



Wafula (Suing as the Legal and Personal Representative of the Estate of the Late Patrick Mapango Wafula) v Wabule & another (Environment and Land Appeal 7 of 2022) [2025] KEELC 5098 (KLR) (9 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5098 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND APPEAL 7 OF 2022**

CK NZILI, J

JULY 9, 2025

BETWEEN

**DINA NAKHUMICHA WAFULA APPELLANT
SUING AS THE LEGAL AND PERSONAL REPRESENTATIVE OF THE ESTATE
OF THE LATE PATRICK MAPANGO WAFULA**

AND

**SIMIYU WABULE 1ST RESPONDENT
FRANK ANDIVA BUTACHI 2ND RESPONDENT**

(Being an appeal from the Judgment and the decision of Honorable C. M. Kesse, Senior Resident Magistrate, delivered on 28th May 2019 in Kitale Civil Case No. 158 of 1993)

JUDGMENT

1. The primary pleadings at the lower court were the amended plaint dated 13/12/2018, the amended defence and counterclaim dated 13/11/2018, a reply to the defence and defence to counterclaim filed on 21/11/2018. At the trial court, the respondents, as the plaintiffs before the 1st respondent passed on, had sued the appellant in the primary plaint. The 2nd respondent had averred that the late Simiyu Webule, as an allottee of Parcel No. 111/511 measuring 5 acres in Kosprin Settlement Scheme acquired through the Settlement Fund Trustees, had sold the suit land to the appellant in 1983 for Kshs.25,000/=, where he was paid a deposit of Kshs.13,000/=.
2. It was averred that the sale aborted as result of failure to obtain a land control board consent on time or at all, leading to the 2nd respondent herein lawfully buying the suit land for Kshs.80,000/=. Upon obtaining a title on 12/3/2008, hence sought for the eviction of the appellant. The 2nd respondent



- averred that his registration as the owner of the suit land was first in time, hence indefeasible and absolute under Section 26 of the Land Registration Act.
3. The 2nd respondent averred that he had sought an order of specific performance, against the deceased 1st respondent in Kitale PMCC No. 501 of 1992, which relief was by consent granted on 27/11/1992 and was never challenged or appealed against by anyone. The 2nd respondent termed the counterclaim as time-barred by dint of Section 35 of the Limitation of Actions Act for a claim that was filed on 15/11/2018. The 2nd respondent prayed for:
 - (a) Nullification of the sale agreement of 1983.
 - (b) An eviction order.
 - (c) Payment of mesne profits at the rate of Kshs.50,000/= per month, from the date of filing the suit till judgment and payment in full.
 4. The appellant opposed the suit through an amended defence and counterclaim dated 13/11/2018. He admitted entering into a sale agreement over the suit land at the Kosprin Settlement Scheme, through the Settlement Fund Trustees for Kshs.29,625/=, which he duly cleared.
 5. Accordingly, the appellant denied any alleged sale agreement between the initial seller and the 2nd respondent, terming it as fraudulent; otherwise, he had acquired legal and equitable interests over the suit land, after his earlier sale agreement was consented to by both the Settlement Fund Trustees and the land control board.
 6. By way of a counterclaim, the appellant averred that he was the lawful owner of the suit land, terming the alleged sale, transfer, and registration in favour of the 2nd respondent by the 1st respondent as lis pendens, secretly, unlawfully undertaken, and subject to rectification of the register. He prayed for:
 - a. Declaration that the transfer and registration of title No. Trans Nzoia/Kosprin/111 in favour of the 2nd respondent was unlawful, null and void.
 - b. Any other appropriate reliefs.
 7. In a reply to the defence and defence to the counterclaim, the 2nd respondent insisted that the appellant had no rightful claim over the suit land, in view of his sale agreement having become invalid, null and void, hence his title to the land remains absolute and indefeasible in law. The 2nd respondent termed the counterclaim as time-barred for being filed 13 years after the cause of action had accrued. Again, the 2nd respondent averred that his title was a first registration on 12/3/2008, hence unimpeachable.
 8. Additionally, the 2nd respondent averred that he had sued the 1st respondent (now deceased), in Kitale PMCC No. 501 of 192 for specific performance of the sale agreement, to which a consent judgment was issued on 26/11/1992 and filed in court on 27/11/1992, following which a decree was issued.
 9. At the trial, Frank Adiva Butich testified as PW1. He relied on a witness statement dated 13/12/2018 as his evidence-in-chief. PW1 told the court that he met the appellant in 1993, who barred him from accessing the suit land that he had bought from the late Simiyu Webule for Kshs.80,000/= on 21/8/1990. That upon the deceased reneging to sign the transfer forms for the suit land then charged with Settlement Fund Trustees, led to Kitale SPMCC No. 501 of 1995, which after service of summons to enter appearance, parties signed a consent judgment before Samba & Co. Advocates, later adopted as a decree of the court.
 10. PW1 contended that the seller owed the Settlement Fund Trustees a loan of Kshs.6,100/=, which he paid off and the Settlement Fund Trustees transferred the suit land to him on 23/2/1993. PW1 told the



