



Mbuta (Suing on His Own Behalf and as the Personal Representative to the Estate of Annah Ndolo Mbuta - Deceased) v Kavila & 4 others (Environment and Land Case 449 of 2017) [2024] KEELC 6903 (KLR) (16 October 2024) (Judgment)

Neutral citation: [2024] KEELC 6903 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND CASE 449 OF 2017
TW MURIGI, J
OCTOBER 16, 2024**

BETWEEN

CHRISTOPHER NDOLO MBUTA (SUING ON HIS OWN BEHALF AND AS THE PERSONAL REPRESENTATIVE TO THE ESTATE OF ANNAH NDOLO MBUTA - DECEASED) PLAINTIFF

AND

JACKSON MUTUA KAVILA 1ST DEFENDANT

REUBEN MBUTA NDOLO 2ND DEFENDANT

ESTHER WANZA MBUTA (ADMINISTRATOR OF THE ESTATE OF ALICE NDUNGE MBUTA) 3RD DEFENDANT

LAND ADJUDICATION AND SETTLEMENT OFFICE MAKUENI COUNTY 4TH DEFENDANT

THE COUNTY LAND REGISTRAR MAKUENI 5TH DEFENDANT

JUDGMENT

1. By an amended Plaint dated 14th February, 2022, the Plaintiff prays for judgment against the Defendants for: -
 - a. A declaration that the alteration, cancellation and/or amendment of the Adjudication Register and/or records over land Parcel Nos. 911, 912, 1160, 1161, 1902, 2916, 3609 and 3613 was fraudulent, unlawful, illegal and in contravention of *the Constitution*.
 - b. An order of temporary injunction barring the 1st Defendant from dealing, building, interfering, alienating the said parcel of land known as Land Parcels No. 911, 912, 1160, 1161, 1902, 2916, 3609 and 3613 while pending the hearing and determination of the suit.



- c. A permanent injunction to issue restraining the 1st Defendant, their agents, servants or any person duly authorized by them to act on their behalf from selling, transferring, alienating, disposing, portioning, building or dealing in any way with that said parcel of land known as Land Parcels No. 911, 912, 1160 and 1161 allocated to the 1st Plaintiff and Land Parcels No. 1902, 2916, 3609 and 3613 allocated to the 2nd Plaintiff and the 3rd Defendant in equal shares.
 - d. An order directed to the Director of Land Adjudication to alter the adjudication register to reflect the 1st Plaintiff as the owner of land Parcel No. 911, 912, 1160 and 1161 and the 2nd Plaintiff as the owner of half share of Land Parcel No. 1902, 2916, 3609 and 3613.
 - e. An order directed to the Land Registrar for rectification of the Register and to substitute the names of the 1st Defendant with the 1st Plaintiff's name in respect of Land Parcels No. 911, 912, 1160 and 1161 and a half share to the 2nd Plaintiff in respect of Land Parcels No. 1902, 2916, 3609 and 3613.
 - f. Aggravated and/or punitive damages for trespass to be assessed by the Honourable Court.
 - g. Mesne profits for unlawful occupation of the properties since 19th July, 1995 to date plus interest.
 - h. Any other relief that this Honourable Court may deem fit and just to grant.
 - i. The Plaintiffs be awarded the costs of this suit.
2. The 1st, 2nd and 3rd Defendants filed an amended Statement of defence on 8th May, 2023 denying the Plaintiff's claim. The 1st Defendant filed a Counterclaim seeking the following orders:-
 - 1) An order of permanent injunction restraining the Plaintiffs, their agents, servants or contractors and each and every one of them from trespassing onto the 1st Defendant's land Parcels Nos. 911, 912, 1160, 1161, 1902, 2916, 3609 and 3613 (Mang'etele Settlement Scheme) and cultivating, grazing, putting up any form of illegal structures thereon, or in any other way whatsoever interfering with the said parcels of land.
 - 2) Costs of the suit at court rates.
 - 3) Any other relief that this Honourable Court may deem fit and just to grant.
 3. The Plaintiff filed a Reply to defence and Defence to counterclaim on 25th May, 2023 in which he reiterated the contents of his amended Plaint. He urged the court to dismiss the counterclaim with costs.
 4. The 4th and 5th Defendants filed their joint Statement of defence on 19th February, 2018 denying the Plaintiff's claim. They urged the Court to dismiss the Plaintiff's suit with costs.

The Plaintiff's Case

5. The Plaintiff Christopher Ndolo Mbuta testified on his own behalf and on behalf of the Estate of Annah Ndolo Mbuta. He testified as PW1 and called two witnesses in support of his case. He adopted his witness statement dated 14/02/2023 as his evidence in chief. He also produced the list of documents dated 11/04/2016 and the supplementary list of documents dated 14/02/2023 in support of his case.
6. The Plaintiff testified that he was allocated land Parcel Nos. 911, 912, 1160 and 1161 Mang'etele Settlement Scheme while his mother Annah Ndolo Mbuta together with her co-wife Alice Ndunge Mbuta (both deceased) were allocated land Parcel Nos. 1902 and 2916 by the government during the



