



Mghendi (Suing as the Legal Representative of the Estate of Christopher Athumani Mwavula) v Bayusuf & 3 others (Environment & Land Case 176 of 2004) [2025] KEELC 4749 (KLR) (25 June 2025) (Judgment)

Neutral citation: [2025] KEELC 4749 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 176 OF 2004**

**SM KIBUNJA, J
JUNE 25, 2025**

BETWEEN

**ONESMUS MWASI MGHENDI PLAINTIFF
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF
CHRISTOPHER ATHUMANI MWAVULA**

AND

**FADHIL MOHAMED BAYUSUF 1ST DEFENDANT
THE HON ATTORNEY GENERAL 2ND DEFENDANT
THE NATIONAL LAND COMMISSION 3RD DEFENDANT
REGISTRAR OF TITLES 4TH DEFENDANT**

JUDGMENT

1. Christopher Athumani Mwavula, the original plaintiff, that is now deceased, commenced this suit against the 1st defendant, and Commissioner of Lands through the Attorney General as the 2nd defendant, through the plaint dated the 12th July 2004. The plaintiff then filed the application dated 2nd September 2016 to among others amend the plaint that was allowed on 28th February 2017, and the amended plaint dated 13th March 2017, was filed bringing on the current 2nd to 4th defendants and removing the Commissioner of Lands. The current plaintiff again moved the court through the application dated 1st August 2022 seeking to inter alia substitute the deceased plaintiff, which application was granted on 7th December 2023. Thereafter, a further amended plaint dated the 8th December 2023 was filed, seeking for the following prayers:
 - a. “A declaration that the deceased’s estate is the lawful proprietor of plot No. 6652/1/MN, Mombasa.



- b. An order directing the Registrar of Titles and the National Land Commissioner [sic] to rectify the register to reflect the deceased's estate as the sole registered proprietor of the suit property.
- c. In the alternative, an order against the 3rd and 4th defendants to allocate to the deceased's estate a parcel of land of the same proportion in the same location as the suit property.
- d. Any other relief that this court deem fit to grant.
- e. Costs of this suit and interest thereon at court rates."

The plaintiff averred that he was allocated unsurveyed residential plot No. 11, Nyali, Mombasa, by the Commissioner of Lands vide the letter of allotment dated 20th September 1990. That he accepted the offer and paid the dues required under the letter of allotment totalling Kshs.142,320 on 25th January 1991 vide bankers cheque No. 030606, and the plot was later mapped and referenced as plot No. 6652/1/MN, suit property. on the 17th June 1991, the Commissioner of Lands wrote to him demanding further payment of Kshs.3,000 for additional stand premium and annual rent that he paid on the 7th August 1991. That vide letter dated 22nd December 1992, the Commissioner of Lands demanded for payment of Kshs.120 being unpaid stamp duty which he paid on 16th February 1993. That the Director of Surveys forwarded to the Commissioner of Lands a Deed Plan No 153411 in respect of the suit property sometimes in 1993, for execution and preparation of a grant but it was apparently misplaced and was not forwarded to him for registration. The plaintiff had on diverse dates from February 1993 written to the Commissioner of lands for issuance of title documents but none has been issued. The Commissioner of Lands wrote to the Director of Surveys on the 14th February 1996 requesting for a certified copy of the Deed Plan No. 153411 for purposes of preparing a new grant, and plaintiff was issued with a Grant No. 29464 on 21st November 1996 that was registered on 24th February 1997 upon payment of Kshs.150. That in total disregard of the plaintiff's proprietary rights the Commissioner of Lands unlawfully and illegally allocated the suit property to the 1st defendant, who took possession, and hence this suit. the plaintiff set out the particulars of illegality at paragraph 14(i) to (iv) of the plaint.

