



Abuga & 4 others (Suing as Officials of Mwanzo Development Company Limited Plot Owners Welfare Association in Mavoko Town, Block 3/2131 (Formerly Lukenya 426) v Mwanzo Development Company Limited (Environment & Land Case 265 of 2017) [2025] KEELC 4793 (KLR) (25 June 2025) (Judgment)

Neutral citation: [2025] KEELC 4793 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 265 OF 2017**

**A NYUKURI, J
JUNE 25, 2025**

BETWEEN

**JASON OMBUI ABUGA 1ST PLAINTIFF
JOSEPH WAMBUGU MUTURI 2ND PLAINTIFF
PATRICK MBUGUA NJOROGE 3RD PLAINTIFF
BENSON MBUGUA MWANGI 4TH PLAINTIFF
NJUGUNA GATHU 5TH PLAINTIFF
SUING AS OFFICIALS OF MWANZO DEVELOPMENT COMPANY LIMITED
PLOT OWNERS WELFARE ASSOCIATION IN MAVOKO TOWN, BLOCK
3/2131 (FORMERLY LUKENYA 426**

AND

MWANZO DEVELOPMENT COMPANY LIMITED DEFENDANT

JUDGMENT

1. Vide a plaint dated 28th August, 2014 and amended on 6th October, 2020 the plaintiff sought the following orders;
 - a. A permanent injunction restraining the defendants whether by themselves, their servants or agents or anybody from demanding extra fees for the production of title deeds to their respective plots.
 - b. An order of specific performance, directing the defendants to immediately transfer and issue the title deeds for the respective plots to the plaintiffs and their members.



- c. Costs of this suit.
 - d. Any other relief this court may deem fit and just.
2. The plaintiff averred that at all material times they had been the plot owners in Mavoko Town/Block 3/2131 (formerly Lukenya 426) while the defendant who is the registered proprietor thereof had caused the suit property to be subdivided into 450 plots and sold part thereof to the plaintiffs. They complained that since 1995, the defendant had failed to transfer the suit property to the plaintiffs and severally extorted money from the plaintiffs alleging that the same is for registration of the plaintiffs' titles. They stated that the defendant had threatened to reallocate and or double allocate the plaintiffs' plots to 3rd parties if extra payment for title deeds is not made so as to deprive the plaintiffs of their land.
 3. They argued that due to lack of title documents they were unable to develop their plots, and had suffered loss and damage.
 4. The defendant entered appearance on 3rd October 2014 and filed defence dated 29th January 2015. It confirmed being the registered proprietor of the suit property and denied knowledge of the plaintiffs' allegation of purchase and failure by the defendant to transfer the suit property to the plaintiffs. It denied ever entering into any contract with the plaintiffs and stated that the suit was incurably defective, bad in law and an abuse of the court process.
 5. The matter proceeded to hearing by way of viva voce evidence. The plaintiff presented five witnesses while the defendant did not present any witness.

Plaintiffs case

6. PW1 was Jason Ombui Abuga, the 1st Plaintiff. He adopted his witness statement dated 28th August 2014 as his evidence in chief. He produced documents attached to the list of documents dated 28th August 2014. His testimony was that in 2008 he bought a plot from the defendant at a consideration of Kshs. 20,000 being plot No. 398 and was issued with a share certificate, allotment letter, passbook and receipts upon payment of the consideration.
7. On cross-examination, he stated that the plaintiffs are persons who came together to sue the defendant although they are not constituted into a registered organization. That he was representing 52 members whose names are on a list. He denied having a sale agreement but stated that on payment of Kshs. 20,000 he was given the share certificate and letter of allotment.
8. He further stated that he did not pay transfer fees because he was told that he would pay the same once his title was ready. That his plot was on land known as Lukenya 426, now Mavoko Town Block 3/2131 and that he could not tell when the change of number was effected. He stated that a Mr. Mutia a director of the defendant is the one who made cancellations on his receipt. That he did not conduct official search but relied on the search obtained by his friends. That he had not constructed on the suit property.
9. In re-examination, he stated that he was to pay transfer fees once title was ready. That it was the defendant who gave him a share certificate, receipts and allotment letter. That the ownership certificate was signed by the director and chairman of the defendant.
10. PW2 was Patrick Mbugua Njoroge. He adopted his witness statement dated 28th August 2014. His testimony was that he purchased plot number 174 from the defendant at a consideration of Kshs. 30,000. That he was issued with a receipt, allotment letter and certificate of ownership. That he lives on the plot he purchased.