- demarcation period. It was his testimony that the 2nd Defendant has never been an allottee and/or owner of land parcels Nos. 911, 912, 1160 and 1161.
7. He further testified that he discovered that land Parcel Nos. 911, 912, 1160 and 1161 were registered in the name of the 1st Defendant during the succession proceedings on Machakos High Court Succession Cause No. 167 of 1996 in respect of his late father's estate.
 8. It was his testimony that he never instructed the Land Adjudication Office to transfer or change ownership of his plots and that he was not aware how it was effected. He testified that the transfers were fraudulently effected since he did not execute any sale agreement or transfer land parcels Nos. 911, 1160 and 1161 Mangelete Settlement Scheme to the 1st Defendant.
 9. He went on to state that his late mother did not execute any sale agreement or transfer her share in land parcel Nos. 1902, 2916, 3609 and 3613 situated within Mangelete Settlement Scheme to the 1st Defendant, Reuben Ndolo or to Alice Ndunge. He asserted that he was not aware how the plots registered in the joint names of his mother and her co-wife came to be registered in the name of the Defendant.
 10. He told the court that he was utilizing land Parcel Nos. 911, 912, 1160 and 1161 while the 1st Defendant was utilizing Parcel Nos. 1902 and 2916. He urged the Court to grant the orders sought in the amended Plaintiff.
 11. On cross-examination by Mr. Nzei, he testified that he did not have any evidence to show that the 3rd Defendant is the administrator of the Estate of Alice Ndunge Mbuta. He further testified that he was allocated the suit properties in the year 1991 but was not aware that the government issues letters of allocation after it has allocated land. He insisted that his name was in the register and that he was given a number.
 12. He further stated that the cancellation of his name in the Register for Mang'elele Settlement Scheme was done fraudulently as he never went to the Land Adjudication Office to transfer his land. He further stated that the other land Parcel numbers were not in the register. He confirmed that he did not challenge the decision in Machakos Succession Cause No. 167 of 1996 and maintained that the suit properties were included in the Succession cause by mistake.
 13. It was his testimony that the Defendant began residing in the suit property in the year 1995 and subsequently changed the Parcel numbers when he took possession thereof. He denied the allegations that his family had agreed to sell the suit properties to the 1st Defendant.
 14. In re-examination, he argued that, the 3rd Defendant did not deny in her defence that she is the administrator of the estate of Alice Ndunge Mbuta. He stated that his father did not have any land and that they lived in Mang'elele Settlement Scheme as squatters.
 15. He further testified that they did not specify the plot numbers in the sale agreement dated 2/1/1990, because the numbers were not out by then.
 16. PW2, Felix Kyalo Muema, a private surveyor adopted his report dated 18/08/2022 as his evidence in chief. He testified that the Plaintiff instructed him to pick the boundaries of the suit properties so as to establish the acreages of the individual suit properties. That after he discovered that there were alterations in the Adjudication Register at Kibwezi, he advised the Plaintiff to liaise with the District Land Adjudication Officer to have the alterations reviewed if they had been done without his consent.
 17. In cross-examination, he testified that the Plaintiff pointed out to him what he deemed to be the boundaries of the suit properties when he visited the land.



18. PW3, Mary Maina, the Land Adjudication and Settlement Officer, Kibwezi gave a background of the suit properties as follows:-Plot No. 912 initially recorded in the name of the Plaintiff was transferred to Ndunge Mbuta and thereafter to the 1st Defendant on 19/07/1995. Plot No. 911 initially recorded in the name of the Plaintiff, was transferred to Ndunge Mbuta on 19/07/1995. Plot No. 1160 initially recorded in the name of the Plaintiff was transferred to Reuben Mbuta and later on 26/08/1990 to Jackson Mutua. Plot No. 1161 initially recorded in the name of the Plaintiff was transferred to Ndunge Mbuta on 26/08/1996 and later to Jackson Mutua Kavila. Plot No. 1902 was initially recorded in the names of Ndunge Mbuta and Anna Mbuta Ndolo was transferred to Jackson Mutua Kavila. Plot No. 2916 initially recorded in the names of Ndunge Mbuta and Anna Mbuta Ndolo was transferred to Reuben Mbuta on 19/07/1995 and later on to the Jackson Mutua Kavila. Plot No. 3578 was a sub-division of Plot No. 1902 belonging to Christopher Mbuta while Plot No. 3609 was also a subdivision of Plot No. 1902 which was initially registered in the name of Jackson Mutua Kavila but later transferred to Abednego Muli Kitisya.
19. She informed the court that she could not tell when the subdivision was carried out. She stated that Plot No. 3613 was a sub-division of Plot No. 2916 initially registered in the name of Jackson Mutua was transferred to Ndunge Mbuta Ndolo.
20. She further testified that the beneficiary of a plot must give his/her consent before any alteration is made in the register. She testified that the register was unclear on whether the Plaintiff had been summoned to give his consent to transfer the suit properties.
21. She stated that the name of Anna Ndolo Mbuta does not appear in the application for transfer of Plot Nos. 2916 and 1160 dated 19/07/1995 by Reuben Mbuta. She further stated that the names and signatures of Annah Ndolo Mbuta and the Plaintiff authorizing the alteration of the register were not indicated in the letter dated 20/07/1995 by Reuben Mbuta and Ndunge Mbuta in regards to Plot Nos. 2916, 1902 and 912. She stated that there was no letter by Plaintiff or Annah Mbuta authorizing the transfer of their respective plots.
22. On cross-examination by Mr. Nzei, she reiterated that a plot beneficiary must give his/her consent to the Land Adjudication and Settlement Officer before his/her name is struck out from the register and added that an oral consent can suffice to transfer an interest in land.
23. She further reiterated that there was no evidence to show that the Plaintiffs gave their consent to make the alterations in the register or how the sub-divisions were carried out. According to PW3, an alteration in the register would be fraudulent if it is effected without the consent of the plot beneficiary/ proprietor.

The 1st Defendant's Case

24. The 1st Defendant Jackson Mutua Kavila testified as DW1. He adopted his witness statement dated 03/03/2023 as his evidence in chief., He also produced the list of documents in support of his case.
25. It is the 1st Defendant's case that he is the lawful registered owner of land Parcel Nos. 911, 912, 1160, 1161, 1902, 2916, 3609 and 3613 situated within Mang'etele Settlement Scheme having purchased the same from the 2nd Defendant and the late Alice Ndunge Mbuta in the year 1995.
26. He went on to state that he has been in exclusive occupation and use of the suit properties since the year 1995 and that the Plaintiffs have never occupied or used the suit properties at any point in time.



