



**Anyembe & another v Okwayo & another (Environment and Land Case
105 of 2019) [2025] KEELC 5033 (KLR) (7 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5033 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND CASE 105 OF 2019**

DO OHUNGO, J

JULY 7, 2025

BETWEEN

JOSIKA MWARO ANYEMBE 1ST PLAINTIFF

KASSIM CHAKA MASAKHWE 2ND PLAINTIFF

AND

JACK NANDI OKWAYO 1ST DEFENDANT

BENARD MAUMO ANYONGO 2ND DEFENDANT

JUDGMENT

1. The Plaintiffs commenced proceedings in this matter by filing plaint dated 9th October 2018. They averred that they are children of Baraza Chaka (deceased) who was the registered proprietor of the parcel of land known as South Wanga/Buchifi/359 (the suit property) on which parcel they were born, brought up and knew as home and where the remains of their parents were laid to rest. They further averred that the Defendants took advantage of their father's illiteracy to misrepresent facts leading to them into possession of the suit property. They listed particulars of fraud and added that the Defendants sold the suit property to another person and subdivided it into South Wanga/Buchifi/2405 and South Wanga/Buchifi/2406.
2. The Plaintiffs further averred that the Defendants took possession of the suit property and planted sugar cane therein from 1999 when the deceased passed away to 2016 and that the Defendants' ownership of the suit property was null and void. They listed particulars of illegality and prayed for judgment against the Defendants jointly and severally for:
 - a. A declaration that the transfer of land parcel number South Wanga/Buchifi/359 to the defendant was fraudulent, null and void and therefore nullification of land parcel number South Wanga/Buchifi/2405 of the defendant and land parcel No. South Wanga/Buchifi/2406



to his partner being a sub-division of the original land and reversion of the entire title to the names of Baraza Chaka.

- b. Costs of the suit.
3. The First Defendant filed statement of defence dated 22nd June 2021 through which he denied the Plaintiffs' allegations and averred that his ownership of the suit property was lawful. He prayed that the suit be dismissed with costs.
4. On 27th October 2021, Counsel for the First Defendant informed the Court that the First Defendant passed away on 28th September 2021. After several adjournments to allow for his substitution, and there being no substitution, the claim against him was marked abated on 20th March 2023.
5. On his part, the Second Defendant filed statement of defence dated 28th March 2024. He too denied the Plaintiffs' allegations and averred that any rights that the deceased may have had over the suit property ceased in the year 1987 when it was transferred to Peter F.R.O who later sold it to the First Defendant who then sold the Second Defendant and processed title for South Wanga/Buchifi/2406 in his favour. He gave notice of an intention to raise a preliminary objection that the Plaintiffs did not have locus standi and prayed that the suit against him be dismissed with costs.
6. The First Plaintiff testified as the sole witness in respect of the Plaintiffs' case. She adopted her witness statement dated 9th October 2018 and produced copies of the documents listed as item numbers 1 to 5 and 7 to 10 in her list of documents dated 9th October 2018 as her exhibits.
7. The First Plaintiff stated in the statement that the deceased had two children with the First Plaintiff as first born and the Second Plaintiff as last born. That the deceased lived on the suit property with the Plaintiffs until the First Plaintiff attained maturity and left for marriage. That when the deceased passed away in 1999 at the age of 77, he left the Second Plaintiff who was then a small boy on the suit property. She added that the deceased was buried on the suit property without objection from anyone and that when the Second Plaintiff attained maturity and applied for a certificate of official search in respect of the suit property for purposes of succession, he was perturbed when he noted that the registered proprietor was the First Defendant who had subdivided it into South Wanga/Buchifi/2405 and South Wanga/Buchifi/2406. She added that the deceased never sold the suit property and that she was in court to ensure justice to the Second Plaintiff since the suit property was his heritage.
8. The Plaintiffs' case was then closed.
9. Benard Maumo Anyango (DW1) adopted his witness statement dated 28th March 2024 and produced copies of the documents listed as item numbers 1, 2, 4 and 5 in his list of documents dated 28th March 2024 as his exhibits. He stated in the statement that sometime in the year 2011 while looking for land to buy, he was introduced to the First Defendant who was selling 2 acres. That they agreed, he paid the full purchase and was issued with title deed in respect of South Wanga/Buchifi/2406 on 13th September 2011 following subdivision of the suit property.
10. DW1 went on to testify that he was using parcel number South Wanga/Buchifi/2406 as of the date of his testimony and that he started using it in the year 2010. He added that parcel number South Wanga/Buchifi/2406 is a subdivision of the suit property and that he conducted a search and obtained green card when he was purchasing the parcel.
11. Herbert Abuyabo Were (DW2) adopted his witness statement dated 28th March 2024. He stated in the statement that he was the registered proprietor of parcel number South Wanga/Buchifi/2405 before he subdivided it and transferred the subdivisions to third parties and that he purchased the parcel from the First Defendant who was well known to him.