court that on 12/3/2008, the Land Registrar Kitale registered the suit land in his favour and issued him with a title deed for land measuring 2.06 Ha. PW1 stated that despite the foregoing, the appellant has denied him use and possession of the land, hence the claim for mesne profit at the rate of Kshs.10,000/= per acre and an order for eviction.

11. PW1 relied on a copy of a title deed, sale agreement dated 18/8/1990, an application for land control board consent, letter of consent, certificate of outright purchase, letter to the appellant by the D.O dated 12/8/2004, discharge of charge dated 7/9/2007, transfer of land dated 7/9/2007, plaint dated 16/11/1993, court payment receipt dated 27/11/1992 and consent letter dated 16/11/1992, all marked as P. Exhibit Nos. 1-9, respectively,
12. In cross-examination, PW1 confirmed that at the time of sale, the appellant had planted maize on the suit land and had been on the land till the filing of the suit. PW1 denied that the appellant had obtained a land control board consent, to have him transferred Parcel No. 44, before he sued the deceased and later obtained a title deed in 2008. PW1 told the court that the appellant had never challenged the decree leading to the transfer of the suit land, other than denying him entry into the land.
13. Dina Nakhumicha testified as DW1. She relied on a witness statement dated 13/11/2018 as her evidence-in-chief. DW1 told the court that she was the legal wife of Patrick Wafula Mapango, who had bought the suit land from the late Desterio Simiyu Wabule at Kshs.29,625/= which he cleared by 17/4/1986, took vacant possession and has been on the suit land. DW1 told the court that on 4/12/1991, though they had obtained the land board consent to transfer the land, it was impossible to process the title deed, after the seller allegedly relocated to Uganda.
14. DW1 stated that they have interred remains of some of their deceased relatives on the suit land without any interruption from the 2nd respondent. DW1 added that during the pendency of this suit, the deceased secretly, illegally and fraudulently sold and transferred the land to the 2nd respondent. She termed the sale, transfer and registration as illegal, null and void. DW1 relied on an agreement dated 10/9/1994, a sale agreement dated 17/4/1986, minutes for Saboti/Kwanza land control board dated 4/12/1991, a power of attorney dated 4/10/2018, an official search certificate, a chief's letter dated 23/10/1990 and 6/6/2016 as D. Exhibit Nos. 1-8, respectively. DW1 told the court that they have been leasing the land to Potoks at Kshs.4,500/=.
15. In cross-examination, DW1 confirmed that the seller of the suit land passed on in 2015, but they had neither sued him for specific performance, nor were they aware of the 2nd respondent's interests over the land. DW1 said that other than the uncertified land control board minutes, she did not produce both the land control board application form and the letter of consent. DW1 insisted that her husband was currently mentally unwell, hence the application she filed on 12/11/2018 seeking to sue as the next friend, as per the power of attorney. DW1 added that she was a resident of Kwanza Lungu Farm Plot No. 44. She said that she had not enquired about the title deed held by the 2nd respondent.
16. Following the close of the defence, the court rendered its judgment on 28/5/2019. The appellant, according to leave granted on 18/3/2022, vide Kitale ELC Misc. Appl No. 25 of 2021, approached the court vide a memorandum of appeal dated 4/4/2022. She faults the trial court for:
 1. Disregarding her evidence on occupation of the suit land since 1984 to date.
 2. Disregarding the fact that the respondent's title deed was subject to overriding interests.
 3. Declaring her sale agreement null and void without supporting evidence.
 - (4) For not considering the totality of evidence, issues for determination and hence reached a judgment contrary to the standard required in law.