27. He further testified that, the Plaintiffs together with one Ezra David Ndolo raised a claim over the suit properties in Machakos High Court Succession Cause No. 197 of 1996 on the grounds that they formed part of the Estate of their late father, Mbuta Ndolo.
28. That in a ruling delivered on 31/03/2016, the court held that the suit properties belonged him and did not form part of the Estate of Mbuta Ndolo (Deceased). He asserted that the present suit is an attempt by the Plaintiffs to challenge the decision of the High Court in Machakos High Court Succession Cause No. 197 of 1995. He urged the court to dismiss the suit with costs and allow his counterclaim as prayed.
29. On cross-examination by Mr. Mbindyo, he testified that the 2nd Defendant sold to him Plot No. 2916 recorded in the names of Annah Mbuta Ndolo and Ndunge Mbuta Ndolo vide the sale agreement dated 12/6/1995.
30. He further testified that he purchased Plot No. 1902 registered in the name of Annah Mbuta Ndolo and Ndunge Mbuta Ndolo from Ndunge Mbuta Ndolo vide the sale agreement dated 15/06/1995. When referred to Clause No. 6 of the sale agreement, he stated that Ndunge Mbuta was selling her share of the suit property.
31. He stated that Annah Ndolo Mbuta sold the property to him vide a sale agreement in the year 1982 when it was registered as Plot No. 602. He further testified that the clan sub-divided the land amongst the family members. He admitted that he did not purchase Plot Nos. 911, 912, 1160 and 1161 from the Plaintiff. He maintained that the suit properties do not belong to the Estate of Mbuta Ndolo and insisted that he purchased the suit properties vide the sale agreements.
32. In re-examination, he stated that the sale agreements demonstrate that he purchased the suit properties.

The 2nd Defendant's Case

33. The 2nd Defendant, Reuben Mbuta Kinyumu testified as DW3. He adopted his witness statement dated 26/05/2023 as his evidence in chief. He testified that he was one of the Administrators of the Estate of the late Mbuta Ndolo and that the Plaintiffs were his step brother and step mother. It was his testimony that the suit properties are part of Mangelete Squatter Settlement Scheme which is a Squatter Settlement Scheme.
34. That during the land demarcation exercise in Mangelete around 1990s, the Plaintiff who was the only enlightened son in their family took advantage and had the land occupied by Mbuta's three households demarcated and recorded in his name and that of his mother Annah Ndolo Mbuta to the exclusion of the other family members.
35. That after they discovered what the Plaintiff had done, they reported the matter to the District Commissioner Makueni who took up the matter with the District Land Adjudication and Settlement Officer (herein after referred to as the DLASO) That the DLASO thereafter summoned the Plaintiff and other family members and confirmed that only one out of Mbuta Ndolo's three houses had been allocated land leaving the other two houses landless.
36. That the DLASO who doubled up as the officer demarcating and allocating government land, repeated the allocation exercise and made the following changes:-
 - a. Land parcel No. 912 initially recorded in the name of Christopher Ndolo Mbuta was allocated to Ndunge Mbuta and the register was accordingly amended.



- b. Mbuta's house retained parcel No 909 which remained recorded in the name of Annah Mbuta deceased.
 - c. Land parcel No, 1160 which was wrongly recorded in the name of the Plaintiff was allocated to him.
 - d. Land parcel No. 1902 which was initially recorded in the name of Annah Mbuta and Ndunge Mbuta was subdivided into three portions namely:-
 - i. Land parcel No. 2916 was recorded in his name.
 - ii. Land parcel No 2892 was recorded in the name of Annah Mbuta.
 - iii. Ndunge Mbuta's portion retained the original parcel number 1902.
37. He further testified that the Plaintiffs were involved in the process and that the records were amended to reflect this position. That with the consent of the larger Mbuta family, some members sold and transferred their respective parcels to the 1st Defendant. That Ndunge Mbuta transferred parcel No. 912 to the Defendant in exchange for another parcel of land. That he sold and transferred Plot No. 1160 to the 1st Defendant for a consideration of Kshs 800,000/= while Ndunge Mbuta sold and transferred parcel No. 1902 to the 1st Defendant for a consideration Kshs 800,000/-.
38. He argued that the entire family including the Plaintiffs benefitted from the sale of their parcels of land and that the Plaintiff was attempting to benefit twice from the sale. He asserted that the 1st Defendant is the owner of the suit properties and that he is a bona fide purchaser for value without notice and has been in exclusive possession thereof.
39. He went on to state that the Plaintiff claimed in the Succession Court that the suit properties form part of the Estate of their late father. That in a ruling delivered on 31/3/2016 the court held that the suit properties belong to the 1st Defendant. According to him, the Plaintiff has now turned around to claim that the suit properties belong to him.
40. It was his testimony that in the year 1966, the Plaintiff vide a sale agreement sold his parcel of land in Mang'etele Settlement Scheme to the 1st Defendant. He further testified that the land was given to him by the Clan and that his late father was the owner of the land.
41. On cross-examination by Mr. Mbindyo, he testified that in the year 1966, his father informed the Akitondo Clan that he should inherit the land in the event of his death. He testified that he sold the land that he inherited from his father to the 1st Defendant. He stated that the Plaintiff also sold the suit property to the 1st Defendant but could not remember the specific parcel.
42. In re-examination, he testified that he has many other agreements with the 1st Defendant apart from the agreement dated 1995.