12. DW2 further testified that that he knew DW1 and that they both purchased land from the First Defendant. That he purchased South Wanga/Buchifi/2405 in the year 2014 and that his title in respect thereof was issued in the year 2020.
13. Defence case was then closed, after which directions for filing and exchange of written submissions were issued. The Plaintiffs filed submissions dated 5th December 2024 while the Second Defendant filed submissions dated 7th January 2025.
14. I have considered the pleadings, evidence and submissions. The issues that emerge for determination are whether fraud and illegality have been established and whether the reliefs sought should issue.
15. The Plaintiffs have contended that the transfer of the suit property from the deceased was through fraud and illegality. Fraud is a serious allegation which must be established through cogent evidence. Courts have persistently emphasised that a party alleging fraud is required to plead it, particularise it, and strictly prove it to standard higher than proof on a balance of probabilities but lower than the criminal law standard of proof beyond reasonable doubt. See *Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR and *John Mbogua Getao v Simon Parkoyiet Mokare & 4 others* [2017] eKLR. Further, where fraud is alleged, it is not enough to simply infer it from the facts. The party alleging fraud has to connect the allegations and the facts in a way that reveals actual fraud. See *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR.
16. Arising from the testimonies of the witnesses and perusal of the certified copy of register and certificates of search, it is manifest that the deceased and Nicodemus M. Kachi were registered as joint proprietors of the suit property on 28th June 1974 following succession in respect of the estate of Musheni Chaka who was the first registered proprietor. On 3rd September 1985, it was transferred to as a gift to Jeremiah H. Juma Laban who charged it in favour of KCB Ltd on 1st December 1988 to secure a facility of KShs 39,000. On 9th February 1987, it was transferred to Peter F. R. O. Musingo at a consideration of KShs 35,000.
17. The charge in favour of KCB Ltd was discharged on 9th October 1998 after which the suit property was further transferred on 25th October 1999 to Fredrick Orata Wasakania at a consideration of KShs 100,000. Another transfer was later registered on 31st December 2003, in favour of the First Defendant, at a consideration of KShs 225,000. A title deed was issued to the First Defendant on 2nd January 2004 and on 1st March 2011, the title was closed upon subdivision into South Wanga/Buchifi/2405 and South Wanga/Buchifi/2406. A perusal of the Certificate of Death that was produced by the Plaintiffs reveals that the deceased passed away on 20th November 1999. Consequently, the three transfers that took place before that date were undertaken in his lifetime.
18. According to the certificates of official search that the Plaintiffs produced, the First Defendant was registered as proprietor of South Wanga/Buchifi/2405 on 1st March 2011 while the Second Defendant was registered as proprietor of South Wanga/Buchifi/2406 on 19th August 2011.
19. As noted earlier, the claim against the First Defendant was marked abated on 20th March 2023. That brought to an end the Plaintiffs' case as far as parcel number South Wanga/Buchifi/2405 is concerned.
20. Regarding parcel number South Wanga/Buchifi/2406 whose registered proprietor is the Second Defendant, the starting point is that the law jealously guards the right to property. Article 40 of the *Constitution* secures protection of right to property by stipulating that every person has the right, either individually or in association with others, to acquire and own property of any description; and in any part of Kenya. It bars the State from depriving a person of property of any description or of any interest in property unless the conditions stated therein are satisfied.