17. This appeal was canvassed by way of written submissions. The appellant, in written submissions dated 26/3/2025. It was submitted that, on grounds 1 and 2 of the memorandum of appeal, the registration of the 2nd respondent as the proprietor of the suit land was subject to the appellant's unregistered interests since she is in physical possession and occupation. She relied on Sections 28 and 30 of the Registered Land Act (repealed), Sections 25 and 28 of the Land Registration Act, William Kipsoi Sigei v Kipkoech Arusei & another [2019], where the court reaffirmed Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri [2014] eKLR.
18. Regarding grounds 3 and 4 of the appeal, the appellant submitted that the trial magistrate was wrong in declaring that the 1983 agreement null and void, as there was no such agreement produced in court by the 2nd respondent and no evidence was adduced in support of the averments in paragraphs 4 and 6 of the amended plaint. The appellant also submitted that she purchased the suit land in 1984, where the 1st respondent granted vacant possession whereas the 2nd respondent's purported purchase of in 1990 has never gained vacant possession. The appellant relied on the doctrine of *qui prior Est tempore, potior est jure*, Hunbury and Martin; Modern Equity -Sweet and Maxwell 1977, pg. 27 and Steadman v Steadman (1976) AC 536,540.
19. The respondent relies on a written submission dated 10/5/2024. It is submitted that the role of this court is to rehear, re-evaluate, reverse or affirm the finding of the trial court, reach an independent finding on fact and law and give reasons thereof either way.
20. Subsequently, it is submitted that the trial court was fair in its findings and discharged its duty as expected, based on the pleadings, facts, issues, and evidence tendered, more so due to the consent judgment against the seller, out of which the deceased signed all the transfer documents in compliance with the decree. The respondent submitted that his documents were valid, legal, procedural and consistent, unlike the appellant, who had no valid ownership documents or authentic documents to sustain her defence to impeach a valid and regularly issued title deed under Sections 25 and 26 of the Land Registration Act.
21. The respondent submitted that the appellant failed to bring cogent evidence to prove fraud and illegality, hence no equitable remedy was available to the appellant. The respondent submitted that the trial court was right to find that the 1st respondent had long died and therefore he was irregularly joined to the suit. Further, the respondent submitted that up to 12/3/2008, he suit premises were held by the Settlement Fund Trustees, hence by dint of Section 41 of the Limitation of Actions Act, adverse possession was inapplicable.
22. Above all, the respondent submitted that the trial court was right to find the power of attorney had no legal consequence for the donor could not have capacity to sign it, making her a busybody in the suit.
23. The court has carefully read through the record of appeal, supplementary record of appeal, memorandum of appeal and written submissions by both parties. The issues calling for my determination are:
 - (1) If the appeal brought against a deceased 1st respondent is competent.
 - (2) If the appellant had a competent counterclaim against a deceased party.
 - (3) If the appellant could advance the defence and counterclaim on behalf of the late Patrick Mapango Wafula.
 - (4) If the late Patrick Mapango Wafula had any registrable interest or rights which were capable of devolving to the appellant.



