivisi/1XX4 belonged to Robinson Wasike Namisi who died in 1994 and that he bought a portion of the said land from one John Murumba Wasike who is the son to Robinson Wasike Namisi. He said that when he purchased a portion of the suit land from the said John Murumba, he did not show him the title deed. He admitted that Succession to the estate of Robinson has not been done and that he bought a portion of the suit land from John murumba after the death of Robinson, the registered owner. He stated that he does not know the wives of the registered owner nor all his children. He stated that since he bought the suit land, they have not gone to the land control Board and that he was aware John murumba died in 2009.
6. On Re-examination, the plaintiff stated that they live on the suit land with his family and that after the seller died, no administrator has been appointed for his estate.
7. Sarah Mideva Sirengo (PW2) Was sworn and identified herself as a farmer and a resident of Mahanga in Naitiri. She referred to her witness statement dated 15/07/2019 which she adopted in her testimony-in-chief. She stated that John Sikuku Wasilwa, the plaintiff herein bought land from her husband while he was still alive. She stated that they inherited the land and they lived with her husband John Murumba for 9 years before he died and that she did not know he had another wife. She stated that they lived with her husband John Murumba on the suit land for 8 years they moved out of the land. She admitted that no succession has been done for the estate of her late father-in-law Robinson Wasike Namisi nor her husband John Murumba.
8. On cross-examination, the witness was shown the land sale agreement Produced as P—Exhibit 1 and denied having signed the same. She stated that the suit land parcel NO.Ndivisi/Ndivisi/1XX4 is registered in the name of her father-in-law Robinson wasike Namisi(deceased) and that succession has not been done.

### **Stafford Mukasa Namisi(PW3)**

9. The witness was sworn and identified himself as a farmer and a resident of Ndivisi. He stated that John Sikuku Wasilwa who is the plaintiff herein is his son and that John Murumba Wasike sold him a portion of the suit land. He referred to his witness statement dated 18/11/2019 which he adopted as his testimony-in-chief. He stated that Sarah Mideva is the wife of John Murumba Wasike and that he witnessed their marriage. He stated that after selling their entire share of the suit land measuring four and a half acres, the said John Murumba moved and bought another land in Naitiri where he lived with his family and where he was buried after his death. He admitted that succession was not done but clansmen helped in doing subdivision and that some of the sons of Robinson have since sold their share of the suit land. He stated that if succession is done, John Wasilwa, the plaintiff herein can be given the share that belonged to John Murumba Wasike.
10. On cross-examination, the witness stated that he did not sign the sale agreements produced as P-Exhibit NO. 1, 2, 3 and 4 respectively.



## Defendant's Case.

11. Beatrice Chemtai (DW1) identified herself as a casual labourer. She referred to her witness statement dated 26/4/2019 which was adopted as her testimony-in-chief. She referred to her list of documents containing 5 items which she produced as D-Exhibits 1, 2, 3, 4 and 5 respectively. She stated that Robinson Wasike Namisi, the registered owner of the suit land and also her Father-in-law died in 1994 and that she lives on the suit land.
12. On cross-examination, she stated that she lived with her husband John Murumba on the suit land until his demise in June,1999. She stated that she was not told by her deceased husband that he sold the suit land.
13. After considering the testimony of the plaintiff and his witnesses and that of the defendant as well as the documents produced by the parties and submissions by Counsel, the trial magistrate rendered herself on 11<sup>th</sup> day of January 2023 by dismissing the former suit with costs to the Defendant/Respondent. The plaintiff/Appellant was dissatisfied and preferred the present appeal on the following seven (7) grounds;
  1. The learned trial Magistrate erred in fact and in law when She dismissed the Appellant's prayer for injunctive relief notwithstanding that he had demonstrated sufficient cause to justify the grant of such relief.
  2. The learned trial Magistrate erred in law and in fact when She failed to recognise that the relief the Appellant sought before her was grantable on grounds other than the establishment of proprietary rights.
  3. The learned trial Magistrate erred in fact and in law when, notwithstanding her own well-reasoned finding, that the Respondent did not have any right to live or work upon the suit property and that her defense and testimony against the Appellant's claim was a sham and a fabrication, nevertheless gave her a platform through which to invade and cause mayhem on the disputed property.
  4. The learned trial Magistrate erred in law and in fact when she totally failed to appreciate that the law is a tool for social engineering empowering her and the parties to be creative in addressing pertinent issues before her including an orderly societal environment.
  5. The learned trial Magistrate erred in fact and in law when she failed to grant the Appellant necessary protection despite evidence that the Appellant had lived and worked on the suit property for more than 34 years by dint of which he has acquired prescriptive rights over the property.
  6. The jurisprudence around the disposition of any immovable property of the estate of a deceased person as provided for in sections 45 and 82(b)(ii) of the *Law of Succession Act*, among others, is bad law urgently in need of a re-look for being rigid and insensitive of its environment.
  7. The learned trial Magistrate erred in fact and in law when she failed to realize the likelihood of mayhem resulting from the judgment and invoke the court's inherent power to put in place measures to protect the Appellant and his family, even if in the interim for substantive justice which is the objective of the due process.



