



**Atsango v Musilwa & 4 others (Environment & Land Case
272 of 2015) [2025] KEELC 3862 (KLR) (15 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 3862 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 272 OF 2015**

DO OHUNGO, J

MAY 15, 2025

BETWEEN

JAMES ETOLE ATSANGO PLAINTIFF

AND

HENRY MUSILWA 1ST DEFENDANT

AYUB AMBANI 2ND DEFENDANT

BERNADETTE WERE 3RD DEFENDANT

BONY MUTESHI 4TH DEFENDANT

TITO MUTESHI 5TH DEFENDANT

JUDGMENT

1. The Plaintiff moved the Court through Plaintiff dated 9th September 2015 in which he averred that he was the registered proprietor of the parcels of land known as Kakamega/Mukulusu/1209 and Isukha/Mukulusu/1222 (hereinafter jointly “the suit properties”) and that in March 2015 the Defendants jointly and severally invaded the suit properties, ploughed and planted crops thereon and destroyed his trees valued at KShs 13,750.
2. The Plaintiff therefore prayed for judgment against the Defendants jointly and severally for:
 - a. Eviction from the Plaintiff’s land parcel numbers Kakamega/Mukulusu/1209 and Isukha/Mukulusu/1222.
 - b. Permanent injunction restraining the Defendants either by themselves, their agents, servants and or representatives from entering onto land parcel numbers Kakamega/Mukulusu/1209 and Isukha/Mukulusu/1222.



- c. Value of destroyed trees of Kenya Shillings Thirteen Thousand Seven Hundred and Fifty (KShs 13,750/-) only.
 - d. Costs of this suit.
3. The Defendants filed Statement of Defence dated 16th March 2016 through which they averred that the Plaintiff obtained title to the suit properties fraudulently and added that he was not a bona fide purchaser. They therefore prayed that the suit be dismissed with costs.
 4. At the hearing, the Plaintiff testified as the sole witness in respect of his case. He adopted his witness statement dated 9th September 2015 and produced copies of the documents listed as item numbers 1 to 4 in his list of documents dated 9th September 2015.
 5. The Plaintiff stated in the statement that he purchased one acre of parcel number Kakamega/Mukulusu/45 which after subdivision resulted into Kakamega/Mukulusu/1208 and 1209 out of which he acquired Kakamega/Mukulusu/1209. That he further purchased half an acre of Kakamega/Mukulusu/1208 from Zacharia Chibondo Murwa which after subdivision resulted into Kakamega/Mukulusu/1222 and 1221 out of which he acquired Kakamega/Mukulusu/1222. He added that he took possession mid-2011 and used the suit properties without any objection until March 2015 when the Defendants trespassed therein, uprooted his trees valued at KShs 13,750 and cultivated the parcels. That he reported the local authorities, but the Defendants became violent and even chased Zacharia Chibondo Murwa who was their father from the homestead. He also stated that the Defendants' actions had made him unable to use the suit properties.
 6. The Plaintiff went on to testify that Zacharia Chibondo Murwa who passed way in the year 2021 signed a witness statement dated 9th September 2015. He urged the Court to consider the witness statement since Zacharia Chibondo Murwa passed way while the case was pending. He further stated that the First and Third Defendants were son and widow, respectively, of Zacharia Chibondo Murwa and that he did not involve Zacharia's widow and children in the transaction through which he purchased the parcels. That disagreements arose when he went to take possession and that Zacharia had told him that he would inform and involve his wife and children in the process of obtaining consent of the Land Control Board.
 7. The Plaintiff's case was then closed.
 8. Henry Musilwa Chibondo (DW1) adopted his witness statement dated 15th March 2021 and produced copies of the documents listed as item numbers i to iii in the Defendants' list of documents dated 15th March 2021. He stated in the statement that he is a son to Zakaria Chibondo Murwa and the Third Defendant herein. That he was born and raised on parcel number Kakamega/Mukulusu/45 and that he discovered that his father had secretly subdivided the parcel and sold portions to purchasers including the Plaintiff.
 9. DW1 also stated that sometime in the year 2013, the Plaintiff went to DW1's home and claimed that Zakaria Chibondo Murwa had leased to him half of parcel number Kakamega/Mukulusu/45 for a term of one year and that the family informed the Plaintiff that they were not aware of such an arrangement since their father who by then was not staying at home had not informed them. That thereafter, the Plaintiff forcefully attempted to fence off a one acre portion of the parcel whereupon they reported the matter to the District Officer Shinyalu.
 10. DW1 added that they registered a caution against the parcel but were surprised that the caution was removed without any notification and the Plaintiff ended up being the registered proprietor. He also stated that although parcel number Kakamega/Mukulusu/45 was registered in the name of their



grandfather Atanas Imili Bukume who passed away in the year 1988, it changed hands in the year 2011 without succession proceedings being filed in respect of the estate of Atanas Imili Bukume. He contended that the Plaintiff did not have a good title in the circumstances.

