



Chitelesi v Mukhonje (Suing as the Administrator of the Estate of Thomas Mukhonje) & 2 others (Environment and Land Appeal E003 of 2023) [2025] KEELC 5430 (KLR) (14 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5430 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E003 OF 2023**

**A NYUKURI, J
JULY 14, 2025**

BETWEEN

PHILIP MULUPI CHITELESI APPELLANT

AND

TIMOTH LUCHELI MUKHONJE (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THOMAS MUKHONJE) 1ST RESPONDENT

THE LAND REGISTRAR KAKAMEGA COUNTY 2ND RESPONDENT

THE DISTRICT LAND SURVEYOR 3RD RESPONDENT

JUDGMENT

1. This appeal was filed by Philip Mulupi Chilelesi, challenging the judgment of Hon. R.S Kipngeno dated 11th July 2023 delivered in Butali Magistrates Court Land and Environment Case No. 29 of 2019. In the impugned judgment, the learned trial magistrate entered judgment for the plaintiff and cancelled both the subdivision of Parcel No. South Kabras/Bushu/164 and titles emanating from the said subdivision and registered in the name of the appellant. The trial court also ordered the appellant to surrender original title deeds for L.R Nos. 2717, 2718, 2719 and 2720 to the Land Registrar Kakamega for purposes of cancellation.

Background.

2. By a plaint dated 18th June 2019, and filed on 20th June 2019, the plaintiff before the trial court, (the 1st respondent herein) who is the administrator of the estate of Thomas Mukhonje (deceased) averred that Parcel No. South Kabras/Bushu/164 belonged to the deceased and that Thomas Mukhonje died on 27th November 2005 before subdividing Parcel No. South Kabras/Bushu/164. That on 2nd January 1997 the 1st defendant (the appellant herein) purchased 2 acres from the deceased to be hived from Parcel No. 164.



3. He further stated that in 2010 the 1st defendant using surveyors carried out survey on the Parcel No. 164 before succession of the deceased's estate was done. That the survey contravened the physical boundaries placed by the deceased on the land.
4. That title for Parcel No. 164 was closed on 20th February 2007 when Parcel No. 164 was subdivided giving rise to Parcel Nos. 2717, 2718, 2719 and 2720. He maintained that the subdivision of Parcel 164 was done by the 1st defendant fraudulently when he was aware the deceased had died. That this information was realized by the plaintiff in 2010 when he conducted official search of Parcel No. 164. The 2nd and 3rd defendants were also accused of fraudulent registration of title herein.
5. The plaintiff sought the following orders:
 - a. That the subdivision done by the 1st defendant giving rise to LR S. Kabras/Bushu/2717, 2718, 2719 and 2720 be ordered cancelled and the land reverts to its original Land Parcel S. Kabras/Bushu/164 in the names of Thomas Mukhonje.
 - b. That the 1st defendant be ordered to surrender original title deeds for S. Kabras/Bushu/2718 and 2720 to the 2nd defendant for purposes of such cancellation.
 - c. Costs of the suit
 - d. Any other relief this Honorable court may deem fit to grant in the circumstances.
6. In a defence dated 15th August 2019, the defendant denied the plaintiff's claim and averred that the plaintiff's claim did not disclose a cause of action against him. Most of the defence, although filed by an advocate, was unintelligible. In paragraphs 4, 5 and 6 of the defence, the defendant's counsel stated as follows;

“as of now, the plaintiff has deliberately enocked the decisions, orders of this court resulting in exposure of contempt of the proceedings. That applicant has no course of action before the High Court regarding of the any matter purported to be alteravasal and race-judicator and should be so declared. That the applicant has messed up with the cases by mixing up the cases there is no way the issue of inheritance from his parents if at all could be still parated in the Court 10 (ten) years after the death of the deceased.”
7. The matter proceeded to hearing by way of viva voce evidence. The plaintiff presented three witnesses while the defendant presented one witness.