The 3rd Defendant's Case

43. The 3rd Defendant Esther Mbuta testified as DW2. She adopted her witness statement dated 26/05/2023 as her evidence in chief. She testified that she is the daughter of the late Ndunge Mbuta, the third wife to Mbuta Ndolo and a member of the Akitondo clan. It was her testimony that the 2nd Defendant is the son of the first wife while the Plaintiff is the son of the second wife Annah Mbuta. She echoed the evidence of DW3



44. In cross-examination, she testified that the suit properties belonged to their father even though she did not have any documentary evidence to demonstrate as much. She testified that Mangelete had not been declared a Settlement Scheme as at the time of her father's death in the year 1986. She further testified that Plot No. 1902 was allocated to Mbuta Ndolo's three wives though she could not confirm the same with evidence. She stated that the sale agreement between Ndunge Mbuta and Jackson Kavila, was for the sale of Plot No. 1902 measuring 200 acres in size.
45. She went on to state that she did not know how the transfer of Plot No. 2916 was effected or how the names Ndunge Mbuta and Annah Mbuta were cancelled from the register. She asserted that her mother and not Annah's portion of the suit property should go to the 1st Defendant.
46. DW4, Pascal Mutwetumo Kyule, adopted his statement dated 30/5/ 2023 as his evidence in chief. He testified that sometime in the year 1990 he was instructed by the District Registration Officer through the District Commissioner Makueni to listen to a dispute involving Mbuta Ndolo's family. That he summoned the Divisional Clan Committee (the Akitondo clan) as well as the Mbuta family committee to deliberate and agree on how the estate of Mbuta Ndolo was going to be distributed under the Kamba customary law.
47. That from their deliberations, they agreed to :-
1. To divide the Mbuta family estate according to the Kamba customary law taking into account the occupation of the three houses as at the time of his demise.
 2. To determine what the estate of the deceased was comprised of.
 3. To identify the remaining estate as at that time.
 4. To distribute the estate amongst the three houses while taking into account what had been sold would be deducted from the share of the estate.
48. That together with members of Mbuta Ndolo's family, it was mutually agreed that the Estate of Mbuta Ndolo was to be distributed amongst his three houses, *the constitution* of the estate was identified and the remaining estate was determined and agreed upon by the entire family including the Plaintiff.
49. That during the hearing, it was established that the house of Annah Ndolo Mbuta had sold several plots and parcels of land among other estates of Mbuta Ndolo. That according to the agreement, the house of Annah Ndolo Mbuta was not supposed to get any share of the estate but in the interest of fairness, the Committee agreed that the family of Annah Ndolo Mbuta would receive three parcels namely:- a parcel of land under irrigation measuring 50 acres, a farm measuring 3 acres and a farm measuring 160 acres.
50. That together with the then Land Adjudication Officer, being the officer demarcating and allocating government land, they proceeded to the Mbuta family land and made the following changes:-
- a. Land Parcel 912 initially recorded in the names of the 1st Plaintiff was allocated to Ndunge Mbuta and the settlement record was accordingly amended.
 - b. Mbuta's 1st house retained parcel No. 909 and remained recorded in the names of Annah Mbuta.
 - c. Land parcel No. 1160 which was wrongly recorded in the name of the plaintiff was allocated to Reuben Kinyumu.



- d. Land parcel No. 1902 initially recorded in the name of Annah Mbuta and Ndunge Mbuta was subdivided into three portions namely:-
 - i. Land parcel No. 2916 was recorded in the names of Reuben Kinyumu Mbuta.
 - ii. Land parcel No. 2892 was recorded in the name of Annah Mbuta.
 - iii. Ndunge Mbuta retained the original No 1902.
51. That after the changes were made, the records held by the DLASO were accordingly amended by striking out the name of the current registered owner and inputting the name of the new owner. He stated that the amendments were made with the consent of the entire family including the Plaintiff.
52. In cross-examination, he testified that he was a retired chief. He testified that he convened a meeting of the clan to sub-divide the land in Mang'ete Sub-location belonging to Mbuta Ndolo after the Plaintiff made a complaint on 30/08/1995. He further stated that Mbuta Ndolo occupied land in Mangelete but had not been allocated any land by the government as at the time of his demise. He testified that no one had been registered as the owner of land in Mangelete.
53. He stated that it was decided that the clan decides the issue of distribution of the estate as the land was in the process of being allocated to the occupiers in the area and that he handled the case because Mbuta's family had disagreed on the mode of distribution.
54. He further testified that he had no authority to distribute estate of the deceased and maintained that the land in question had not been registered. He further stated that the late Mbuta Ndolo was not allocated any land and that his family had come to inherit the land that he had occupied.
55. In re-examination, he testified that the land was not registered in the name of Mbuta Ndolo as at the time when the Clan meeting was held. According to him, the Plaintiff, his mother and a few family members were not happy with the sub-division exercise and wanted him to call for a divisional meeting under his chairmanship to rehear what the location officer had decided.
56. He confirmed that an amicable verdict was reached by the Divisional Clan Elders under his chairmanship in the presence of Mbuta family comprising of three households.
57. The 4th and 5th Defendants did not call any witnesses in support of their case.
58. After the close of the hearing, both parties agreed to file and exchange their written submissions.

The Plaintiff's Submissions

59. The Plaintiff filed his submissions on 20th December, 2023.
60. On his behalf, Counsel submitted that the procedure employed to effect the cancellation of the Plaintiff's name in the register was unlawful, unprocedural and fraudulent as no proceedings were commenced under Section 9 (2) (a) and (b) of the [Land Adjudication Act](#) to enable a basis for the alterations done in the Adjudication Register in respect of the suit properties.
61. Counsel asserted that the procedure for cancellation was explained by PW3 who stated that an alteration in the register can only be effected with the consent of the plot beneficiary.
62. Counsel reiterated that PW3 maintained in her evidence that it was improper and unprocedural to alter and/or amend the adjudication register without involving the beneficiaries and/or following the due process. Counsel argued that there were no proceedings in existence which would lead to the alterations that were made in the adjudication register.