- (5) If the failure to sue the initial seller of the land was fatal to the appellant's defence and counterclaim.
 - (6) If the 2nd respondent's title deed, based on the consent judgment, decree and subsequent documents leading to its issuance in 2008 is impeachable.
 - (7) If the 2nd respondent proved his claim to the required standards to be entitled to the reliefs sought.
 - (8) If the appellant pleaded and proved any overriding interests or rights that the title deed held by the 2nd respondent was subject to.
 - (9) Whether the appeal has merits.
 - (10) What is the order as to costs?
24. It is trite law that parties are bound by their pleadings and issues for the court's determination flow from the pleadings. Following leave to amend dated 27/11/2018, the primary pleading by the 2nd respondent is the amended plaint dated 13/12/2018. In the said amended plaint, the name of Simiyu Webule was dropped as the 1st respondent, leaving the 2nd plaintiff as the only plaintiff in the suit. The amended plaint was duly served upon the firm of Katama Ngeywa & Co. Advocates on 17/12/2018. From the court record, there is no amended defence and counterclaim filed after 17/12/2018.
 25. The court record of 23/11/2018 indicates that the trial court was informed of the death of the 1st plaintiff. The appellant's pleadings, after failing to file an amended defence and counterclaim, despite being aware of the new developments, remained the one dated 13/11/2018, against a non-existent 1st plaintiff. The particulars of fraud were against two plaintiffs. The counterclaim bore no titular heading as required by Order 7 of the *Civil Procedure Rules*.
 26. While aware of all these developments, the appellant proceeded to prefer an appeal against a deceased party. A suit filed against a deceased party is a nullity ab initio. In *Pratap Chand Mehta v Chrisna Devi Mehta* AIR 1988 Delhi 267, the court held that a suit filed against a dead person is a nullity.
 27. Proceedings brought or undertaken against a deceased party are also null and void. It is common ground that as of 11/12/2018, the 1st plaintiff was deceased. The appellant, while aware of this, continued with a counterclaim at the lower court and before this court to advance her case and the appeal against a deceased party. A nullity is a nullity as held in *Macfoy v United African Co. Ltd* [1961] 3 ALL ER 1169. The inclusion of a deceased person as a respondent in these proceedings, therefore, renders the appeal incompetent ab initio. In *Geeta Bharant Shah & Others v Omar Said Mwatayari & Another* [2009] eKLR, the court said the trial court should have put down its tools, for it had no jurisdiction to hear a suit filed against a deceased person by the time the suit was filed. The court held that the person suing did not tell the truth in his verifying affidavit on the facts; otherwise, he could have established that the defendant was deceased at the filing of the suit.
 28. If the counterclaim at the lower court was a nullity ab initio against the 1st respondent, can the appeal before me be cured at all? I do not think so. The appellant already knew of the death of the 1st respondent as of 23/11/2018. The failure to have a titular heading in the counterclaim to advance it solely against the 2nd respondent is critical. A counterclaim is a separate suit. It falls or succeeds independent of the main plaint.
 29. Even if the court were to sever the two, still the amended defence pleadings are against two plaintiffs and not to the acts of the surviving plaintiff, the 2nd respondent. A party is bound by its pleadings. The



- anomaly to rectify and amend the defence and counterclaim to bring it against the surviving plaintiff goes to the core of the appellant's counterclaim and its effects to this appeal.
30. Ground number 2 and prayer (c) of the memorandum of appeal dated 4/4/2022 speak to the two respondents. If the appellant still wanted to advance her defence and counterclaim against the 1st respondent, then the law expected her to seek citation proceedings against the beneficiaries to the estate of the 1st respondent. The failure to do so rendered the claim against the 1st respondent fatal and so is the appeal before this court. Issues numbers 1, 2, and 3 are answered in the negative.
 31. The appellant at the lower court was advancing a defence and counterclaim brought by her husband, said to have been suffering from a mental disease. The appellant came to the suit as a guardian following an application dated 12/11/2018, armed with a power of attorney registered as No. 945/18 on 19/10/2018. The application was brought under Order 32 Rule 3(1) and 15 of the Civil Procedure Rules. In the reply to the defence and defence to the counterclaim, the capacity of the appellant to advance the defence and counterclaim on behalf of her husband was not challenged.
 32. The Power of Attorney had complied with Section 4 of the Registration of Documents Act, Cap 285 and Section 19 and 20 of the Stamp Duty Act. The capacity of the husband under the Mental Health Act and Order 32 of the Civil Procedure Rules had not been challenged through the pleadings by the respondent. In Francis Mwangi Mugo v David Kamau Gachago [2017] eKLR, the court observed that a power of attorney gives one the capacity to act for another who could not do so, and is the backbone of jurisdiction.
 33. Order 32 Rules 3 and 15 of the Civil Procedure Rules gave the husband the right to appoint the spouse through a power of attorney to advance the defence and counterclaim. A power of attorney is defined as an instrument authorizing a person to act as an agent or attorney of the person granting it, see Black Laws Dictionary, 14th Edition. The finding of the court is that the appellant was properly appointed by the trial court based on a power of attorney. That the order was not appealed against or set aside. The amended defence and counterclaim were filed reflecting the status of the appellant in line with Order 1 Rules 8 and 13, Order 7 Rule 6 and Orders 30 and 32 of the Civil Procedure Rules.
 34. The next issue is whether the appellant's husband had protectable or enforceable interests or rights over the suit land, based on an earlier agreement on page 83 from the initial allottee of the suit land. It is trite law that a letter of allotment confers no title in land since it is an invitation to treat. Further, until a letter of offer for land in a settlement scheme is perfected, no title to land can pass from the holder of the allotment letter to a potential buyer. See Torino Enterprises Ltd v Attorney General Petition 51(E006) of 2022 [2023] KESC 79 [KLR.] (22nd September 2023) (Judgment).
 35. In Christopher Kagwiri Ngari v Settlement Fund Trustees & Others [2011] eKLR, the court said that after payment of full standard premiums in a settlement scheme, there would be a discharge of charge and thereafter, a title deed to a bona fide purchaser follows. In this appeal, the burden was on the appellant to show that the seller in 1983 was a valid and lawful allottee of the suit land. No proof of a letter of offer, charge, payment of premiums, or discharge of title in the name of Desterio Simiyu Wabule was produced.
 36. In Caneland Ltd v The Commissioner of Lands & Others, Civil Appeal No. Nai 311 of 1998, the Court of Appeal held that though the applicant obtained a letter of allotment over the same property several years back, it did not perfect it into a title and if the 2nd, 3rd and 4th respondent had obtained another letter of allotment, later proceeded to obtain and transfer the title in favour of the 6th respondent, was in order.



