



REPUBLIC OF KENYA



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Shadrack (Sued in her Capacity as the Administrator of the Estate of Shedrack Wambua Kivai) v Muthama (Environment and Land Case E086 of 2021) [2025] KEELC 4853 (KLR) (25 June 2025) (Judgment)

Neutral citation: [2025] KEELC 4853 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND CASE E086 OF 2021

A NYUKURI, J

JUNE 25, 2025

BETWEEN

LYDIA MWIKALI SHADRACK PLAINTIFF

SUED IN HER CAPACITY AS THE ADMINISTRATOR OF THE ESTATE OF SHEDRACK WAMBUA KIVAI

AND

ANTHONY MWAKA MUTHAMA DEFENDANT

JUDGMENT

Introduction

1. By a plaint dated 16.9.2021, the plaintiff sought against the defendant the following orders:
 - a. A declaration that the plaintiff is lawfully entitled to a piece of land containing by measurements ten acres in the estate of Shedrack Wambua Kivai and more particularly in parcel number Donyo Sabuk/Komarock BLock 1/12374 (previously known as plot number 480 at Komarock)
 - b. A declaration that the defendant holds ten acres in parcel number Donyo Sabuk/Komarock BLock 1/12374 (previously known as plot Number 480 at Komarock) in trust for the plaintiff.
 - c. An order compelling the Defendant to transfer to the plaintiff one of the resultant subdivisions of title number Donyo Sabuk/Komarock BLock 1/12374 (previously known as plot no. 480 at Komarock) containing measurements ten acres.
 - d. Cost of the suit.
 - e. Any such other or further relief as this Honourable court may deem fit and just to grant.



2. The plaintiff averred that between 13th August 2000 and 21st February 2003, he lawfully purchased from the deceased Shadrack Wambua Kivai several pieces of land, totalling to ten acres to be excised from the parcel of land previously known as plot No. 480 measuring 36.30 Hectares and later registered as Donyo Sabuk/Komarok Block 1/12374. That the transactions were executed in the defendant's presence who also benefitted from the consideration paid. He maintained that he had been in occupation of the said 10 acres for close to two decades and had built permanent houses thereon.
3. He stated that the defendant caused the subdivision of the suit property and without justification or lawful excuse, neglected to transfer the 10 acres to the plaintiff. Further that the defendant in his capacity as personal representative of the estate of the deceased was holding the 10 acres in trust for the plaintiff. The plaintiff further stated that the defendant had sued the plaintiff *vide* Machakos ELC Case No. 360 of 2009 which was dismissed on 29th September 2017 for want of prosecution.
4. In a defence and counter claim dated 10th February 2022, the defendant denied the plaintiff's claim. She stated that suit No. ELC 360 of 2009 was delayed by her counsel then on record and that her application for reinstatement of the suit was disallowed. She maintained that she was a stranger to the plaintiff's claim and that the same was a calculated fraudulent scheme by the plaintiff aimed at defrauding the deceased's estate.
5. The defendant also stated that the plaintiff never raised his claim during the deceased's lifetime and that after the deceased's death on 5th June 2007, the plaintiff did not raise any claim in the Succession Cause for the deceased's estate. She asserted that in 2009, the plaintiff trespassed in the suit property intermeddling with the deceased's estate and that thereafter changed tune and alleged to have purchased the same. That the defendant filed Machakos ELC 360 of 2009 but that the same was dismissed for want of prosecution and an attempt to reinstate it was unsuccessful. She also stated that the plaintiff trespassed on the suit property in November, 2021 and erected a temporary structure thereon.
6. The defendant conceded to have subdivided the suit property and alleged that she filed Machakos Succession Cause No. 499 of 2008 which was confirmed and that no objection was raised by the plaintiff. She alleged that between 2010 and 2021, the plaintiff was not in trespass of the suit property. She maintained that the plaintiff who is not a beneficiary or creditor of the deceased estate is not entitled to the suit property. In the counter claim she sought the following orders;
 - a. A permanent Injunction restraining the defendant by himself, servants, agents or any person acting under her authority from entering, remaining into, alienating, selling and/or disposing off or in any like such manner dealing with the parcel of land known as Land parcel Donyo Sabuk/Komarok/Block 1/12374.
 - b. An order of eviction do issue against the defendant, his servants, agents or any other person acting under his instructions/authority, from the suit property being Land parcel Donyo Sabuk/Komarok/Block 1/12374.
 - c. A declaration that the issue 10 acre parcel of land under Land parcel Donyo Sabuk/Komarok/Block 1/12374 forms part and parcel of the estate of Shadrack Wambua Kivai(deceased) and the same be dealt with in accordance with the certificate of confirmation of grant dated 10th August, 2009.
 - d. General damages for trespass.
 - e. Costs of this suit