63. Counsel submitted that the 2nd Defendant did not have a title to pass to the 1st Defendant when he purported to sell Plot No. 2916 vide the sale agreement dated 12th June, 1995 as the land was registered in the names of Annah Mbuta Ndolo and Alice Ndunge Ndolo.
64. Counsel further submitted that the 2nd Defendant had no available land to sell to the 1st Defendant as he had never settled in Mang'etele Settlement Scheme which was reserved for squatters occupying the land. In addition, Counsel contended that the 2nd Defendant was not allocated any land to enable him to acquire and pass title.
65. Counsel submitted that the 2nd Defendant had no authority to sell Plot No. 1902 to the 1st Defendant since it was registered in the names of Annah Mbuta Ndolo and Alice Ndunge Ndolo as at the time when he executed the sale agreement dated 15th June, 1995.
66. Counsel reiterated that the Plaintiff did not participate or authorize the cancellation and transfer of Plot Nos. 911, 912, 1160 and 1161 to either the 1st Defendant or Alice Ndunge Ndolo. Counsel submitted that the Plaintiff acknowledges that the 1st Defendant is the registered proprietor of land Parcel No. 602 measuring 166.82 Ha and has no claim whatsoever to the said parcel of land.
67. Counsel submitted that the Court is vested with the power to order rectification of the adjudication register under the provisions of Sections 80 (1) and (2) of the *Land Registration Act* as the alterations and transfers of the suit properties were effected fraudulently as pleaded and proved. Counsel urged the court to enter judgment for the Plaintiff and dismiss the 1st Defendant's counter-claim with costs.
68. To buttress his submissions, Counsel relied on the case of *Mursal & another v Evelyn Nthangu Manesa* (Suing as the legal administrator of Chris Koech) (2022) eKLR.

The 1st, 2nd and 3rd Defendants' Submissions

69. The 1st, 2nd and 3rd Defendant's submissions were filed on 28th February, 2024.
70. On their behalf, Counsel identified the following issues for the Court's determination: -
 - i. Whether the alterations to the adjudication register were proper?
 - ii. Whether the suit properties were validly acquired by the 1st Defendant?
 - iii. Whether the Plaintiff's suit is time-barred?
 - iv. What orders should the court make?
71. Counsel submitted that adjudication register was incorrect as the Plaintiff had caused the suit properties to be registered in his name. Counsel submitted that the DLASO, Makueni conducted consultations and inquiries by summoning the Plaintiff and other members of the Mbuta Family with a view to fixing the land quagmire. Counsel further submitted that the Plaintiff's allegations of fraud and his absence at the time of the alterations were spurious and unsubstantiated.
72. Counsel submitted that the alterations made by the DLASO were done on the basis of inquiries and consultations as contemplated under Section 26 of the *Land Adjudication Act*. Counsel further submitted that the 1st Defendant validly acquired the suit properties from the allottees noted in the register and as such, he was a bona fide purchaser for value without notice of fraud or defect in the title of the allottees.
73. Counsel submitted that the Plaintiff's suit is statute-barred as the allegations of fraud came to his knowledge in the year 1995 and hence the limitation period lapsed in the year 2007. Counsel contended



that this Court lacks jurisdiction to hear and determine the Plaintiff's suit by virtue of Section 26 of the *Limitation of Actions Act*. Counsel urged the Court to dismiss the suit with costs and allow the 1st Defendant's counterclaim as prayed.

74. None of the authorities cited by Counsel were availed for the Court's perusal.
75. As at the time of writing this judgment, the 4th and 5th Defendants had not filed their submissions as directed.

Analysis and Determination

76. From the disposition of the pleadings, the evidence and submissions of the parties, the following facts are not in dispute: -
- i. The original allottee of Plot Nos. 911, 912, 1160 and 1161 was Christopher Ndolo Mbuta as per adjudication register dated 27/6/1991;
 - ii. The original allottees of Plot Nos. 1902 and 2916 were Annah Ndolo Mbuta and Alice Ndunge Mbuta as per adjudication register dated 27/6/1991;
 - iii. Plot Nos. 3609 and 3613 are subdivisions of Plot Nos. 1902 and 2916 respectively;
 - iv. The suit properties herein were listed in Machakos HCSC No. 167 of 1996 (In the Matter of the Estate of Mbuta Ndolo) as part of the estate of the Deceased;
 - v. Vide the Ruling dated 31st March, 2016, the High Court made a finding that the suit properties herein do not form part of the Estate of Mbuta Ndolo (Deceased).
77. Having considered the pleadings, the evidence on record and the respective submissions, the following issues fall for determination: -
- i. Whether this suit is statute barred?
 - ii. Whether the Plaintiff is entitled to the orders sought in the plaint?
 - iii. Whether the 1st Defendant is entitled to the orders sought in the counterclaim?

Whether the Plaintiff's Suit is Statute Barred

78. The 1st-3rd Defendants argued that the Plaintiff's suit is statute barred as the allegations of fraud came to his knowledge in the year 1995 and hence the limitation period lapsed in the year 2007. They further argued that this court lacks jurisdiction to hear and determine this suit. The record shows that the 1st-3rd Defendants filed a Notice of Preliminary Objection dated 24th November 2016 to the Plaintiff's suit and Notice of Motion dated 11/04/2016 on the following grounds:-
1. The suit is incompetent, statute barred, res judicata, bad in law and is an abuse of this Honourable court process.
 2. That the said Notice of Motion is likewise bad in law and cannot stand.
79. In a ruling delivered on 29th September 2017, the court dismissed the objection and held that the suit was not res judicata or statute barred. No evidence was adduced to show that the 1st-3rd Defendants appealed against the said ruling. It is crystal clear that the ruling has not been set aside or challenged in any way and is therefore binding on the parties herein.