Plaintiff's evidence

8. PW1 was Timothy Lucheli. His testimony was that he was the administrator of his father the deceased herein. That on 12th January 1997, the defendant purchased two acres from the deceased to be excised from Parcel No. 164. That having done an official search on 18th February 2010, he noted that title for Parcel No. 164 was closed on 20th February 2007 on subdivision giving rise to title Nos. 2717, 2718, 2719 and 2720. That Parcel Nos. 2717 and 2719 are in the names of Thomas Mukhonje while Parcel Nos. 2718 and 2720 are in the name of the defendant. That on 1st December 2006 he was summoned by the D.O indicating that the surveyor was to survey the land. That he applied for mutation and noted that it was done on 20th February 2005 and that by then his father was already dead. That in total, the defendant's land measures 3.995 acres. That the defendant bought a total of 2.75 acres and that he had taken 3.95 acres.
9. The witness stated that the application for consent was undated but the consent was issued on 17th January 2002. That the transfer was signed on 18th January 2005. That at the time the consent was



issued on 17th January 2002, the said Parcel had not been created and therefore transfer documents were not genuine since title for Parcel No. 164 had not been closed in 2002. He stated that before his father died, he subdivided his land into five plots. That in Case No. CC 136 of 2006, he had been accused of stealing the defendant's sugar cane.

10. In cross-examination, he stated that the defendant had 3 agreements with his late father. That he only had one agreement in court for two acres but did not have the other two agreements. He stated that they had had many cases with the defendant. He confirmed that in Kakamega Appeal No. 18 of 2014, he was the appellant appealing against a decision from Butali and it concerned a boundary. That it arose from case No. 19 of 2011. He denied having a case at the tribunal with the defendant. That he did not know if the appeal case was dismissed and that he never filed an appeal in Kisumu. He stated that he had no receipt in respect of the green card he produced in court showing title for Parcel No. 164 was closed on 20th February 2007. That the green card was dated 18th February 2010 while the receipt was dated 7th February 2011. He stated that his father died on 27.11.2025 and that as the defendant's green card was closed on 20th February 2005 that was before his father died.
11. He also averred that the search for Parcel Nos. 2717 and 2719 showed that it was registered in his father's name on 20th December 2005. That Parcel No. 2718 was registered on 5th February 2005 while search for Parcel No. 2720 was registered on 5th February 2007. He stated that the 1st defendant had been staying on the land before and after his father's death and that his father never sued the 1st defendant. That documents for transfer, consent and application for consent were given to his advocate from the land registrar's office. He stated that the 1st defendant owns land but that the records were not straight. In reexamination he stated that the 1st defendant had a portion of his land but his objection was based on the fact that the registration occurred after the death of his father.
12. PW2 was David Masira Ilumeundu, the Deputy Land Registrar Kakamega Land Registry. He produced green card for Parcel No. 164 and stated that entry No. 6 showed that the title was closed on 20.02.2007 with subdivision yielding Parcel Nos. 2717, 2718, 2719 and 2720. That the green card for 31st January 2020 showed entry No. 6 to be dated 20th February 2005 and stated that, that entry had been altered at dates, months and year. That the search done on 06.12.2006 showed that Parcel No. 164 was still registered in the name of Thomas Mukhonje. That he could not tell the person at Lands Office who altered the entries in the green card. That the alterations herein were not countersigned by the Land Registrar. He produced mutation forms, Land Control Board Application forms, consent and transfer forms.
13. On cross-examination, he stated that there were cartels at the Lands Office who are their officers or outsiders. That entry No. 6 was altered to have the year as 2005 instead of 2007. That the copies were certified copies of green card not original although the court had asked him to bring the original. That mutation for Parcel Nos. 2717 and 2718 were presented at Lands Office before 20th February 2005.
14. PW3 was Thomas Malikuba the Assistant Chief Tumbeni sublocation. He stated that the defendant purchased 2 $\frac{3}{4}$ acres of land from the deceased. That before he became chief, he used to work with Olwenyi & Associates Ltd. That together with a surveyor from Olwenyi Ltd, they demarcated Parcel No. 164 into five portions as requested by the owner giving the defendant 2 $\frac{3}{4}$ acres. That before registration of the subdivisions, Thomas Mukhonje fell ill halting the process. That he later learnt that the land was subdivided using another mutation. He denied witnessing Thomas Mukhonje signing the transfer form before Derek Mango Advocate. That the land belonging to the defendant was 1.1 Hectares which he was supposed to get from Parcel No. 164. That marked the close of the plaintiff's case.