### **Appellant's Submissions.**

14. The Appellant through the firm of M/S Omagwa Angima & Co. Advocates condensed all the 7 grounds of appeal into one ground number 6 and argued that the law as it obtains prohibits the disposal of immovable assets of estate property of a deceased person before confirmation of grant may be well intentioned but prone to abuse in the process occasioning serious injustice. He submitted that the provision was enacted into law without due regard to the circumstances obtaining in Kenya. He argued that besides, it can hardly be said to be founded on principles of justice and fairness and does not sit well with justice and morality and is not in tandem with our obtaining constitutional dispensation. He stated that a look at the facts of this particular case leaves a bad taste in the mouth! The learned Counsel submitted that if all one has to do is sell his or her share of the estate of a deceased and then thereafter raise the defence of lack of confirmed grant, the same is bound to and has done a lot of injustice, disproportionate with the mischief it was intended to address.
15. The learned Counsel submitted that there is no justice where someone can sell his share of his father's estate, pocket the money, even purchase alternative property elsewhere and move out only to return and claim the protection of the law merely stating that he had no authority to sell. He stated that it would be different if another member of the estate proved that his rights, other than those of the seller, have been infringed through the sale.
16. As to whether the courts are bereft of power to act, the learned Counsel submitted that what is not defensible is how the courts of justice become the reason such crooked behaviour is accepted and even encouraged. He submitted that it is trite principle of law that every case should be treated on the basis of its peculiar facts and even on that basis alone, the courts should look at the facts and circumstances peculiar to the case and on finding that the intentions of the vendor were fraudulent, based on the principles of equity, reject his fraudulent schemes. Reliance was placed in the case of; *Aliaza v Saul, Civil Appeal 134 of 2017* (2022) KECA 583 (KLR) (24 June 2022).

### **Respondents Submissions.**

17. The Respondent through the Firm of R.e Nyamu & Co. Advocates submitted that the Respondent is the wife of the late John Murumba who is the purported seller of four and half acres of the suit land parcel NO. Ndivisi/Ndivisi/1XX4 and that at the time of the purported sale of the suit property herein, the property was registered in the name of the late Robinson Wasike Namisi and succession had not been done and that John Murumba had no capacity to sell land parcel NO. Ndivisi/Ndivisi/1XX4 which is registered in the name of the late Robinson Wasike Namisi. He submitted that the plaintiff's copies of sale agreement produced as P-Exhibit 1, 2, 3 and 4 were entered into illegally since the purported seller, one John Murumba had no capacity to dispose of the suit property which belongs to the late Robinson Wasike Namisi and the purported seller was not an administrator of the estate of the said Robinson Wasike Namisi and therefore, had no power or capacity to dispose of the suit property. Reliance was placed in the following cases; *Kenya Power & Lighting Co. Ltd v Sheriff Molana Habib* (2018) KLR, *Green Square Limited v Sheladia Associates Inc & 2 Others* (Environment & Land Court Case NO. 55 of 2014 (2014) KLR