11. On cross-examination he stated that he purchased his plot in 2002 and that he has an agreement with the person who sold him the plot, one James Chege. That James Chege had purchased the plot from defendant. That at the time of purchase, the suit property was No. 426. That he paid a sum of Kshs. 10,500 to the defendant for issuance of title. In re-examination he stated that the ownership certificate from the defendant indicates his name.
12. PW3 was Njuguna Gathu the 5th plaintiff. He adopted his witness statement dated 28th August 2014 as his evidence in chief. He stated that he purchased his plot No. 168 from the wife of Joseph Murege in 2012 and the agreement was done at the defendant's office. That he paid Kshs. 200,000 to the seller, Kshs. 50,000 to the defendant for transfer fees and Kshs. 20,000 to the surveyor. That the defendant issued him with a certificate of ownership, receipt and letter of allotment. That the defendant subsequently sought another Kshs. 200,000 allegedly for beacon certificate and title which he did not pay as he had already paid for the same.
13. In cross-examination, he stated that he was not issued with title for the plot he purchased and that he did not produce the sale agreement with the seller. That the defendant's director Mutie and Njuguna are the ones who asked him to pay money for processing title. He stated that his plot was part of the suit property. That he did not have a sale agreement with the defendant. That it was Mr. Mutie who signed his allotment letter and certificate of ownership. In re-examination, he stated that he had lived on his plot since 2012. He stated that during his testimony Mr. Mutie was in court and that the transfer was done in the defendant's office.
14. PW4 was Joseph Wambugu the 2nd plaintiff. He adopted his witness statement dated 28th August 2014 as his evidence in chief. His testimony was that he purchased plot Nos. 226 and 227 and paid the entire consideration in the defendant's office. That the defendants issued him with certificate of ownership and allotment letter and told him he will get title in a month's time. That he had been cultivating his plots.
15. In cross examination he stated that he paid consideration of Kshs. 150,000 to the defendant and that he purchased his plots from one Shelmith Wanja who had purchased it from the defendant. That he transacted with the defendant and dealt with Mr. Mutie and Mr. Njuguna, the defendants directors. That the defendant is the one that prepared the sub divisional map.
16. PW5 was Benson Mbugua, the 4th plaintiff. He adopted his witness statement dated 28th August 2014. That he purchased five plots from the defendant in 1995 and paid a consideration of Kshs. 100,000 as each plot was Kshs. 20,000. That he was issued with ownership certificate, allotment letter and receipts.
17. On cross-examination, he stated that he fenced the five plots and that he is in possession of the same. That he had brought the suit also on behalf of others. That he bought the five plots for himself and on behalf of his brothers and sisters and had their receipts. That he had not filed authority from them to file suit. He stated that Mr. Mutie who was in court then, was the defendant's director. That marked the close of the plaintiffs' case.
18. No evidence was presented by the defendant when the defence counsel closed the defence case.
19. Parties filed submissions in support of their respective cases. On record are the plaintiffs' submissions dated 9th April 2024 and the defendants submissions dated 17th February 2025.

Submissions

20. Counsel for the plaintiff submitted that the plaintiffs were part of a group of members who purchased parcels from the defendant from early 1990s to 2014, paid the purchase price in full, were issued with



receipts and took possession. Counsel submitted that the plaintiffs' contention was that having paid consideration and all the fees requested by the defendant, and having been issued with allotment letters, receipts and ownership certificates by the defendant, the defendant was obligated to transfer the titles to them.