11. Under cross examination and re-examination, DW1 stated that the Plaintiff was not involved when his father transferred parcel number Kakamega/Mukulusu/45 from DW1's grandfather to himself and that his father had signed and filed a witness statement in support of the Plaintiff's case.
12. Lastly, Benedah Mujidi Zakaria (DW2) stated that she is the Third Defendant but her name was not properly captured in the Plaintiff's case. She adopted her witness statement dated 15th March 2021.
13. DW2 stated in her said witness statement that she got married to Zakaria Chibondo Murwa in 1969 and that they were blessed with six children who were all in occupation of parcel number Kakamega/Mukulusu/45 where she established a family home with Zakaria. That she learnt that Zakaria had secretly subdivided the parcel and sold portions thereof to buyers including the Plaintiff. She generally rehashed the contents of DW1's statement.
14. Under cross examination and re-examination, DW2 stated that Zakaria had abandoned her for many years prior to his death and did not live with her. She added that she did not know where Zakaria lived.
15. The defence case was then closed. Directions were thereafter given that parties file and exchange written submissions. The Plaintiff filed submissions dated 4th October 2024. On their part, the Defendants filed submissions dated 3rd June 2024.
16. I have carefully considered the pleadings, evidence and submissions. I note that despite their allegations that the Plaintiff obtained title to the suit properties fraudulently and that he was not a bona fide purchaser, the Defendants did not file any counterclaim. Put differently, they have not challenged the Plaintiff's titles to the suit properties. It is plain enough that parties are bound by their pleadings and that the court too is in a sense bound by the parties' pleadings since pleadings circumscribe the issues for determination and reliefs sought. See *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR. In the circumstances, the sole issue for determination is whether the Plaintiff is entitled to the reliefs sought.
17. There is no dispute that the Plaintiff is the registered proprietor of the suit properties. According to the evidence on record, the Plaintiff was registered as proprietor of land parcel number Kakamega/Mukulusu/1209 on 2nd March 2012 and title deed issued to him on 13th April 2012. Similarly, the Plaintiff was registered as proprietor of land parcel number Isukha/Mukulusu/1222 on 31st August 2012 and title deed issued to him on 21st September 2012.
18. The rights of a registered proprietor of land are well settled. The entry point is Article 40 of the *Constitution* which guarantees protection of the right to property. At the statutory level, Section 24 of the *Land Registration Act* makes specific provisions as follows:
Subject to this *Act*—
 - (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
 - (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.



19. To ensure that the courts are always cognisant of a registered proprietor's rights, Section 26 of the *Land Registration Act* obligates courts to accept the certificate of title issued by the Land Registrar as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and the title is not to be challenged except on the grounds specified in the provisos under Section 26 (1) (a) or (b). Those provisos state that the grounds on which a title can be nullified are fraud or misrepresentation to which the registered proprietor is proved to be a party or where it is shown that the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme. Thus, despite the fortified protection, title to property which is found to have been unlawfully acquired is open to impeachment.
20. As noted earlier, the Defendants have not challenged the Plaintiff's titles. Mere mention of fraud and alleging that the registered proprietor is not a bona fide purchaser without going a step further to seek cancellation of the titles through a counterclaim is not good enough. The court can only decide a case that is pleaded both in terms of allegations and prayers.
21. In the evidence tendered by DW1 and DW2, they acknowledged that they are in occupation of the suit properties. The Plaintiff is therefore entitled to both eviction and permanent injunction so as to vindicate his rights as a registered proprietor.
22. The Plaintiff also sought judgment for KShs 13,750 (Kenya Shillings Thirteen Thousand Seven Hundred and Fifty) being value of trees destroyed by the Defendants. The fact of the destruction and the quantum of the loss are corroborated by the Sub-County Forest Officer in his report dated 5th June 2015. I find that the sum is proven, and I will therefore award it.
23. In view of the foregoing, I find merit in the Plaintiff's case, and I enter judgment against the Defendants jointly and severally as follows:
 - a. The Defendants to vacate the parcels of land known as Kakamega/Mukulusu/1209 and Isukha/Mukulusu/1222 within 90 (Ninety) days from the date of delivery of this judgment. In default, eviction order to issue.
 - b. A permanent injunction is hereby issued restraining the Defendants either by themselves, their agents, servants and or representatives from entering the parcels of land known as Kakamega/Mukulusu/1209 and Isukha/Mukulusu/1222.
 - c. KShs 13,750 (Kenya Shillings Thirteen Thousand Seven Hundred and Fifty) being value of destroyed trees.
 - d. Costs of the suit.

DATED, SIGNED, AND DELIVERED THROUGH MICROSOFT TEAMS, AT NYAMIRA, THIS 15TH DAY OF MAY 2025.

D. O. OHUNGO

JUDGE

Delivered in the presence of:

Ms Munihu for the Plaintiff

First and Third Defendants present in person

No appearance for Second, Fourth and Fifth Defendants

Court Assistant: B Kerubo