Defendant's evidence



15. DW1 was Philip Mulupi Chitelesi. He stated that he bought Parcel No. 164 from Thomas Mukhonje. That Parcel Nos. 2718 and 2720 are in his names. That the land was transferred to him during the lifetime of Thomas Mukhonje being subdivision of Parcel 164. According to him, title 164 was closed on 20th February 2005. That before Thomas died, there was no dispute over the suit property.
16. That there was no evidence that subdivision was done in 2007. That he had a tribunal case with the plaintiff and that he was awarded the land but the plaintiff appealed in ELC 18 of 2014. That the matter was settled by the ruling in the appeal case. In cross examination, he stated that he initially purchased $\frac{3}{4}$ acres and that later he bought 2 acres. That the acreage of Title No. 2720 was 1.315 hectares, which is more than 2 acres. That he owned 2 acres on Parcel No. 2720. That he purchased more land from Thomas Mukhonje but that some agreements were not in written. He stated that when the mutation dated 20th December 2005 was done Thomas was already dead. Further that the transfer was registered in 2007 when Thomas had already died. He denied interfering with entries in the green card. That the visit by the surveyor in 2006 was for a boundary determination. He conceded that he did not avail agreements for the extra portion within his title deed. That marked the close of the defence case.
17. Upon consideration of the case, the trial court found that the transaction between the defendant and the deceased stopped when the deceased died and ought to have been completed upon succession. That therefore, as the deceased died before the transfer, the plaintiff was entitled to the orders sought.
18. The appellant, being aggrieved with these findings appealed against the same vide his Memorandum of Appeal dated 13th July 2023 citing the following five grounds of appeal:
 - a. That the learned trial Magistrate erred in law and fact in arriving at a conclusion that the 1st respondent's father died on 27/11/2005 before subdividing L.P.N South Kabras/Bushu/164 yet the Green Cards indicate that it was subdivided on 20/2/2005 and thus leading him to issue undesired final orders for cancellation of new numbers.
 - b. That the learned trial Magistrate erred in law and fact in failing to appreciate the fact that it did not matter when the new numbers were registered whether the 1st respondent's father was alive or not so long as all the necessary transfer documents had been lodged at the Land Registrar's office during his lifetime.
 - c. That the learned trial Magistrate erred in law and fact in arriving at a decision for cancellation of new title numbers Bushu/2717, 2718, 2719, and 2720 back to Bushu/164 in the names of the 1st respondent's deceased father and succession to commence when it is the 1st respondent's deceased father who by himself subdivided Bushu/164 during his lifetime.
 - d. That the learned trial Magistrate erred in law and fact in failing to take into consideration the evidence of the land registrar during cross-examination by counsel for the appellant and the appellant's submissions altogether.
 - e. That the learned trial Magistrate was out rightly biased in evaluating the facts before him thus arriving at a wrong decision.
19. Consequently, the appellant sought the following orders:
 - a. That the suit as filed by the 1st respondent at the trial court be dismissed.
 - b. The appellant be awarded costs of this appeal and those of the suit at the trial court.
 - c. Any other or further relief as this court deems fit.



20. The appeal was disposed by way of written submissions. On record are submissions by the appellant dated 20th November 2023, submissions by the 1st respondent dated 16th February 2024 and submissions by the 2nd and 3rd respondents dated 15th October 2024.

Appellant's submissions

21. Counsel for the appellant submitted that it was not disputed that Thomas Mukhonje died on 27th November 2005. That the appellant produced green card dated 19th February 2016 and 3rd January 2020 showing that Parcel No. 164 was subdivided in 20th February 2005. That the 1st respondent misled court with his green card showing subdivisions having been done on 20th February 2007. Counsel argued that the Land Registrar failed to file defence and colluded with the 1st respondent becoming the latter's witness. Counsel argued that the land registrar failed to establish whether title for Parcel No. 164 was closed on 20th February 2005 or 20th February 2007. It was further submitted that the altered green card produced was tailor made for this case. Counsel argued that the 1st respondent could not undo what his father did during his lifetime. Counsel argued that once transfer documents are submitted at the Lands office, title may be issued immediately or years later. Counsel argued that subdivision and transfer were done during the lifetime of the deceased. That issuance of title is the work of the Land Registrar.

