



**Wafula v Walela & 6 others (Environment & Land Case  
106 of 2010) [2025] KEELC 3780 (KLR) (8 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 3780 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT & LAND CASE 106 OF 2010**

**EC CHERONO, J**

**MAY 8, 2025**

**BETWEEN**

**BENJAMIN BARASA WAFULA ..... PLAINTIFF**

**AND**

**ALEX MWANGELA WALELA ..... 1<sup>ST</sup> DEFENDANT**

**JOSEPH MAKHANA EVAN ..... 2<sup>ND</sup> DEFENDANT**

**WYCLIFF WANYONY ELAM ..... 3<sup>RD</sup> DEFENDANT**

**JOEL KHAEMBA WATIMBINI ..... 4<sup>TH</sup> DEFENDANT**

**DICKSON JUMA WALELA ..... 5<sup>TH</sup> DEFENDANT**

**JANE NAFULA WALUBENGO ..... 6<sup>TH</sup> DEFENDANT**

**HARRIET NABWILE WAWIRE ..... 7<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. By a Plaint dated the 26/10/2010, the Plaintiff seeks judgement against the Defendants for:
  - a. As per paragraph 7 above. The plaintiff's claim against all the seven (7) defendants jointly and severally is for the defendants to give vacant possession of land parcel no. Ndivisi/Muchi/2XX6 and/or in the alternative and without prejudice to the foregoing be evicted therefrom.
  - b. Costs of this suit
  - c. Any other relief this court deems fit and just to grant.
2. The plaintiff avers that he is the administrator of the estate of Moses Barasa Cheng'oli, who passed away on 27/04/1995, leaving behind land parcel No. Ndivisi/Muchi/2XX6 (hereinafter referred to as



"the suit land") as part of his estate. He claims to have discovered that the defendants had encroached upon the suit land since 1995, having acquired fraudulent or false sale agreements and falsely presenting themselves as purchasers.

3. The 4th, 6th, and 7th defendants entered Appearance and filed a statement of defense dated 6/12/2010, denying the plaintiff's claim. The 4th defendant averred that he purchased a portion of the suit land Measuring 100ft x 89 ft in 1971 from Elam Walela Wekesa, who had previously bought it from Moses Barasa Cheng'oli, the plaintiff's father. The 6th defendant claimed to have occupied a portion Measuring 50ft x 100 ft portion of the suit land since 1995 while the 7th defendant averred that his father, John Brown Eliud Wawire purchased land from Elam Walela Wekesa in 1978 and has been in occupation since then.
4. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> defendants entered appearance and filed a joint statement of defence where they denied the plaintiffs claim and averred that their father Elam Walela Wekesa bought land from the plaintiff's father one Musa Barasa Cheng'oli in the year 1968 and that they have since been in use and occupation of the said land.
5. With leave of the court, the 1<sup>st</sup>, 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants filed an amended joint statement of defence and counter-claim on 27/11/2019 in which they averred that the 1<sup>st</sup> defendant's father Elam Walela Wekesa(dcd) bought a portion of 1 acre of land comprised in the suit land from the plaintiff's father Musa Barasa Che'g'oli(dcd) vide an agreement dated 24/06/1968 and took possession and have been in occupation since then to date. The 4<sup>th</sup> defendant averred that he bought a portion of land where he is currently occupying from Elam Walela Wekesa who had previously bought from Musa Barasa Chen'oli a portion Measuring 100ft x 89 ft in 1971. The 6<sup>th</sup> defendant claimed to be occupying a portion Measuring 50ft x 100 ft of the suit land since 1995 after purchasing the same from Elam Walela Wekesa, who had previously bought it from Musa Barasa Cheng'oli. On his part, the 7th defendant stated that his father John Brown Eliud Wawire bought a portion of the suit land from Elam Walela Wekesa in 1978 and have been in occupation since then. They argued that they have been in open, notorious and continuous occupation of their various portions and have subsequently acquired their prescriptive rights. That the plaintiff is estopped from denying the 1<sup>st</sup>, 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants right over the land more so following the proceedings in Bungoma HC P&A Cause No. 129 of 2006.
6. In his counter-claim the 1<sup>st</sup>, 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants reiterated the above averments and claimed that having bought their respective portions of the suit land for valuable consideration and since the plaintiff is the administrator of the estate of Musa Barasa Cheng'oli, he should be compelled to transfer to them their respective portions. They sought the dismissal of the plaintiff's case and prayed that judgment for their counterclaim be entered with costs.