21. Counsel contended that the plaintiffs had proved their case on the required standard. On the defendant's failure to present evidence, counsel relied on the case of Janet Kaphiphe Ouma & Another –vs- Marie Stopes International (Kenya) Kisumu HCC No. 68 of 2007, Billiah Matiangi –vs- Kisii Bottlers Limited and Another (2021) e KLR and Kenya Power and Lighting Company Limited –vs- Nathan Karanja Gachoka & Another (2016) e KLR for the proposition even where the evidence of the plaintiff is uncontroverted, he or she is obligated to prove his or her case on the required standard.
22. On whether the plaintiffs proved their case, counsel cited the cases of Gella –vs- Casman Brown (1973) 358 EA and Nguruma Limited –vs- Jan Bunde Nielsen & 2 Others(2014)e KLR for the proposition that the plaintiff had proved entitlement to orders of injunction.
23. Regarding general damages, counsel relied on the case of Taita Taveta University College –vs- Rugut & Maritim (suing on their behalf and as the administrators of the estate of the late Cosmas Kipserem Kipkoech(Civil Appeal E009 of 2021) (2022)KEHC 12772(KLR)(31 August, 2022)(judgement) and submitted that an award of damages is an exercise of discretion and that the award should consider prevailing economic environment. Counsel also submitted that the plaintiffs are entitled to costs and relied on Section 27 of the [Civil Procedure Act](#).
24. In response, counsel for the respondent submitted that that the 1st and 2nd plaintiffs had been removed from the suit by amended plaint filed. Further counsel argued that the amended plaint was filed without leave of court.
25. It was also argued for the defendant that the suit was time barred as the cause of action arose in 1995. Counsel referred to the case of Malachi Bob Mwangi v Sarova Hotels Ltd. Civil Appeal No 627 of 2019 and section 197 of the [Evidence Act](#) and contended that the plaintiff had failed to prove their case to the required standard.

Analysis and determination

26. The court has carefully considered the pleadings and evidence . While the defence counsel argued that the plaint was amended without leave of court, the proceedings of 17th September 2020 show that the plaintiff's application for leave to amend plaint was allowed. In addition, although the defendant raised the issue of limitation in his submissions, no preliminary objection or application was filed in regard to time limitation. Besides the question of the suit being time barred was not raised in the defence. Submissions are not pleadings, and a party cannot raise objection in submissions when none was raised in the pleadings or even evidence. Issues for determination flow from pleadings and not submissions which are mere persuasive arguments and not a substitute for pleadings. A question raised in submissions is meant to ambush the opposite party and in the interests of justice this court will disregard the same together with arguments that have no bearings on the pleadings filed in this suit.
27. Therefore, two issues arise for the court's determination, namely;
 - a. Whether the plaintiff's proved lawful acquisition by purchase of plots from the defendant.
 - b. Whether the plaintiffs are entitled to orders of permanent injunction and specific performance as sought in the plaint.



28. The legal protection for the right to property under Article 40 (6) of *the Constitution* is only in regard to property that was lawfully acquired and does not extent to unlawfully acquired property.
29. Therefore, a claimant can predicate their claim of ownership by demonstrating lawful acquisition which may include lawful purchase.
30. Regarding a lawful purchase of land, Section 38 of the *Land Act* provides for the elements of a valid contract in sale of land as follows;

Validity of contracts in sale of land

1. Other than as provided by this Act or by any other written law, no suit shall be brought upon a contract for the disposition of an interest in land—
 - a. The contract upon which the suit is founded—
 - i. Is in writing;
 - ii. is signed by all the parties thereto; and
 - b. The signature of each party signing has been attested to by a witness who was present when the contract was signed by such party.
 2. Subsection (1) shall not apply to—
 - a. A contract made in the course of a public action;
 - b. The creation or operation of a resulting, implied or a constructive trust; or
 - c. Any agreement or contract made or entered into before the commencement of this Act, provided that—
 - i. The verbal contracts shall be reduced to writing within two years from the date of enactment of this Act; and
 - ii. the Cabinet Secretary shall put a notice of the requirement to reduce the contracts in writing, in a newspaper of nationwide circulation.
31. Therefore, for a sale of land contract to be valid, the contract must be inwritten, signed by both parties and their signatures attested by a witness who should be present at the execution of the contract. However, lack of the above elements will not render invalid a contract for sale of land in instances of contracts in respect of public auctions or where there is a resulting, implied or constructive trust and where the agreement was made before the enactment of the *Land Act*.
 32. Specific performance is an equitable remedy granted where there exists a valid contract and where damages would be inadequate in the circumstances of the case.
 33. In the case of *Gharib Suleman Gharib v Abdulrahman Mohamed Agil LLR No. 750 (CAK) Civil Appeal No. 112 of 1998* the court held that:

The jurisdiction to order specific performance is based on the existence of a valid and enforceable contract and being an equitable relief, such relief is more often than not granted



where the party seeking it cannot obtain sufficient remedy by an award of damages the focus being whether or not specific performance will do more perfect and complete justice than an award of damages.