1st respondent's submissions

22. Counsel for the 1st respondent argued that the trial court was right in cancelling title held by the appellant since Thomas died on 27th November 2005 and as at 5th December 2006, Parcel No. 164 was still registered in the deceased's name. Counsel maintained that title for Parcel No. 164 was closed on 20th February 2007 on subdivision. That documents produced by the appellant demonstrated fraud as consent was alleged to have been issued on 17th January 2002 for a Parcel created in 2007.
23. It was further argued that entry No. 6 on the green card was altered with no countersigning from 20th February 2007 to 20th February 2005. Counsel maintained that the subdivisions were fraudulently done and that the court cannot endorse fraud and an illegality.
24. Regarding the 1st respondent's cross appeal, counsel argued that the trial court was wrong in not granting the respondent costs since costs follow the event.

The 2nd and 3rd respondent's submissions.

25. Counsel for the 2nd and 3rd respondents submitted that there was alteration in the green card for Parcel No. 164 and that a search conducted on 6th December 2006 showed that Parcel No. 164 was still in the deceased's name hence the court should not overlook the same.
26. On whether the trial magistrate was justified in cancelling title, counsel referred to section 45 (1) of the *Law of Succession Act* and the decision in the case of *Morris Mwiti Mburugu v Denis Kimathi Mburugu* (2016) eKLR for the position that property of a deceased person should not be interfered with contrary to sections 45 and 82 of the *Law of Succession Act*. Counsel argued that the trial court was right in maintaining that where the owner of land dies before concluding a transaction, the administrator is the one to conclude the same.

Analysis and determination

27. The court has carefully considered the appeal, the entire trial court record and the parties' rival submissions. The role of this court as a first appellate court is to re-assess the evidence on record and



make its own independent conclusions, bearing in mind that it had no advantage of seeing or hearing the witnesses, and make due allowance for that.

28. Section 78 of the *Civil Procedure Act* grants this court in the exercise of its appellate jurisdiction extensive jurisdiction as follows;

78. Powers of appellate court

1. Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—
 - a. To determine a case finally;
 - b. To remand a case;
 - c. To frame issues and refer them for trial;
 - d. To take additional evidence or to require the evidence to be taken;
 - e. To order a new trial.
 2. Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.
29. Hence this court sitting as an appellate court has extensive jurisdiction including the jurisdiction to perform the same duties as the trial court by retrying the matter and making its own independent conclusions on all issues in the case, but keeping in mind that it had no advantage of observing the demeanour of witnesses.
30. The duty of the first appellate court was discussed in the case of *Gitobu Imanyara & 2 Others v. Attorney General* [2016] eKLR, where the Court of Appeal stated as follows;
- “An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must consider the evidence, evaluate it itself and draw its own conclusions, although it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.
31. While a first appeal is decided on facts and the law, the first appellate court is usually the final court on facts hence on appeal, parties are entitled to an independent, fair and full analysis of the evidence as anything short of that would be an injustice.
32. Having considered the appeal herein the only issue that arise for determination is whether the learned trial magistrate was right in finding that the appellant’s acquisition of title was unlawful.
33. Section 26 of the *Land Registration Act* provides for conclusiveness of title as follows;

“

“26. Certificate of title to be held as conclusive evidence of proprietorship

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed



in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

34. Essentially, registration of title vests in the proprietor, indefeasible as well as absolute rights regarding to the land, unless it is proved that registration was obtained by fraud, misrepresentation, illegality, improper procedure, or corruption; whether or not the registered proprietor was party thereto. Therefore, a title with no proper lawful supporting documents demonstrating that the process of acquisition of such title was lawful, cannot be accorded legal protection.