2. The plaintiff's claim is opposed by the 1st defendant vide the statement of defence dated the 31st July 2004, inter alia averring that he is the legal owner as a purchaser for value of the suit property without notice; that his title cannot be interfered with by reasons of omissions or actions of the 2nd defendant that were not within his knowledge; that the procedure adopted by the plaintiff was irregular and the prayers he seeks cannot be sustained and have been overtaken by events; that the suit is time barred and prayer (b) is a prerogative orders whose procedure under the Law Reform Act has not been followed, and the suit should be dismissed with costs.
3. The 2nd defendant also opposed the plaintiff's suit through the statement of defence dated 30th August 2004, averring inter alia that there was no allocation of the suit property to the plaintiff, and if the allocation took place it was improperly done; that alternatively, the payments made by the plaintiff was a formality for all land registrations and not proof of ownership of the suit property; that the particulars of illegality are denied and if the plaintiff was allocated the said plot, then it was by mistake or improperly done as the 1st defendant is the rightful legal owner of the suit property; that the suit does not raise reasonable cause of action and or triable issues and should be dismissed with costs.
4. The plaintiff, Christopher Athumani Mwavula, testified on 8th November 2010, 12th June 2019 and 12th February 2020, and inter alia told the court that he filed this suit after the 1st defendant built a house on plot No. 6652/1/MN, the suit property, that belongs to him. He told the court that the Commissioner of Land had in 1986 advertised through the formal media for members of the public to apply for unsurveyed plot No. 11, Nyali upon paying Kshs.1,000. That he applied and sent his



cheque and received a receipt dated 27th October 1987. Then he received a letter of allotment dated 20th September 1990, and he complied with the conditions by sending a cheque of Kshs.142,320 with a forwarding letter dated 25th January 1991, and was given a receipt of the same date. He received a letter dated 17th June 1991 asking to pay Kshs.3,000 extra stand premium as the plot had been found to be larger after survey. He sent a cheque for the said amount dated 7th August 1991 and received a receipt on 27th August 1991. He then received a letter on 22nd December 1992 informing him plot No. MN/1/6652, Mombasa was his and he should pay Kshs.120 for stamp duty, which he did on 16th February 1993 and received a receipt dated 13th April 1993. Thereafter he wrote severally to the Commissioner of Lands for the title without receiving any response. Upon visiting the Commissioner of Lands office, he learnt that Deed Plan No. 153411 had been prepared in 1993, but it had got lost. He wrote on 17th November 1995 to the Commissioner of Lands to re-issue the Deed Plan. The Commissioner of Lands wrote to the Director of Surveys on 14th February 1996 asking for a reissue of the Deed Plan, for which he paid Kshs.200, and it was reissued. He was issued with the grant/ title No. CR. 29464 that was registered on 24th February 1997 upon him paying Kshs.100 that was receipted. That his Deed Plan was signed on 20th February 1991 while that for the 1st defendant was signed on 11th March 1991. That on going to the suit property with the Municipal surveyor, he found a building, that he learnt belonged to the 1st defendant, had been built on the plot. That his title over the suit property was dated earlier than that of the 1st defendant, and a search he conducted on 12th June 2014 still confirmed him as the registered owner. That he learnt the 1st defendant had bought the plot from one Elmi Haji Hassan, before the title was issued at Kshs.325,000. That he did not know both the 1st defendant and Elmi and had not met them. During cross examination, by Mr. Makuto the learned counsel for 2nd & 4th defendants and Mr. Mogaka, learned counsel for the 1st defendant, the plaintiff explained the failure to accept the offer within 30 days was due to the fact that he received the letter of allotment late. That his Deed Plan has never been recalled or revoked. He told the court that the Commissioner of Lands' letter dated 17th June 1991 indicated the plot number as LR. No. MN/1/5235, formerly unsurveyed plot No.11, Nyali, and it was for that plot that he paid the additional Kshs.3,000. That the receipt he was issued with indicated the payment was for plot MN/1/5235. That Elmi transferred LR. No. MN/1/6652 to the 1st defendant. That Elmi's grant CR. No. 32323 was registered on 2nd April 1992 and his Deed Plan was No. 153933. That his Grant was CR. No.29464, and was registered on 24th February 1997. That he was aware the Land Registrar had written to the Commissioner of Lands on the ownership of the suit property between Deed Plans Numbers 153933 and 153411.

