



REPUBLIC OF KENYA



**KENYA LAW**  
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**Lotukumo v Burudi & 2 others (Environment & Land Case  
7 of 2020) [2025] KEELC 4625 (KLR) (17 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4625 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT & LAND CASE 7 OF 2020**

**CK NZILI, J  
JUNE 17, 2025**

**BETWEEN**

**JOSEPH KEDIMUK LOTUKUMO ..... PLAINTIFF**

**AND**

**MAXWELL MWAYA BURUDI ..... 1<sup>ST</sup> DEFENDANT**

**MARY MUHONJA MWAYA ..... 2<sup>ND</sup> DEFENDANT**

**JOSHUA MWACHI BURUDIDEF ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff approached the court through an amended amended plaintiff, dated 20/12/2022. He sought:
  - a. Declaration that the transfer of Land Title No. Kwanza/Kwanza Block 3/Luhya/270 into the names of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants on 4/10/2006 inclusive of 2 acres of land that he had bought was illegal and fraudulent.
  - b. Rectification of the register for Land Title No. Kwanza/Kwanza Block 3/Luhya/270, by way of cancellation of title deed issued to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants for the same to revert to the name of the 1<sup>st</sup> defendant to enable him to transfer the 2 acres into his name within the timelines the court will specify.
  - c. Permanent injunction restraining the defendants, their agents or servants from trespassing, entering, fencing, dealing, selling or in any manner interfering with the plaintiff's quiet use, possession or interest in the 2 acres being part of the Title No. Kwanza/Kwanza Block 3/Luhya/270.
2. The plaintiff contended that he was a beneficial owner of the 2 acres out of the title referenced above, in which he bought 1 acre of land on 20/1/2006, and another 1 acre on 24/1/2006 from the 1<sup>st</sup> defendant,



- making a total of 2 acres, paid in full before he was placed into vacant possession and has since been utilizing the portion.
3. The plaintiff averred that the 1<sup>st</sup> defendant had committed himself to sign all the statutory documents and to take all the necessary steps to transfer the portion bought, since the land as at the date of sale, was still under his name.
  4. Again, the plaintiff contended that, after the 1<sup>st</sup> defendant declined to effect the transfer and instead, his wife the 2<sup>nd</sup> defendant lodged an LDT Case No. 25 of 2008. The plaintiff averred that the ruling was in his favour and was made a decree of the court on 3/4/2009 in Kitale RM Land Case No. 75 of 2008, following which on 29/2/2012, he lodged a caution against the title to safeguard his interest.
  5. Further, the plaintiff averred that the 2<sup>nd</sup> defendant appealed in Kitale HC ELC Appel No. 4 of 2018 regarding the Land Disputes Tribunal award, which was allowed on 13/5/2019 on account of jurisdiction regarding registered land.
  6. Thereafter, the plaintiff averred that on 10/6/2019, he established after an official search that the 1<sup>st</sup> defendant had colluded and fraudulently or secretly transferred the entire land to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants on 4/1/2006, inclusive of his entitlement of the 2 acres. The plaintiff blamed the 2<sup>nd</sup> and 3<sup>rd</sup> defendants for occasioning the fraud yet they were aware of his interest in the 2 acres, as well as his occupation thereof, otherwise, the said actions were unjustified, malicious, illegal and undertaken to defeat his accrued rights or interests.
  7. The defendants opposed the amended amended plaint through an amended statement of defence dated 30/1/2023, terming the suit as a non-starter, and res judicata. The defendants averred that the plaintiff should have followed the alleged seller since the alleged Kemaiko Akemuluk had neither the authority to act on behalf of the defendants and therefore had no land to sell to the defendants, nor were the defendants parties to the transaction. The defendants denied that the plaintiff ever took possession of the land as alleged or at all. Equally, the 1<sup>st</sup> defendant denied undertaking to sign any transfer documents in favour of the plaintiff.
  8. Accordingly, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants denied selling 2 acres of their land to the plaintiff or the 1<sup>st</sup> defendant having filed any case through his wife, otherwise if any case was filed, the 2<sup>nd</sup> defendant did it in her capacity as the owner of the land, which suit was heard and determined by the elders and subsequently adopted as an award of the court in Kitale CM Land Case No. 75 of 2008.
  9. The defendants averred that in view of Kitale ELC Appeal Case No. 4 of 2018, which determined ownership of the land, thus this suit is res judicata. The defendants termed the plaintiff as dishonest for he has all along known that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are the owners of the land since 2008, when he lodged the tribunal case, otherwise, it is not true that he discovered the alleged fraud on 10/6/2019.
  10. Additionally, he defendants averred that the transfer of the land from the 1<sup>st</sup> defendant to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants was lawfully done, and that the 1<sup>st</sup> defendant was not at liberty to notify the plaintiff or anyone about his intention to transfer his land. Therefore, the defendants averred that there was nothing illegal or unjustified in the transaction, and terminating the claim of fraud is time-barred.
  11. From the court records, the plaintiff initially testified on 24/5/2024, relied on his witness statement dated 28/7/2022 and produced his ID Card, sale agreement dated 20/1/2006 with Kimadio Akemuluk who had bought the land from the 1<sup>st</sup> defendant, Maxwell Mwaya Buridi, as P. Exhibit Nos. (1) and (2), agreement dated 9/3/2005 and 24/1/2006, as P. Exhibit No. (3) and (4), copy of title as P. Exhibit No. (5), letter dated 10/6/2019 as P. Exhibit No. (6), green card as P. Exhibit No. (7) and was extensively cross-examined.