21. Beyond the constitutional protection, further protection to a registered proprietor of land is afforded through Sections 24 and 26 of the [Land Registration Act](#).
22. Section 24 of the [Land Registration Act](#) provides as follows:

Subject to this Act—

 - (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
 - (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.
23. Section 26 of the [Land Registration Act](#) obligates the Court to accept the registered proprietor's certificate of title as prima facie evidence of proprietorship unless the provisos under Section 26 (1) (a) or (b) are established. Thus, the grounds on which a title can be nullified are fraud or misrepresentation to which the registered proprietor is proved to be a party and where it is shown that the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.
24. The particulars of fraud that the Plaintiffs pleaded are “Transferring the land without the mandatory consent from the land control board. Colluding with corrupt land officers to indicate that the defendant had purchased 5 acres when it's only alleged to be 34 acres, Transferring the entire land without considering the lawful and bona fide inheritors or heirs, Taking advantage of the illiteracy, health condition, and old age of the plaintiff's father.” The Plaintiffs needed to not only prove those particulars to the required standard but to further demonstrate that the Second Defendant was party to any proven fraud. Beyond making allegations, the Plaintiff have not offered any proof. Their case seems to be built around theories and suppositions but without supporting evidence. As I noted earlier, several of the transactions that led to the Second Defendant's title took place during the lifetime of the deceased. There is no evidence that the deceased questioned the transactions. Even after the deceased passed away on 20th November 1999, it took almost a decade before the present suit was filed on 11th October 2018.
25. The Plaintiffs also pleaded the following as particulars of illegality “Purporting to sell what does not belong to the defendant. Failing to exercise due diligence before buying and transferring the land. Acting in bad faith to defeat justice. Deliberately and arrogantly and or misrepresenting facts to own and transfer land.”
26. While proof of illegality does not require as stringent a standard as proof of fraud and the claimant is not obligated to prove that the registered proprietor was party to the illegality, the claimant must still prove the allegations on a balance of probabilities. Given the rich history of transactions in the suit property leading to the Second Defendant's title, the Plaintiffs needed to join previous transferees whose actions they are principally questioning. The Plaintiffs did not do so. Additionally, the Plaintiffs needed to prosecute their case against the First Defendant since he is the one who passed title to the Second Defendant. Instead, they watched as their case against the First Defendant abated and even after the abatement, they did not seek revival and substitution.
27. The importance of establishing a link between past proprietors and current ones in cases where a fraudulent or illegal transaction in land is alleged was discussed by the Court of Appeal in [Pande &](#)



another (Suing as the Legal Representatives of the Estate of Aboma Otiemo (Deceased)) v Karia & 4 others
[2025] KECA 741 (KLR) where the Court held:

The two respondents did not purchase the suit property from 3rd respondent but Silvanus. However, Silvanus was never a party to the suit. How would the two respondents' alleged fraud, illegalities and other malfeasance in the acquisition of the suit property be proved in the absence of Silvanus in the suit? The importance of establishing a nexus between the parties in a suit, and in particular in matters of land, was reiterated in the case of *Mohamed v Duba & Another* (2022) KECA 442 thus:

“The nexus between the parties and the resulting transfer of the property is crucial in determining the legitimacy of the transactions. Failure to establish this connection can hinder the court's ability to make a just determination.”

28. In view of the foregoing, the Plaintiffs have not proved either fraud or illegality. It follows that they are not entitled to the reliefs sought. I find no merit in the Plaintiffs' case, and I therefore dismiss it with costs to the Second Defendant.

**DATED, SIGNED, AND DELIVERED THROUGH MICROSOFT TEAMS, AT NYAMIRA, THIS
7TH DAY OF JULY 2025.**

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance by the Plaintiffs

No appearance by the First Defendant

No appearance by the Second Defendant

Court Assistant: B Kerubo