5. In his defence, the 1st defendant testified as DW1 on 12th February 2020 and inter alia told the court he does not know the plaintiff. He testified that he had bought the plot for Kshs.325,000 on the strength of letter of allotment, and built two houses, which he has been leasing out to tenants. He paid Kshs.143,345 to the Commissioner of Lands, and was issued with title in 1992. The title was charged as security for a loan to M. A. Bayusuf & Sons Ltd, which defaulted in repayments and the bank sold it to Abubaker Ahmed Aman around 2010/2011, when this suit was pending in court. During cross examination, DW1 testified that he bought the plot in 1991 at Kshs.325,000 out of which he paid Kshs.145,000 to the Commissioner of Lands, and was to pay the balance after transfer to his name. That the title came out in the name of the vendor who then transferred it to him. That he has never been asked to return the title by the Commissioner of Lands. That his grant did not have a Deed Plan number and he could not tell where the receipt issued for the cheque of Kshs.145,000 he gave the vendor to take to Commissioner of Lands was. That he did not know where Elmi Haji Hassan, the vendor who sold the plot to him lives. That the Land Registrar wrote the letter dated 17th December



- 2003 to the Commissioner of Lands seeking for a resolution on ownership of the suit property between the two Deed Plans numbers 153933 and 153411, but stated he never got to know the decision.
6. The 2nd & 4th defendants called Silas Kiogora Mburugu, Principal Land Administration officer with the National Land Commission, [3rd defendant], who testified as DW2. He testified that their records confirm that MN/1/6652 was allocated to Elmi Haji Hassan on 29th August 1990 as unsurveyed plot 101, Nyali, under letter of allotment reference No. 315000/XV111/326. The offer was accepted by way of payment and receipt No. C016942 issued. The plot was then surveyed as confirmed by the document dated 11th March 1991 and became MN/1/6652 and grant processed in the normal way and forwarded to Mombasa lands office for registration vide letter reference No. 127286/16. That the deed plan for the plot was No. 153933. That the plot could not have been allocated to the plaintiff as it had been committed through allocation to Elmi. The witness was heard virtually, and was stood down to a latter date to be cross examined by the counsel for the plaintiff on their documents physically on the 10th March 2021. On that date, the court was informed that DW2 had retired, and was not availed in all the subsequent hearings. The case 2nd & 4th defendants closed their case on the 25th July 2024. Thereafter, the 3rd defendant's case was marked closed upon application by the plaintiff's counsel.
 7. The court issued directions on filing and exchanging submissions on the 25th July 2024, 28th October 2024 and 25th February 2025. Subsequently, the learned counsel for the plaintiff, 2nd & 4th defendants filed their submissions dated the 19th December 2024 and 10th March 2025 respectively, that the court has considered. Strangely, the learned counsel for the 3rd defendant only filed a document headed "3RD Defendants Grounds Of Opposition" dated the 25th February 2025.
 8. The following are the issues identified for the court's determinations:
 - a. Whether the plaintiff was the first rightful allottee and proprietor of the suit property.
 - b. Whether the plaintiff is entitled to the orders, or any of the orders sought.
 - c. Who pays the costs?
 9. The court has carefully considered the pleadings filed, oral and documentary evidence tendered, submissions by the learned counsel for the parties, superior courts decisions cited thereon and come to the following determinations:
 - a. The grounds of opposition filed by the 3rd defendant dated 25th February 2025, was primarily protesting that it had been wrongly joined in the suit. This is to say the least misplaced considering its predecessor, the Commissioner of Lands, was the 2nd defendant from the commencement of the suit in 2004, and filed a defence dated 30th August 2004. The Commissioner of Lands was substituted with the 3rd defendant in 2017, and the parties' cases had been closed before the orders for filing and exchanging submissions were first made on 25th July 2024. The application to amend the plaint dated the 2nd September 2016 was heard and allowed on the 28th February 2017, following which the Commissioner of Lands were removed as 2nd defendant and the current 2nd to 4th defendants were joined. The 3rd defendant, through its predecessor, has been aware of this suit since 2004 and one of its officers, Silas Kiogora Mburugu, Principal Land Administration officer, testified as DW2, as a witness for the 2nd and 4th defendants. It is therefore surprising that the 3rd defendant chose to file grounds of opposition at the time it did while well aware there was no pending joinder application to respond to instead of submissions as directed or a formal application. The said grounds of opposition are therefore, struck out.