Whether the Plaintiff is Entitled to the Orders Sought

80. The Plaintiff is seeking for a declaration that the alteration, cancellation and amendment of the Adjudication Register and/or records over the suit properties was fraudulent, illegal and in contravention of *the Constitution*.
81. It is trite law that allegations of fraud must be specifically pleaded and proved. In the case of *Vijay Morjaria vs Nansing Madhusingh Darbar & Others [2000] eKLR (Civil Appeal No 106 of 2000)* Tunoi JA stated as follows:
- “It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”
82. Similarly, in the case of *Kinyanjui Kamau vs George Kamau [2015] eKLR* the Court of Appeal held that;-
- “...it is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo Vs Ndolo [2008]1 KLR (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 that 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...*”
83. In Civil cases, the standard of proof is on a balance of probabilities. Although the standard of proof for fraud is not beyond reasonable doubt it is higher than proof on a balance of probabilities.
84. The Plaintiff testified that he was allocated Plot Nos. 911, 912, 160 and 1161 while his late mother Annah Ndolo Mbuta together with Ndunge Mbuta were allocated Plot Nos. 1902 and 2961 by the government in the year 1991.
85. He went on to state that he discovered that the suit properties had been fraudulently transferred to the 1st Defendant without his consent or that of his mother during the succession proceedings in Machakos High Court Succession Cause No. 167 of 1996.
86. To prove that the alterations, cancellations and/or amendment of the Adjudication Register over the suit properties was done fraudulently, the Plaintiff relied on the particulars of fraud set out in paragraph 16(a) of the amended Plaint as follows:-
- a. The 1st, 2nd and 3rd were dealing or transacting with the suit properties without the 1st and 2nd Plaintiff's consent, knowledge and/or authority.
 - b. The 1st, 2nd and 3rd Defendants were dealing or transacting with the suit properties while knowing quite well that they belong to the 1st and 2nd Plaintiffs.
 - c. The 5th Defendant authorized the 4th Defendant to register the ownership of the suit properties while knowing quite well that they belong to the 1st and 2nd Plaintiffs.



- d. The 4th Defendant prepared and/or caused the 1st Defendant to be registered as the owner of the suit property while knowing quite well or ought to have known that they had been allotted to the 1st and 2nd Plaintiffs half sharer.
- e. The 4th and 5th Defendants in collusion with the 1st, 2nd and 3rd Defendants and Alice Ndunge Ndolo changed the entries in the Land Adjudication and Settlement Makueni Register without notifying the 1st and 2nd Plaintiffs to denote that they knew they were perpetrating an illegality and acted so as to deprive the 1st and 2nd Plaintiffs of their lawful property.
- f. The 4th and 5th Defendants prepared and/or caused the 1st Defendant to be registered as the owner of the suit properties whilst knowing quite well or ought to have known that they had been allotted to the 1st and 2nd Plaintiff half share.
87. At this juncture, this court is called upon to determine how alterations, cancellations and/or amendments are effected in an Adjudication Register.
88. PW3 took the court through the procedure involved in making any alteration, cancellation and/or amendment in the Adjudication register. According to PW3, an alteration or amendment to the Adjudication register can only be effected with the consent of the plot proprietor/beneficiary. It was her testimony that the proprietor/beneficiary would be summoned before any alteration or amendment is made on the register. She stated that it would be irregular to alter or amend the register without the consent of the plot proprietor/beneficiary. In the matter at hand, PW3 testified that there was no evidence to show that the Plaintiffs gave their consent to make the alterations and/or amendments in the register with regards to the suit properties.
89. The Plaintiff argued no proceedings were produced under Section 9 (2)(a) and (b) and 10(3) of the [Land Adjudication Act](#) to show the basis of the alterations and the procedure employed to effect the cancellations.
90. The 1st -3rd Defendants admitted that consent of the proprietor/beneficiary is a requirement to effect any change in the Adjudication Register. They contended that the register was amended after the DLASO consulted with the Plaintiff and Mbuta Ndolo family members who came up with the changes. DW4 testified that together with the Land Adjudication officer who doubled up as the officer demarcating and allocating government land, they visited the Mbuta family land and upon consulting the family members, the records held by the DLASO were accordingly amended by striking out the name of the current owner and inputting the name of the new owner. It was their evidence that the amendments were made with the consent of the entire family including the Plaintiff. In this regard the Defendants produced the ruling of the Divisional Secretary Analysis and record of a Joint Divisional Clan Elders Meeting with the Provincial Administration dated 3rd September 1995(DEX9) to show how the estate of the late Mbuta Ndolo was distributed under the Kamba Customary law.
91. Both parties relied on the provisions of Section 26 of the [Land Adjudication Act](#) to submit on the law governing alterations in the Adjudication register. According to the Plaintiff any alterations to the Adjudication Register must be in accordance with the provisions of Section 26 of the [Land Adjudication Act](#). The Defendant on the other hand submitted that Section 26 does not prescribe any structure and/or form to be employed by the Adjudication Officer in determining the issue before him. It was submitted that the DLASO made alterations in the register on the basis of the inquires and/or consultations as contemplated in the Act.
92. Section 26 to 29 of the [Land Adjudication Act](#) provides for an elaborate dispute resolution mechanism for resolving any dispute arising from the adjudication process. Once an adjudication register is



completed and any person considers himself aggrieved with the correctness thereof, the procedure for filing an objection is provided under Section 26 of the Act which provides as follows:-

1. Any person named in or affected by the adjudication register who considers it to be incorrect or incomplete in any respect may within sixty days of the date upon which the notice of completion of the adjudication register is published object to the adjudication officer in writing saying in what respect he considers the adjudication register to be incorrect or incomplete.
 2. The adjudication officer shall consider any objection made to him under subsection (1) of this section and after such further consultation and inquiries as he thinks fit he shall determine the objection.
93. Section 26A of the Act provides that the Adjudication Officer is required to forward to the Director of Adjudication a final Adjudication register for the purposes of registration.
94. Section 27 provides for finalization of the adjudication register subject to appeals as follows:-
1. The adjudication officer shall from time to time alter the adjudication register to conform with any determination of objections under section 26 of this Act.
 2. If the adjudication officer considers that to alter the adjudication register would incur unreasonable expense, delay or inconvenience, he may instead recommend to the Minister that compensation be paid and the Minister may make such payment of compensation of moneys provided by parliament as he thinks fit.
 3. When all objections have been determined and the time for appeal under section 29 of this Act has expired the Adjudication officer shall send the adjudication register to the Director of Land Adjudication together with particulars of all determinations of objections and the Director shall-
 - a. alter the duplicate adjudication register accordingly; and then
 - b. certify the adjudication register and on the duplicate adjudication register that it has become final subject to the outstanding appeals; and
 - c. forward the adjudication register to the Chief Land Registrar together with the list of the appeals.

95. Section 28 provides that:-

Upon receiving the adjudication register under Section 27 of this Act, the Chief Land Registrar shall cause registration to be effected in accordance with the adjudication register.