### **Evidence by parties.**

7. During pre-trial conference, directions were taken by consent of the parties that the matter to process by way of viva voce evidence. When the matter came for hearing, the plaintiffs sought for an adjournment which was disallowed and the matter ordered to proceed. He later sought to have the court recuse itself on the grounds that he had preferred a complaint against the trial judge with the judicial service commission and filed two cases against him. On determining the application and the issues raised, the court dismissed the application and ordered the matter to proceed as directed. The plaintiff thereafter opted not to participate in the hearing and his case was subsequently dismissed with costs and the 1<sup>st</sup>, 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants counter-claim proceeded for hearing ex-parte. The defendant's called four (4) witnesses in support of their counter-claim.



8. DW 1 Alex Mwangala Walela adopted his witness statement dated 25/11/2019 as his testimony-in-chief. He also produced into evidence 16 documents contained in his list of documents dated 25/11/2019. He reiterated the averment in the counter-claim.
9. Joel Khaemba Watibini (DW2), Jane Nafula Walubengo (DW3) and Harriet Nabwile Warire (DW4) adopted their respective witness statements dated 25/11/2019 as their testimony-in-chief.
10. At the close of the defence case, this Court directed the parties to file their submissions. The 1<sup>st</sup>, 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants filed their submissions dated 20/02/2025 while the plaintiff did not file submissions.

### **Analysis and Determination.**

11. I have carefully considered the pleadings by the parties, the evidence adduced, the written submissions, authorities cited and the relevant provisions of law and in my view, the one issue for determination is whether the 1<sup>st</sup>, 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants have made a case for their counter-claim.
12. The 1<sup>st</sup>, 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants case is that they are entitled to the suit land by virtue of sale agreements entered into between the years 1968 and 1971. It was their case that the plaintiff as the legal representative of the estate of Musa Barasa Cheng'oli was fully aware of their proprietary rights and interest over the suit land and that he undertook to transfer the title to them upon completion of their succession process which they funded. That they are shocked by the turn of events where the plaintiff now wants to evict them from the suit land.
13. In support of the counterclaim, they produced the following documentary evidence; land sale agreement between Elam Walelea Wekesa and Barasa Cheng'oli dated 24/06/1968-D-Exhibit 1, agreement for payment and receipt of Kshs 1,400/= towards expenses for the succession process between Birungi Wabwile on behalf of Harriet Wabwile, the 7<sup>th</sup> Respondent as D-Exhibit 2, minutes dated 20/09/2009 on the way forwards regarding the succession process-P-Exhibit 3, acknowledgment note dated 02/06/2010 by the family of Elam Wekesa Walela to clear their share of the costs for the succession process-D-Exhibit 4, acknowledgment note for the receipt of Kshs.5000/= from Jarius Walela dated -/06/2010 towards payment of the costs for the succession process D-Exhibit 5, acknowledgment note for the receipt of Kshs.5150/= from Wycliss Wanyonyi dated -10/07/2010 towards payment of the costs for the succession process-D-Exhibit 6, acknowledgment note for the receipt of Kshs.24,000/= from Judith Nasimiyu dated 22/09/2008 towards payment of the costs for the succession process-D-Exhibit 7, acknowledgment note for the receipt of Kshs.6000/= from Joel Khaemba dated 28/10/2010 towards payment of the costs for the succession process and registration-D-Exhibit 8, Land sale agreement dated 29/10/1996-D-Exhibit 9, Acknowledgment of payment dated 18/12/2008- D-Exhibit 10, a copy of identity card and KRA PIN of the buyer and seller i.e Harriet Nabwile and the plaintiff- D-Exhibit 11, copy of transfer forms- D-Exhibit 12, a copy of an application for LCB consent- D-Exhibit 13, a copy of death certificate for John Brown Eliud Wawire- D-Exhibit 14, a copy of sale agreement dated 26/4/1978- D-Exhibit 15 and acknowledgment of payment dated 19/12/2008- D-Exhibit 16.
14. Section 107(1) of the *Evidence Act*, cap 80 Laws of Kenya provides 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.
15. The burden of proof is on the defendants who seek orders of this Court for judgment to be entered in terms of the counter-claim to prove their case to the required standard. In this case, the plaintiff did not file a reply to defence and counter-claim and neither did he cross-examine the defence witnesses nor call any witnesses to rebut the evidence tendered. In the case of Janet Kaphiphe Ouma & another v



Maries Stopes International (Kenya), Kisumu HCCC No 68 of 2007, Ali Aroni J, citing the decision in Edward Muriga through Stanely *Muriga v Nathaniel D. Schulter, Civil Appeal No 23 of 1997* held as follows:

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1<sup>st</sup> plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence.”