35. In the case of *Alice Chemutai Too – Vs – Nickson Kipkurui Korir & 2 Others* [2015] eKLR, the court held that:

“It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part. I had occasion to interpret the above provisions in the case of *Elijah Makeri Nyangwara –vs- Stephen Mungai Njuguna & Another*, Eldoret ELC Case No. 609 B of 2012 where I stated as follows:- “...it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent titleholder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally, or through a corrupt scheme. The titleholder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions. “I stand by the above words and I am unable to put it better than I did in the said dictum.”

36. Similarly, in *Munyu Maina v Hiram Gathiba Maina Civil Appeal No.239 of 2009*, the Court of Appeal held that:-

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

37. Regarding fraud, it is trite that fraud must be specifically pleaded and strictly proven and the standard of proof for fraud is higher than the standard of proof in ordinary civil claims although lower than the standard of proof in criminal cases of beyond reasonable doubt.



38. In the case of *Kinyanjui Kamau vs George Kamau* [2015] eKLR the court stated that:

“It is trite law that any allegations of fraud must be pleaded and strictly proved. see *Ndolo vs Ndolo* (2008)1KLR (G & F) 742 wherein the court stated that “.. we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove the allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely; proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases..”
In case where fraud is alleged it is not enough to simply infer fraud from the facts.”

39. In the instant case, it is not disputed that Parcel No. S. Kabras/Bushu/ 164 was lawfully registered in the name of the late Thomas Mukhonje the father of the 1st respondent. It is further not disputed that the appellant had land sale agreements with the late Thomas Mukhonje for land measuring 2 ¾ acres to be excised from Parcel No. S. Kabras/Bushu/ 164. It is also agreed by the parties that Thomas Mukhonja died on 27th November 2005. What is disputed is whether the subdivision of Parcel No. S. Kabras/Bushu/ 164 and acquisition of the appellant’s title was procedural and lawful; the respondent having argued that the said subdivision and transfer of title to the appellant was done after the death of Thomas Mukhonje.
40. Section 109 of the *evidence Act* places the burden of proof of a fact on the person alleging the same. As the appellant alleged lawful acquisition of the suit property, he was obligated to prove that fact.
41. I have considered documents leading to the subdivision and acquisition of title by the appellant. The appellant produced a green card showing that subdivision occurred on 20th February 2005 and that transfer to him of his titles for Parcel Nos. 2718 and 2720 were made on 5th February 2007. However, the evidence of the Land Registrar was that there was an alteration of the date on the green card from 5th February 2007 to 5th February 2005, which alteration was not countersigned. This evidence was not rebutted or challenged in any way.
42. Besides, the evidence on record show that the mutation form which was the basis of the subdivision herein, was presented for registration at the land registry on 20th December 2005, yet the subdivision was done 10 months before, that is on 5th February 2005, which therefore means that the subdivision was not supported by any legal documentation. There could be no subdivision of parcel No. 164 on 5th February 2005 before presentation of the mutation forms. The 1st respondent’s evidence on the mutation forms presented was not rebutted or challenged by the appellant. As there were no supporting documents at the time of subdivision, it is my finding that the said exercise was done fraudulently. Besides, the consent application and consent itself were issued in 2002 which was 3 years before the subdivision herein which the appellant alleged to have taken place in 2005. From the appellant’s own evidence, it is clear that his titles were not in existence in 2002. Therefore, a consent dated 2002 mentioning a title alleged to have been created in 2005, is obviously fraudulent. In short, the appellant’s title was not supported in any way.
43. For the above reasons, I find and hold that the appellant’s title failed to meet the threshold set out in section 26 of the *Land Registration Act*. In the premises, I find and hold that the trial court was right in nullifying both the subdivision of Parcel No. 164 and the appellant’s title. While it is true that the appellant purchased 2.75 acres from the deceased, which the estate owes him till now, the unprocedurally issued titles should revert to the estate and then the appellant can have what he purchased transferred to him lawfully.



44. In the premises, I find no merit in this appeal which I dismiss with costs.

45. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA IN OPEN COURT/VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM THIS 14TH DAY OF JULY, 2025

A. NYUKURI

JUDGE

In the presence of;

Mr. Getanda for the 1st respondent

Ms Odera holding brief for Mr. Simiyu for the 2nd and 3rd respondents

Mr. Philip Mulupi Chitelesi the appellant in person

Court Assistant: M. Nguyai