Provided that where the land is affected by an appeal under section 29 of this Act, a restriction shall be made and registered in respect of that land expressed to endure until the determination of the appeal, and on such determination the register shall if necessary be altered in accordance with the determination.

96. If a party is aggrieved by the determination of an objection under the provisions of Section 26 of the Act, he/she may file an appeal to the Minister in accordance with the provisions of Section 29(1) of the [Land Adjudication Act](#) which provides as follows:-
1. Any person who is aggrieved by the determination of an objection under Section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by—



- a. Delivering to the Minister an appeal in writing specifying the grounds of appeal; and
- b. sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.

97. The Plaintiff contended that the cancellation of his name and that of his late mother from the adjudication register was fraudulent as they were effected without his consent or that of his mother. He reiterated that he did not give his consent to the DLASO to transfer the suit properties to the 1st Defendant. He further stated he did not sell or transfer the suit properties to the 1st Defendant. He stated that his mother did not execute any sale agreement or transferred the suit properties to the 1st and 2nd Defendants.

98. The Plaintiff relied on the evidence of PW3 and the extract of register for Mangelete Settlement Scheme to demonstrate the alterations that were made in the register as follows :-In Plot No 911, the Plaintiff's name was cancelled and substituted with Ndunge Mbuta on 19/07/1995. In Plot No. 912 the Plaintiff name was cancelled and substituted with Ndunge Mbuta . Ndunge Mbuta's name was cancelled and with substituted the 1st Defendant on 19/07/1995. In Plot Nos. 1902 and 2916 the names of Anna Mbuta Ndolo and Ndunge Mbuta were cancelled and substituted with the 1st Defendant on 19/07/1995.

99. The Plaintiffs lamented that the procedure employed to cancel their names from the register was marred with fraud as no proceedings were conducted under Section 9(2)(a) and (b) of the Land Adjudication Act. Section 9 of the Act stipulates the duties of the Adjudication officer as follows:-

- 2 The Adjudication officer shall hear and determine-
 - a. any petition respecting any act done, omission made or decision given by a survey officer, demarcation officer or recording officer, and
 - b. any objection to the adjudication register which is submitted in accordance with section 26 of this Act.

100. Section 10 of this Act, provides for the general powers of the adjudication officer as follows:-

- (1) The Adjudication officer shall have jurisdiction in all claims made under this Act relating to interest in land in the adjudication are with power to determine any question that needs to be determined in connection with such claims and for that purpose he shall be legally competent to administer oaths and to issue summons notices or orders requiring the attendance of such persons or the production of such documents as he may consider necessary for the carrying out of the adjudication.

101. It is the 1st-3rd Defendants case that the register was amended after the Land Adjudication Officer summoned and held consultation with the Plaintiff and the Mbuta family members. PW2, PW3 and PW4 testified that in the company of the Land Adjudication Officer who doubled up as the officer demarcating and allocating government land they proceeded to the Mbuta family land and made the changes with the consent of all the family members including the Mbuta family earlier referred in his evidence in chief. That subsequently the records of the Land adjudication and settlement officer were amended by striking out the name of the current owner and inputting the new owner. In this regard, they produced the Divisional Secretaries Analysis record of a joint Divisional Clan Elders meeting with the Provincial Administration Clan minutes held on 30/08/1995 to 3rd September 1983 by the



- Divisional Clan Elders, Provisional Administration and the Late Mbuta Ndolo household and next of Kin.
102. the 1st -3rd Defendants contended that that the adjudication register was incorrect as the Plaintiff had caused the suit properties to be registered in his name and that of his mother to the exclusion of the two households.
103. It is the 2nd -3rd Defendants case that after they discovered that the Plaintiff had caused the family land to registered in his name and that of his mother, they reported the matter to the District Commissioner who in turn referred the matter to the DLASO. From the foregoing, it is clear that the family raised an objection to DLASO with regards to the entries in the register which eventually led to the cancellation of the Plaintiffs name from the register.
104. At this juncture, this court is called upon to determine whether the District Land Adjudication and Settlement Officer complied with the procedure for filing and hearing of objections stipulated in the Act.
105. the procedure for filing objections before the Adjudication Officer is set out in Section 12 of the [Land Adjudication Act](#) which provides as follows: -
1. In the hearing of any objection or petition made in writing, the adjudication officer shall make or cause to be made a record of the proceedings, and shall, so far as is practicable, follow the procedure directed to be observed in the hearing of civil suits, save that in his absolute discretion he may admit evidence which would not be admissible in a court of law, and may use evidence adduced in another claim or contained in any official record, and may call evidence of his own accord.
 2. Any proceeding conducted under this Act by the adjudication officer or by an officer subordinate to him for that purpose is a judicial proceeding for the purpose of Chapters XI and XVIII of the Penal Code (Cap. 63).
106. No evidence was adduced to show that there were records of proceedings before the Land Adjudication and Settlement Officer leading to the cancellation of the Plaintiff's name together with that of his mother from the Adjudication Register. Much as the Defendants insisted that the Land Adjudication Officer consulted and made inquires with the Plaintiff and Mbuta family members, no evidence was adduced in support this evidence. No documentary evidence was adduced to show the said consultation were ever made or a decision was arrived at to effect the cancellations in the register. The cancellations in the Adjudication register were effected on 19/07/1995 before the two holds lodged a complaint to the District Commissioner and before the Elders arrived at their decision.
107. It is the finding of this court that the Defendants did not comply with the provisions of Section 26 of the [Land Adjudication Act](#).
108. The Plaintiff is also seeking for an order of permanent injunction, an order for rectification of the Adjudication register, aggravated and/or punitive damages for trespass and mesne profits which I will address at the tail end of this judgment.
109. The 1st Defendant filed a counterclaim seeking for a permanent injunction restraining the Plaintiffs from trespassing, cultivating, grazing, putting up structures or in any way interfering with the suit properties. He asserted that he is the lawful registered owner of the suit properties having been declared as such in Machakos High Court Succession Cause No. 167 of 1996. He produced the ruling in Machakos HCSC No. 167 of 1996(DEX4), certificates of ownership to show that he is the owner of the suit properties(DEX11). It was his testimony that he is in exclusive occupation of the suit properties



since the year 1995 and has extensively developed the same. In this regard, he produced a bundle of photographs to show developments made on Plot No 1902 and 2916(DEX1).