- b. The plaintiff has through his documentary and oral evidence taken the court through the letter dated 19th October 1987 that he wrote to the Commissioner of Lands seeking to be allocated the suit property, the allotment letter dated 20th September 1990 allocating him un-surveyed plot No. 11, Nyali, under reference No. 31500/XV/176A measuring 0.202 hectares, that after survey got the reference for the suit property, his acceptance letter, receipts for all the requisite amount, additional payments requested and the stamp duty, culminating to the preparation of the Deed Plan 153411 for the suit property. He also took the court through his correspondence engaging the Commissioner of Lands after the grant took too long to be issued, following which the Commissioner wrote to the Director of Surveys to re-issue the Deed Plan and thereafter his grant CR. No. 29464. He further told the court that when he went to the suit property with the County Surveyor to take possession, he found 1st defendant was already in occupation through the two houses he had built and rented to tenants, and hence this suit. On his part, the 1st defendant did not go beyond the sale agreement between him and Elmi Haji Hassan, who he alleged sold him the suit property. It was his evidence that that the said vendor's title was the letter of allotment dated 29th August 1990 for plot No. 101 Nyali under reference No. 31500/XV11/174C measuring 0.21 hectares, that he gave him. The 1st defendant told the court he gave the vendor a cheque of Kshs.145,000 to take to the Commissioner of Lands as payment for the amounts under the letter of allotment and the plot was surveyed and Deed Plan No. 153933 issued.
- c. As pointed out by the plaintiff, the allotment letter the 1st defendant relied on was only stamped and not signed. Simply put, the plaintiff's claim is primarily a challenge of the 1st defendant title and or entitlement to the suit property. It is instructive to note that between the plaintiff's deed plan number 153411 and that for the 1st defendant number 153933, that for the plaintiff was the first in time. The plaintiff has alleged illegalities on the defendants in the process of the 1st defendant acquiring registration with the suit property. Though the 2nd & 4th defendants' witness, DW2, who never availed himself for cross-examination by the plaintiff, supported the allocation of the plot to Elmi Haji Hassan, all the defendants failed to answer or shed light on whether the said Elmi Haji Hassan had regularly applied for the plot before allocation, and whether the stand premium and other fees set out in the letter of allocation were paid as no copies of receipts were produced. They also failed to produce a copy of the deed plan No. 153933, that 1st defendant relied on, other than relying on the survey's slip. The plaintiff's counsel has extensively submitted that unlike the plaintiff who has shown he followed the due process to get the registration with the suit property, the 1st defendant has not done so, as he did not even file any submissions. The 1st defendant's title cannot be defendant under sections 24, 25 and 26 of the [Land Registration Act](#) Chapter 300 of Laws of Kenya.
- d. Though the 1st defendant knew his title was under challenge, he did not find it necessary to avail Elmi Haji Hassan as a witness, to come and help him defend the letter of allotment and the subsequent process of paying the amounts required thereon. No surveyor was availed to confirm how un-surveyed plot No. 101 Nyali in the letter of allotment issued to Elmi Haji Hassan was sited on the ground for un-surveyed plot No. 11 Nyali for the plaintiff. Under said section 26 the [Land Registration Act](#), a title can be challenged on grounds of fraud/misrepresentation or on an illegality/irregularity and where procedure was not followed. In the



case of *Munyu Maina versus Hiram Gathiba Maina, Civil Appeal No. 239 of 2009* the Court of Appeal stated thus:

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

I find the plaintiff has successfully challenged the 1st defendant’s title to the suit property, by showing that he applied for the plot, accepted the offer albeit late, and made all the payments required to the point of his grant being registered. That his Deed Plan preceded that relied upon by the 1st defendant which must be through illegalities committed by the 3rd defendant’s predecessor. The testimony of DW2 in an attempt to sanctify the 1st defendant’s title amounted to nought as it was not tested through cross-examination after he failed to present himself on the dates set.