- f. Any other or further relief the court deems fair and expedient to grant in the circumstances.
7. The suit was heard by way of oral testimony. Both the plaintiff and defendant presented one witness each.

Plaintiffs Evidence

8. PW1 was Antony Mwaka Muthama. He adopted the contents of his witness statement dated 16.9.2021 as his evidence in chief and produced documents attached to the list of documents dated 16th September 2021, and supplementary list of documents dated 3rd March 2022. His testimony was that between 13th August 2000 and 21st February 2003, he lawfully purchased several pieces of land which totalled to 10 acres from the late Shedrack Wambua Kivai who received the purchase price in full. That he purchased part of plot No. 480 at Komarock which was subsequently registered as Donyo Sabuk/Komarock BLock 1/12374. He stated that he took possession of his 10 acres and has been in occupation for almost two decades. That upon the death of Shedrack Wambua Kivai, his widow the defendant herein obtained grant of letters of administration and subsequently caused the subdivision of the suit property into several parcels with the aim of transmitting purchased portions to the respective buyers including the plaintiff, but that she unjustifiably failed to transfer the 10 acres to him.
9. The witness stated that some of the resultant subdivisions are still registered in the defendant's name. He stated that the defendant being the personal representative of the deceased's estate, she was under legal obligation to transfer the 10 acres to the plaintiff and therefore she is holding the 10 acres in trust for the plaintiff. That the defendant's suit being Machakos ELC 360 of 2009 was dismissed on 29th September 2017 for want of prosecution. He produced certificate of official search, sale agreements, amended plaint in Machakos ELC 360 of 2009, demand letter, translations of the agreements and the original agreements in Kamba language.
10. On cross-examination, he stated that he entered land sale agreement with Shadrack Wambua on 13th August 2000 and that the seller died around 2008. He stated that after purchase, the parties had a surveyor place beacons on the property in the presence of the seller and his son. That he had several agreements in regard to plot No. 480. He confirmed that before filing this suit he had been sued by the defendant vide ELC Case No. 360 of 2009. That he was aware that the defendant filed a Succession Cause in regard to the deceased's estate. He stated that he still lives on the suit property as he has constructed a house on it but that he was not asked to present evidence of occupation. In re-examination, he stated that he knew the defendant and that the defendant's name, identity card number and signature were on the agreement. He denied trespassing on the suit property. He stated that he had never been charged with fraud. That marked the close of the plaintiff's case.

Defendant's Evidence

11. DW1 was Lydia Mwikali Shedrack, the defendant in this case. She adopted her witness statement dated 10th February 2022 as her evidence in chief. She produced documents attached to her list of documents dated 9th May, 2022, save document No. 3 (Amended plaint in ELC 360 of 2009). Her testimony was that she was the administrator of the estate of the late Shedrack Wambua Kivai having been issued with confirmed grant on 10th August 2009. That she sued the plaintiff in Machakos ELC 360 of 2009 but that the matter was dismissed for want of prosecution and her application for reinstatement was declined.
12. The witness further stated that the deceased died on 5th June 2007 and that the plaintiff never raised any claim before his death and during succession. That the plaintiff trespassed in the suit property in 2008



and began harvesting grass thereon. That he was stopped but came back in 2009 resulting in filing of ELC No. 360 of 2009. She claimed that the plaintiff's claim was strange to her and that the same was based on fraud as his agreements were forgeries. That she undertook subdivision of the suit property. That the obtaining of title for parcel Donyo Sabuk/Komarock BLock 1/93197 and claim for Block 1/93198 was fraudulent and the same are allegedly in the hands of the 1st defendant and should be returned to the estate of administration.