110. The 1st Defendant stated that he purchased the suit properties from the 2nd Defendant and the late Ndunge Mbuta. He produced a sale agreement dated 12th June 1995 between him and Reuben Kinyumu Mbuta (DEX2). The agreement was for the of 300 acres out of Plot No.2916 Mangelete sub location. In paragraph 3 the agreement states that the land is part of plot No. 1902 currently owned by Mbuta Ndolo but was in the process of being subdivided into 3 equal shares in the names of Annah Mbuta Alice Ndunge Mbuta and Reuben Kinyumu.

111. He also produced the sale agreement dated 15th June 1995, between him and Ndunge Mbuta Ndolo for the sale of 200 acres comprised in Plot No. 1902 (DEX3). In clause No. 5 it states that “The said land is part of L.R. No. 1902 currently owned by Mbuta Ndolo and is in the process of being subdivided into 3 equal portions to be registered in the names of Ndunge Mbuta Ndolo, Annah Kyaku Mbuta and Reuben Kinyumu Mbuta.

Clause No. 6 of the agreement states that “the vendor is selling 200 acres out of her share stated above and in the event that her share shall turn out to be less than the said acreage (200) then the purchaser will take the entire portion but in the event of the said land being more than 200 acres as aforesaid the vendor shall be entitled to retain the extra acreage.”

112. The sale agreements produced by the Defendants have the requisite requirements of a contract for the sale of land. To actualise the sale, the 2nd Defendant made an application to the DLASO Makueni to transfer P/Nos. 2916 and 1160 Mangelete Settlement Scheme to the 1st Defendant(DEX7). Ndunge Mbuta also made an application dated 19/07/1995 to the DLASO Makueni to transfer P/No 1902 and 1161 in Mangelete Settlement Scheme to the 2nd Defendant (DEX8). In both applications, the transfer was in consideration of a sale to the 1st Defendant. It was contended that the 1st Defendant is a bona fide purchaser for value as he undertook due diligence and purchased the same from the registered owners.

113. A bona fide purchaser was described in the case of Lawrence P. Mukiri v Attorney General & 4 others (2013) eKLR (2013) eKLR as follows:-

“.....a bona fide purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchase to successfully rely on the bona fide doctrine, he must prove the following;-

- a. He holds a certificate of title;
- b. He purchased the property in good faith;
- c. He had no knowledge of fraud;
- d. The vendors had apparent valid title;
- e. He purchased without notice of any fraud.

114. The sale agreements between the 1st and 2nd Defendant and the 1st Defendant and Ndunge Mbuta culminated to the 1st Defendant being registered as the owner of Plot Nos. 1902 and 2916 which are jointly registered in the names of Annah Mbuta and Ndunge Mbuta.

115. The 1st Defendant having confirmed from the register that Plot No. 2916 was registered in the name of the 2nd Defendant and while Plot No.1902 was registered in the joint names of Anna Ndolo Mbuta and Ndunge Mbuta it would have been difficult for him to infer any irregularities.



116. As regards Plot No 911, 912, 1160, and 1161, the 1st Defendant did not produce any sale agreement to show that he purchased the same from the 2nd Defendant and the late Ndunge Mbuta. PW3 testified that Plot No. 3578 was a subdivision of Plot No. 1902 belonging to the Plaintiff, Plot No. 3609 was a subdivision of Plot No. 1902 initially registered in the name of the 1st Defendant while Plot No. 3613 was a subdivision of Plot No 2916. She stated that she could not tell when the subdivisions were carried out. The 2nd and 3rd Defendants testified that the suit properties belong to the 1st Defendant as he had purchased the same. From the evidence presented by the parties herein, it is crystal clear that the Plaintiff and the 1st Defendant are claiming ownership over the suit properties. From the evidence presented herein it crystal clear that the Defendants were aggrieved by entries in the Adjudication register which were in favour of the Plaintiff. It is also clear that the Plaintiff is aggrieved by the procedure employed in cancelling his name and that of his late mother from the adjudication register.
117. Looking at the reliefs sought by the Plaintiff and the 1st Defendant herein, it is crystal clear that that they want the court to ascertain their interest in the suit properties herein. The titles for the suit properties have not been issued.
118. The jurisdiction to ascertain and determine interest in land in a settlement area falls within the jurisdiction of the DLASO. This therefore means that the court can only come in to ensure that the process is carried in accordance with the law. The court is cognizant of the fact that where there is prescribed procedure for redress by an act of Parliament or the Constitution then such procedure must be exhausted first.
119. In the case of Speaker of National Assembly v Karume (1992) eKLR 21 the court held that :-
- “ where there is a clear procedure for the redress of any particular grievances prescribed by the constitution or an act of parliament that procedure should be strictly followed”.
120. PW3 testified that the suit properties fall within her jurisdiction. This therefore means that that the procedure of lodging objections must be adhered to.
121. In the end, this court finds and holds as follows;-
- a. A declaration is hereby issued that the alteration, cancellation and/or amendment of the Adjudication register over parcels Nos 911, 912, 1160, 1161, 3609 is illegal as it did not follow the due process of law.
 - b. For avoidance of doubt, this court has not determined the dispute on the substantive rights of the parties herein which is a matter that should be determined in accordance with the law.
 - c. Given the circumstances of this case and the time expended, each party is directed to bear its own costs.

.....

HON. T. MURIGI

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 16TH DAY OF OCTOBER, 2024.

In the Presence of:

M.B. Nzei for the 1st to 3rd Defendant



Mbindyo for the Plaintiff

Court assistant Steve