### **Legal Analysis And Decision.**

18. I have considered the record of Appeal, the submissions by the parties and the relevant law. I am reminded that as a first appellate Court, my duty is to re-evaluate the evidence adduced as well as the judgment of the trial court and draw my own conclusions, taking into account the fact that I neither



saw nor heard the witnesses testify (see *Selle v Associated Motor Boat Company Ltd* (1968) E.A 123 and *Williamson Diamonds Ltd v Brown* (1970) E.A 1)

19. The gist of this appeal is that the Appellant, John Sikuku bought from one John Murumba Wasike (now deceased) a portion of land Measuring four and a half acres to be excised from the suit land parcel NO. Ndivisi/Ndivisi/1XX4. The said John Murumba Wasike is said to be the son to one Robinson Wasike Namisi (deceased) who is the registered owner of the suit land and John Murumba Wasike was selling his share of his father's estate. After the Appellant purchased the four and a half acres from the said John Murumba Wasike, he was put in possession and has since been in possession and occupation from 1999 until 24/02/2019 when the Respondent entered and took possession of a section of the disputed land prompting the Appellant to institute the former suit.
20. From the record of appeal and submissions by counsel for the parties, the following issues are not disputed;
  1. The Appellant bought a portion of the suit land parcel NO. Ndivisi/Ndivisi/1XX4 Measuring four and a half acres from one John Murumba in 1999
  2. The suit land was by then registered in the name of the vendor's father, one Robinson Wasike Namisi who passed on in 1994 and the suit property has not been succeeded.
21. From the submissions by the Appellant, his Counsel condensed the 7 grounds of appeal to one ground NO. 6 as follows;

"6.The jurisprudence around the disposition of any immovable property of the estate of a deceased as provided for in Section 45 and 82(b) (ii) of the *Law of Succession Act*, among others is bad law urgently in need of a relook for being rigid and insensitive of its environment."
22. Section 45 of the Succession Act provides as follows;

"45 (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this Section shall-

  - (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment;
  - (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration,"

In *Veronica Njoki Wakagoto* (deceased) (2013) eKLR, Musyoka J interpreted the provision of Section 45 of the Succession Act and stated as follows;

" The effect of (Section 45)...is that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorized to do so by the law. Such authority emanates from a grant of representation and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence."

Section 82 (b) (ii) of the *Law of Succession Act* also provides thus;

"(ii) no immovable property shall be sold before confirmation of the grant..."
23. It is not disputed that the suit property is still registered in the name of Robinson Wasike Namisi and no grant has been issued as no Succession proceedings have been commenced. If John Murumba Wasike



(deceased) sold a portion of the suit land which is a free estate of the deceased, such a sale is a nullity and unenforceable in law. The Seller John Murumba Wasike(deceased) is guilty of selling a free property forming part of the estate of a deceased person. The Appellant is equally guilty of intermeddling by taking possession of part of a free property of a deceased person. The Appellant should have done due diligence and sought Counsel before entering into the transaction.

24. Counsel for the Appellant has urged this Court to exercise its inherent powers by stepping on a higher ground and make pronouncements that would recognize the Appellant as owner of the portion he purchased, considering that he has lived on the land with his family for more than 20 years.
25. It is trite that the mandate of judiciary (judges and judicial officers) is to interpret the laws made by Parliament while the Executive is charged with enforcement of the law. What the learned Counsel is inviting this court to do is not within its mandate. The subject of this appeal is the sale of the suit land parcel NO. Ndivisi/Ndivisi/1XX4. Sections 45 and 82 (b) (ii) of the Succession Act is clear on how a free property of the estate of a deceased person should and/or should not be handled. This Court has not powers to circumvent the express provisions of a statute which prohibits the disposal of a property belonging to a deceased person. I therefore decline the invitation by Counsel for the Appellant to discard the statutory provisions of the law and “craft a law” in favour of his client.
26. The upshot of my finding is that this appeal is devoid of merit and the same is hereby dismissed with costs to the Respondent

Orders accordingly.

**READ, DATED and SIGNED at Bungoma this 08<sup>th</sup> day of May, 2025.**

**HON. E.C CHERONO**

**ELC JUDGE**