13. The witness stated that in November 2021, the plaintiff entered the suit property parcel Donyo Sabuk/Komarock BLock 1/12374 and constructed a temporary 12 by 12 iron sheet structure which the plaintiff currently calls a permanent home of over 20 years. That one Boniface Mwangangi Matheka also trespassed in the suit property and filed ELC 20/2021 upon dismissal of the defendant's suit being ELC 322 of 2009 for want of prosecution.
14. On cross-examination, she stated that she had known the plaintiff for a short period. That she does not know where the plaintiff comes from. That she knew him when he claimed to have purchased land from the deceased and that she did not know if the deceased sold land to him. When asked to show the court her identity card, she showed the court National Identity Card No. 32xxx04. She stated that during the agreement of 13th August 2000 she was not present and does not know who signed the same. She stated that she had never lost her identity card.
15. The witness stated that the plaintiff went to her asking for the land and that he had a land sale agreement which she showed her children. She also stated that she did not see or show the agreement to her children. She averred that she did not inform the plaintiff of having filed succession cause or inform the succession court of any of the buyers at the time of distribution of the estate. That she did not report the plaintiff to the police for trespass. She stated that she did not report to the CID that her signature on the plaintiff's agreement was forged. She stated that there was no one using the 10 acres in dispute and that the plaintiff had built an iron sheet house on the land when this case was ongoing. She stated that her home was not near the suit property.
16. She stated that one Boniface Mwangangi was also a buyer and that she did not know that Boniface Mwangangi claimed to have purchased the land together with the plaintiff. That she did not give Boniface Mwangangi title for 5 acres and does not know how he got his title. She denied ever selling land for purposes of paying her children's school fees.
17. In re-examination, she stated that when she saw the plaintiff's agreement with a signature purported to be hers, she reported to her advocate. She stated that she did not know who lives on the suit property. That Boniface Mwangangi came on the suit property in the company of a surveyor and police officers and they were forced to give him five acres of land, although he had no agreement. She maintained that she did not know if her husband sold any land. That marked the close of the defence case.
18. Parties were directed to file and serve their respective submissions. The plaintiff's submissions are dated 10th February 2023 while the defendant's submissions are dated 9th January 2025.

Submissions

19. Counsel for the plaintiff submitted that the plaintiff had proved his case on the required standard having presented land sale agreements that showed purchase of 10 acres from parcel of land which was later registered as Donyo Sabuk/Komarock BLock 1/12374. Counsel argued that although the defendant pleaded fraud, no particulars of fraud were stated which is contrary to provisions of Order 2 Rule 10 (a) of the *Civil Procedure Rules*.



20. Counsel further referred to sections 107 and 109 of the [Evidence Act](#) and argued that the plaintiff had met the threshold on proof of her claim.
21. In response, counsel for the defendant submitted that the plaintiff's claim was predicated on fraud as the plaintiff never raised any objection in regard to succession cause no. 499 of 2008 filed by the defendant in regard to the deceased's estate. Counsel contended that the plaintiff brought his claim after 21 years and that there was no evidence of purchase of the suit property as no family member of the late Shedrack Wambua Kivai signed the sale agreements. Regarding his counterclaim, counsel argued that the same was not resjudicata in view of the decision in Machakos ELC 360 of 2009. To buttress this argument, counsel relied on the case of [Kibiro Wagoro v Francis Nduati Macharia & Another](#) ELC 63 of 2017.