16. In Kenya Akiba Micro Financing Limited v. Ezekiel Chebii & 14 Others (2012) eKLR the court stated as follows: -“In my view, a statement made on oath should as a matter of fact be expressly denied on oath. If not challenged, it remains a fact and the truth for that matter.” The only evidence on record in the instant case was from the 1<sup>st</sup>, 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants.
17. In the case of Karuru Munyororo v Joseph Ndumia Murage & another Nyeri HCCC No 95 of 1988, Makhandia, J (as he then was) held that: “The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff’s evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon.”
18. From the oral and documentary evidence presented by the defendants, it is clear that the plaintiff’s father, Musa Barasa Cheng’oli, initially sold a one-acre piece of land to Ellam Walela Wekesa, the father to the 1st defendant as per D-Exhibit 1. Ellam Walela Wekesa later sold a portion measuring 90ft by 75ft to the 4th defendant in 1974 D-Exhibit 8, a portion measuring 0.22acres to John Brown Eliud Wawire, the father of the 7th defendant, in 1978 as per D-Exhibit 15 and a portion measuring 96m by 35m to the 6th defendant in 1996 as per D-Exhibit 9. It is imperative to note that there is no evidence that the purchase price was not paid. Further, the defendants testified that they took possession and occupation of their respective plots immediately after purchase and have remained in occupation ever since.
19. The sale agreements produced as exhibits are in writing and are all signed by the respective parties and witnesses. They contain the description of the parties entering into the contract, has description of the property being purchased and the purchase price. In my considered view therefore, they meet the criteria for a valid sale agreement as contemplated under the provisions of Section 3(3) of the Law of Contracts Act as at the time. See the case of Nelson Kivuvani vs Yuda Komora & Ano. Nairobi Hccc No. 956 of 1991, where the court- held: -“The agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligation express or implied of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract”
20. It also emerges from the evidence that the plaintiff chaired a meeting on 20/09/2009 which gave rise to the minutes produced as D-Exhibit 2 wherein the issue for discussion was the sharing of the suit land and the costs of the succession process to ensure the defendant received their respective shares. From the minutes, deliberations were made to the effect that the defendants would cater for the costs of the succession. The defendants explained that it was these deliberations that saw them pay to the plaintiff various sums to settle the costs of the succession process as can be seen in the acknowledgment of payments produced as D-Exhibit 5, 6,7,8,10 and 16. The defendant’s also produced a copy of the plaintiff’s ID, KRA PIN, duly signed transfer forms and application for land control board consent which he had surrendered to enable the the 7<sup>th</sup> defendant obtain registration of her portion of land as



D-Exhibit 11,12 & 13. This further reinforced their claim that an agreement had been reached for the plaintiff to transfer the land to them, but he later reneged on the arrangement.

21. In conjunction to my pronouncements in preceding paragraphs with the production of these documents, the evidential burden of proof shifted to the plaintiff. See case of *Mbuthia Macharia vs Annah Mutua & Another* [2017] eKLR, discussed the burden of proof and stated thus:

“The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence? In this case, the incidence of both the legal and evidential burden was with the appellant.”

22. From the foregoing, it is my finding that the sale agreements produced by the defendants in support of the counterclaim were valid and therefore enforceable by the parties. Consequently, the 1<sup>st</sup>, 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants counter-claim dated 27/11/2019 is merited and the same is hereby allowed.
23. It is trite that costs follow the event and since the 1<sup>st</sup>, 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants have proved their counterclaim on the required standard, they are therefore entitled to costs.
24. Ultimately, I enter judgment for the 1<sup>st</sup>, 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants as against the plaintiff as sought in the counterclaim.
25. Orders accordingly.

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

**HON.E.C CHERONO**

**ELC JUDGE**