- e. From the evidence availed by the plaintiff, that is unrebutted, his title to the suit property has never been challenged, or called for revocation. Though the Land Registrar was not presented as a witness, the plaintiff filed and produced as exhibit the letter by the Land Registrar dated 14th May 2003 summoning both the 1st defendant and himself in their efforts to confirm the legality of the title documents over the suit property, but the 1st defendant failed to present himself. It appears no further efforts were taken by the Land Registrar towards settling or investigating the legality of the two grants/titles over the suit property.
- f. The learned counsel for the plaintiff cited the case of Peter Muiruri Kamau versus Mary Mwhiki [2017] eKLR, the court held as follows:

“Is the defendant a bona fide purchaser for value without notice? The Ugandan case of Katende vs Haridas & Company Limited (2008) 2 EA 174, defined a bona fide purchaser as thus;

“a bona fide purchaser is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine he must prove the following; he holds a certificate of title; he purchased the property in good faith; he had no knowledge of fraud; he purchased for valuable consideration; the vendors had apparent good title and he purchased without notice of any fraud.”

The court then went on to find a party that benefited from fraud does not fall under this category holding:

“Applying the above test to the case at hand and the facts of the case the defendant holds a hollow title. No evidence was led to prove that the consideration changed hands and having held as much, there was no consideration that passed and therefore no interest was conveyed to the defendant.... It is clear from the above that the law does not support illegal transactions. The defendant’s title is being challenged on grounds of illegalities, fraud, undue influence, misrepresentation and on those accounts the defendant cannot be said to be a bona fide purchaser.”



The counsel also referred to the case of Dina Management Limited versus County Government of Mombasa & 5 Others, Petition No. 8 (E010) of 2021, where the Supreme Court of Kenya held that:

“94. To establish whether the appellant is a bona fide purchaser for value therefore, we must go to the root of the title, right from the first allotment, as this is the bone of contention in this matter.”

The court cited the case of Funzi Development Limited & Others versus County Council of Kwale (2014) eKLR, where it was held that;

“...a registered proprietor acquires an absolute and indefeasible title if and only if allocation was legal, proper and regular. A court cannot on the basis of indefeasibility of title sanction an illegality or give its seal of approval to an illegal or irregularly obtained title.”

And proceeded to hold that:

“Indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of title did not comply with the law, then such a title cannot be held as indefeasible. The first allocation having been irregularly obtained, H. E Daniel Arap Moi had no valid legal interest which he could pass to the appellant..... Having found that the 1st registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under Article 40 of *the Constitution*, the root of title having been challenged, as we already noted above the appellant could not benefit from the doctrine of bona fide purchaser.”

With the above decisions in mind, and noting that in addition to failing to call Elmi Haji Hassan, vendor, as a witness, the 1st defendant did not avail a copy of the sale agreement under which he allegedly bought the suit property from the vendor, proof of payment of the consideration, transfer document, receipts on payments fees set out in the letter of allotment issued to the vendor, stamp duty, registration fees and rates, the court finds he has therefore failed to show he was a bona fide purchaser for value without notice. The plaintiff's title, being the earlier one than that of Elmi Haji Hassan, that was transferred to the 1st defendant, should under the applicable law and the equitable doctrine of first in time prevail.

- g. It was reported that the suit property's title had been charged by the 1st defendant to a bank and that it was sold during the pendency of this suit in court. Under the doctrine of lis pendens, the court has the power to issue orders as it deems appropriate in this judgement.
 - h. Under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, costs follow the events unless where for good cause the court finds otherwise. In this case, the plaintiff is granted costs.
10. Flowing from the foregoing conclusions, the court finds the plaintiff has proved his claim on a balance of probabilities, and orders as follows:
- a. A declaration is hereby issued that the Estate of Christopher Athumani Mwavula is the lawful proprietor of plot No. 6652/1/MN, Mombasa, suit property.



- b. An order is hereby issued directing the Registrar of Titles, 4th defendant, to rectify the register of the suit property to reflect the Estate of Christopher Athumani Mwavula as the sole registered proprietor of the suit property.
- c. The plaintiff is awarded costs of this suit and interest thereon at court rates.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 25TH DAY OF JUNE 2025.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:

Plaintiff : No Appearance

Defendants : No Appearance

Shitemi-court Assistant.