Analysis and Determination

22. The court has duly considered the pleadings, evidence and submissions filed. On the counterclaim, the defendant conceded that a similar claim which she had filed in Machakos ELC Case No. 360 of 2009 was dismissed for want of prosecution. She however stated that her counterclaim should be considered because it is not res judicata.
23. Elements of res judicata are outlined in section 7 of the [Civil Procedure Act](#) which are that a court is barred from hearing a matter where the issue raised in the current suit is the same as the one in the former suit; the parties in the former suit and in the current suit are the same or are their privies; the issue was decided on merit with finality by a competent court in the former suit. In the instant matter, as the former suit was dismissed for want of prosecution, it follows that it was no determination of the issue on merit hence I find and hold that the counterclaim is not res judicata. However, the defendant having failed to appeal against the decision to dismiss her claim for want of prosecution in Machakos ELC Case No. 360 of 2009, cannot succeed in filing a fresh claim as this fresh claim is an abuse of the court process, because she failed to prosecute a similar claim and is basically wasting precious judicial time.
24. Therefore, on the substance of the claim herein, four issues arise for the court's determination, namely;
 - a. The plaintiff lawfully purchased the suit property from the late shedrack Wambua Kivai
 - b. Whether the plaintiff is a trespasser on parcel No. Donyo Sabuk/ Komarock BLock 1 /12374
 - c. Whether the defendant is entitled to orders sought in the counter claim.
 - d. Whether the plaintiff deserves orders sought in the plaint
25. The legal protection for the right to property under Article 40 (6) of the [Constitution](#) is only in regard to property that is lawfully acquired and does not extent to property that is unlawfully acquired. Hence a claimant can base their claim of ownership on lawful purchase as a means of lawful acquisition.
26. 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.
- 27. Therefore, for a sale of land contract to be valid, the contract must be in written, signed by both parties and each party’s signature attested by a witness who should be present at the execution of the contract. However, these elements do not apply in instances of contracts in respect of public auctions; where there is a resulting, implied or constructive trust and where the agreement was made before the enactment of the [Land Act](#).
- 28. In the instant matter, there is no dispute that parcel No. Donyo Sabuk/ Komarock BLock 1/ 12374 was previously registered in the name of Shedrack Wambua Kivai and before its registration, it was known as plot No. 480. Therefore, the deceased who owned the suit property had capacity to transact over the same. The plaintiff alleges to have purchased several pieces of land making a cumulative acreage of 10 acres. He produced several sale agreements showing purchase. The agreements presented by the plaintiff show that the registered proprietor sold a total of 10 acres to the plaintiff in the presence of witnesses.
- 29. While the defendant denied the plaintiff’s claim and insisted that the plaintiff has never purchased the suit property, terming the agreements as forgeries, she did not give any specific reasons for that assertion. Besides, in the defendant’s own plaint filed in Machakos ELC 360 of 2009, the defendant confirmed that there was a contract between the plaintiff and her husband Shedrack Wambua Kivai but alleged that the contract was unenforceable. She did not however plead the particulars for the alleged unenforceability. That being the case, and the plaintiff having demonstrated sale agreements executed by the parties and attested by witnesses, I find and hold that the sale agreements entered into by the plaintiff are valid and enforceable contracts having met the threshold in section 38 of the [Land Act](#).
- 30. Section 28 of the [Land Registration Act](#) provides that trust is one of the overriding interest which registered land is subject to and provides as follows;

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register-

 - a.
 - b. Trusts including customary trusts.