34. Consideration for specific performance were clearly laid out in *Reliable Electrical Engineers Ltd. V Mantrac Kenya Limited* (2006) eKLR where the court stated as follows;

The Jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages an adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the defendant.

35. In the instant case, the defendant did not offer any evidence to controvert the plaintiffs' testimony. That notwithstanding, section 107 of the *Evidence Act* places the burden of proof for a claim on the plaintiff whether or not the defence controverts the plaintiff's evidence.
36. In the instant case, the plaintiffs testified that they purchased plots from the defendant and or the defendant's members which led to the defendant issuing them with letters of allotment, certificates of ownership and receipts. These three documents create a nexus of transaction between the plaintiffs and the defendant.
37. This court by dint of the provisions of section 60 (1) (o) of the *Evidence Act*, which allows it to take judicial notice of matters of local notoriety, takes judicial notice of the fact that land buying companies in Eastern Kenya and particularly in Machakos County, buy and sell plots not by way of the conventional sale agreements but by issuance of letters of allotment, ownership certificates and receipts, thereby representing that a purchaser of a plot owns shares in the land buying company. This is a practice that has taken root in Eastern Kenya including within Machakos County.
38. Therefore, even without the conventional land sale agreement, but where payment of consideration is made as agreed by parties, in respect of a purchase of land from a land buying/selling company, the letters of allotment and ownership certificates and receipts are issued demonstrating payment of consideration, in my view is evidence of lawful purchase, a valid contract and demonstrate resulting trust on the part of the land buying company in favour of the person who has paid consideration in full and has been issued with letter of allotment, receipt and ownership certificate.
39. In this case, the defendant's defence being a mere general denial and the defendant having not offered any evidence controverting the plaintiffs' evidence of the fact that the defendant received and or was present when the purchase prices was paid to its members and endorsed the purchases by the plaintiffs by issuance of ownership certificates, receipts and letters of allotment, and provided the proposed subdivision showing the plaintiffs' respective plots, I hold and find that there is a valid sale of land contract between the defendant and the plaintiffs regarding the plots stated in the pleadings creating a resulting trust and therefore the defendant is legally bound to transfer the same to the plaintiffs herein. As there is no evidence of breach of contract by the plaintiffs, who besides paying the consideration paid survey fees, title processing fees and fees for beacon certificates, and took possession of their respective plots, it is my finding that the plaintiffs entered into an enforceable contract with the defendants and are entitled to orders of specific performance. Besides, the defendant has no right to



demand more payments from the plaintiffs who have paid the consideration in full and therefore the plaintiffs are entitled to orders of permanent injunction sought.

40. Having found that the defendant is obligated to ensure that the plaintiffs are issued with titles of their respective plots, I find and hold that the plaintiffs are entitled to the orders sought in the plaint.
41. In the premises I find and hold that the plaintiffs have proved their case on the required standard and I allow their claim as follows;
 - a. A permanent injunction is hereby issued restraining the defendant whether by itself, its servants or agents or anybody from demanding extra fees for the issuance of title deeds in respect of the plaintiffs' respective plots.
 - b. An order of specific performance is hereby issued directing the defendant to immediately transfer and issue title deeds to the plaintiffs for their respective plots in 60 days of this judgment. In default, the Deputy Registrar of the court shall execute all relevant documents to vest the respective purchased plots in the plaintiffs' names.
 - c. Costs of this suit are hereby awarded to the plaintiffs and shall be borne by the defendant.
42. It is so ordered

DATED, SIGNED AND DELIVERED AT KAKAMEGA IN OPEN COURT/VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM THIS 25TH DAY OF JUNE, 2025

A. NYUKURI

JUDGE

In the presence of;

Ms. Chemutai for the plaintiff

No appearance for the defendant

Court Assistant: M. Nguyai

4