37. In *Wreck Motors Enterprises v Commissioner of Land & Others* Civil No. 71 of 1997, the court observed that a land title comes into existence after issuance of a letter of allotment, meeting the conditions stated therein and the actual issuance of the title. In my considered view, the appellant's claim to the land was stillborn as of 1983. The agreements dated 21/3/1984 and 17/4/1986, followed by the minutes of the Sabaot land control board of 4/12/1991, were not perfected by the Settlement Fund Trustees or the Kispron Settlement Scheme officials in favour of the appellant. There is no evidence that the appellant engaged the Settlement Fund Trustees or the settlement scheme, if at all, the seller had relocated to Uganda, to perfect the offer and or to have his name included in the area list.
38. Fraud and illegality have to be specifically pleaded and proved on a balance higher than in ordinary suits. See *Vijay Morjaria v Nansingh Madhusing Darbar & another* [2000] eKLR. The officials of the settlement scheme were not called to attest to the interests of the appellant on the suit land since 1984. The documents produced by the appellant cannot confer interest in land as held in *Gladys Wanjiru Ngacha v Teresa Chepsaat & Others* [2008] eKLR.
39. Trespass is entry into the land of another without consent, approval, or permission. The appellant had no superior rights to the land.
40. She did sue the person who took her money and failed to perfect the transaction. The seller had no better title to offer in 1983 or in 1986, when he entered into the sale agreements. There is no evidence that the purchaser conducted due diligence to reach out to the settlement scheme and to establish or verify the status of the loan. The appellant can only blame herself for not following up with the issuing or allocating authority. Evidence of fraud or illegality in acquiring the title deed on the part of the 2nd respondent is lacking. Fraud or illegality cannot be inferred. The allocating authority and the seller were not sued by the appellant.
41. The trial court was therefore correct in relying on the paper trial by the 2nd respondent, which had no break in the chain on how he acquired the title deed, in a formal, regular and procedural manner. See *Dr. Joseph N. K. Arap Ngok v Justice Moiwo Ole Keiwua & 4 Others* Civil Appl. No. Nai 60 of 1997 (Unreported). The paper trial by the appellant was inconsistent and not credible. Section 41 of the *Limitation of Actions Act* does not allow the appellant to rely on overriding rights over land initially belonging to the government. The decree against the initial seller was also binding on the court. It had pronounced on the right of ownership of the suit land between the 1st respondent and the 2nd respondent. There was no fraud proved against the two in view of a legal transfer sanctioned by a court decree as defined under Section 2 of the *Civil Procedure Act*.
42. A sale agreement entered in conflict with Section 178 of the *Agriculture Act*, now repealed, which section governed the sale, transfer and registration of land in a settlement scheme, could not be enforced by the trial court to defeat the title held by the 2nd respondent, who had followed all the procedural steps in acquiring the title to the suit land. I find the appeal both incompetent and lacking merit. It is dismissed with costs.
43. Orders accordingly.

JUDGMENT DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 9TH DAY OF JULY 2025.

HON. C.K. NZILI

JUDGE, ELC KITALE.

In the presence of:



Court Assistant - Dennis

Murunga for the appellant present

Respondents present

Samba for the Respondents absent