31. As was held in the case of *Mugambi (Legal Representative of the estate of Geoffrey Mugambi Nkanata - Deceased) v Jacks & 8 Others* (Environment and land Appeal E045 of 2023 [2024] KEELC 3800 (KLR) (8 May 2024) (Judgment), a trust is a fiduciary relationship in which a settler gives another party known as the trustee the right to hold title to property or assets for the benefit of a third party beneficiary.
32. Trust is defined by the *Black's Law Dictionary* 9th Edition to mean a right enforceable, solely in equity to the beneficial enjoyment of the property to which another holds legal title, a property interest held by one person (trustee) at the request of another (settler) for the benefit of a third party (beneficiary). Trust can be implied, resulting or constructive.
33. In the instant case, the plaintiff lawfully purchased 10 acres from Shedrach Wambua Kivai, to be excised from parcel No. Donyo Sabuk/ Komarock BLock 1/ 12374. The administrator of the estate of the seller can only hold the property in trust for the plaintiff because upon purchase, the purchased land ceased to belong to Shedrach Wambua Kivai, and became the property of the plaintiff. In the premises, I find and hold that the defendant holds 10 acres part of the land previously known as parcel No. Donyo Sabuk/ Komarock BLock 1/12374 in trust for the plaintiff.
34. Entry into another person's property without their consent or authority is unlawful and amounts to trespass. Is the plaintiff's presence on the suit property unlawful? I do not think so. The plaintiff having lawfully purchased 10 acres from the late Shedrach Wambua Kivai, he had a right to enter and possess the same. I therefore find and hold that the plaintiff is not in trespass of the 10 acres which he is in possession.
35. Regarding the counterclaim, the same having herein above been found to be an abuse of the court process in view of the dismissal for want of prosecution of Machakos ELC Case No. 360 of 2009, I hereby dismiss the counterclaim.
36. It is trite that a party is bound by their pleadings. I have considered the prayers sought by the plaintiff. He sought orders that a declaration be made that he is entitled to 10 acres being part of parcel No. Donyo Sabuk/ Komarock BLock 1/12374 and that the defendant holds 10 acres from the said title in trust for the plaintiff. He further sought an order compelling the defendant to transfer to him one of the resultant subdivisions of title No. Donyo Sabuk/ Komarock BLock 1/ 12374.
37. Although the plaintiff proved that he lawfully purchased 10 acres and that that creates a trust in his favour against the defendant, as parcel Donyo Sabuk/Komarock BLock 1/12374 was no longer in existence at the time of filing this suit, his claim that the trust is in regard to the said title fails. Regarding the plaintiff's prayer that the defendant be compelled to transfer any of the plots arising from subdivision of parcel No. Donyo Sabuk/ Komarock BLock 1/ 12374, he produced an official search showing that the title for parcel No. Donyo Sabuk/ Komarock BLock 1/ 12374 was closed on subdivision on 15th October 2007 resulting in parcel Nos. 19462 and 19463. This suit was filed in 2021, which is 14 years after the suit title was closed on subdivision. None of the parties herein produced the official search certificates for the new parcel Nos. 19462 and 19463. Whether the two new numbers are still intact to date or have been subjected to further subdivision, was not brought to the attention of this court. Further, the plaintiff did not inform court the registered owners of parcel Numbers No. Donyo Sabuk/ Komarock BLock 1/ 19462 and 19463 or the status thereof as at the time of filing this suit in 2021.
38. Up until now, while the plaintiff is aware that in 2007 title for parcel No. Donyo Sabuk/ Komarock BLock 1/ 12374 was closed on subdivision resulting in parcels 19462 and 19463, he has not told this court on which title his parcel measuring 10 acres is located and who is the registered owner of the 10 acres he is claiming. He has also not told the court the acreages for parcel Nos. 19462 and 19462. Yet,



he has asked this court to compel the defendant to transfer to him one of the resultant subdivisions of parcel No. Donyo Sabuk/ Komarock BLock 1/ 12374.

39. Asking this court to pick any of the subdivisions of parcel No. Donyo Sabuk/ Komarock BLock 1/ 12374, being either parcel No. Donyo Sabuk/ Komarock BLock 1/ 119462 or 19463, without giving the court sufficient and relevant information, including but not limited to; the current status of the titles, the registered owners and acreage thereof, and in which parcel the plaintiff's 10 acres are situated, is asking this court to award the plaintiff land through guesswork and gambling.
40. The role of the court is to apply the law to the facts of the case in a manner that will result in just outcomes. Therefore, the court will not accept the plaintiff's invitation to be led into the dark and be constrained to blindly hand over land to the plaintiff through guesswork, notwithstanding the fact that the plaintiff has demonstrated lawful purchase of part of the land previously owned by Shedrack Wambua Kivai.
41. The plaintiff having failed to state which parcel his 10 acres is located, and considering that there are other purchasers including one Bonface Mwangangi who is said to hold title for his 5 acres, as stated in evidence, this court will not award land to the plaintiff in circumstances where the plaintiff has failed to make material disclosure of relevant facts including the status, acreage and ownership of the land he seeks to get. Granting the plaintiff's prayer as sought may create a landmine that may not only result in injustice, but may constitute condemnation of persons not before this court who may be having a claim on the two parcels resulting from the subdivisions of parcel No. Donyo Sabuk/ Komarock BLock 1/ 12374. Court orders cannot be issued in vain or to trouble or vex persons not parties to a suit.
42. On that basis and based on the fact that the title sought to be awarded to the plaintiff was closed in 2007 on subdivision and the registered proprietors of the new titles having not been disclosed, I find and hold that the plaintiff has failed to prove his case on the required standard and the same is hereby dismissed.
43. In view of the circumstances obtaining in this matter I order that each party shall bear its own costs of the suit and counterclaim.
44. 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;

Mr. Ngolya for the plaintiff

No appearance for the defendant

Court Assistant: M. Nguyai