12. Following an application for amendments, the plaint was further amended with leave of court on 20/12/2022. It appears that after further amendments of the amended plaint, the plaintiff opted to start the matter de novo. Joseph Lokutum as PW1 relied on a witness statement dated 20/12/2022 as his evidence in chief and produced a copy of his ID card, sale agreement dated 20/1/2006, copy of agreement dated 9/3/2005, copy of agreement dated 24/1/2006, copy of title deed dated 4/10/2006, letter dated 10/6/2019 and an extract of the register as P. Exhibit No. (1) - (6), respectively. Even though the defendant's counsel was present at the call-over, he failed to show up to cross-examine the witness when the hearing started at 9:30 a.m.
13. Kamadio Ademuluk was PW2. He relied on a witness statement dated 21/3/2022 as his evidence-in-chief. PW2 told the court that he purchased 1 acre of land from the 1<sup>st</sup> defendant by an agreement dated 9/3/2005 who placed him into possession of the same after he made all the payments. PW2 said that eventually by an agreement dated 20/1/2006, he sold the portion to the plaintiff who on the same day, acquired another 1 acre by the 1<sup>st</sup> defendant.
14. At the close of the plaintiff's case, the defendants while aware of the hearing date going by an affidavit of service dated 18/2/2025, where a hearing notice was served on 14/11/2024 and counsel on record took a time allocation for 9:30 a.m. opted to stay away. Equally, the case tracking system shows that the defendant's counsel filed an application dated 17/2/2025 at 8:27 a.m., on the morning of the hearing. The application was neither served upon the defendants nor prosecuted by the counsel who opted to be absent at 9:30 a.m. So, the defendants' defence was ordered closed for non-prosecution and non-attendance.
15. The plaintiff orally submitted that the evidence tendered in support of the claim stood uncontroverted and therefore, since the burden of proof has been discharged, the court should rectify the register for the title held in the names of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to revert to the 1<sup>st</sup> defendant, so that he can transfer 2 acres out of the title to the plaintiff and in the alternative. Further, that an order to issue for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to sign transfer forms to transfer 2 acres of Title No. Kwanza/Kwanza Block 3/Luhya/270 to the plaintiff and in default, the Deputy Registrar of the court to do so. Again, the plaintiff submitted that he is entitled to a permanent injunction.
16. Lastly, the plaintiff urged the court to find that the amended statement of defence by the defendants had not been substantiated by way of calling evidence.
17. The issues calling for my determination are:
  - (1) If the plaintiff has pleaded and proved that there was a binding sale agreement for 2 acres out of the 1<sup>st</sup> defendant's Title No. Kwanza/KwanzaBlock 3/Luhya/270.
  - (2) If the transfer of the land between the 1<sup>st</sup> defendant and the 2<sup>nd</sup> and 3<sup>rd</sup> defendants was subject to the accrued interest or right of the plaintiff who was already in possession and occupation of the land with effect from 2006.
  - (3) If the said transfer and registration in issue No. 2 above was illegal, fraudulent and out to defeat the plaintiff's agreement with the 1<sup>st</sup> defendant.
  - (4) If the plaintiff's suit is res judicata and or the cause of action is time-barred.
  - (5) If the plaintiff is entitled to the reliefs sought.
  - (6) If the defence has merit.
  - (7) What is the order of costs?



18. The plaintiff seeks enforcement of sale agreements which he entered into with the 1<sup>st</sup> defendant to acquire 2 acres out of Title No. Kwanza/Kwanza Block 3/Luhya/270 in 2005 and 2006. The plaintiff relies on P. Exhibit Nos. (2), (3) and (4) being the agreements which were executed by the parties on 20/1/2006 and 9/3/2005, at a time when the 1<sup>st</sup> defendant was the registered owner of the land.
19. From P. Exhibit No. (4), it appears that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants became the registered owner of the suit land on 4/10/2006. The plaintiff has averred and pleaded that by the time the sale agreements were signed and vacant possession granted to him, the 1<sup>st</sup> defendant was the registered owner of the land. The plaintiff insists that while aware of the said facts the 1<sup>st</sup> defendant fraudulently and in collusion secretly transferred the land on 4/10/2006 to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, in order to defeat his occupation, possessory and accrued rights or interests.
20. The burden of proof is on he who alleges the existence of certain facts for the court to find in his favour. The only way that the plaintiff could have substantiated the contents of paragraph 5 of the amended plaint is through a copy of records or a title deed showing that as of 2005 and January 2006, the suit land was in the name of the 1<sup>st</sup> defendant. Official search certificates for the land as of 9/3/2005 and 20/1/2006 had to be availed before the court to show that the 1<sup>st</sup> defendant was the registered owner of the suit land. A letter dated 10/6/2019 was attached to the plaintiff's bundle of documents dated 15/2/2023. It has a copy of the register for Kwanza/Kwanza Block 3/Luhya/270 opened on 1/10/2001 in the name of the government. Entry No. 2 shows that the 1<sup>st</sup> defendant became the owner on 17/8/2004 and a caution was placed on the tile by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants on 30/8/2006 but withdrawn on 4/10/2006. The plaintiff's witness statement captures all of these facts.
21. The court's role is to interpret a contract within its four corners and not to rewrite it. Parties to the contract have the freedom to contract. A court of law must enforce a contract unless it is found to be void, illegal, fraudulent, unconscionable or against public policy. See *NBK -vs- Pipe Plastic Samkolit (K) Ltd* [2002] EA 503.
22. Sale agreements on land must comply with the provisions of Section 3 (3) of the *Law of Contract Act* and Section 38 of the *Land Act*. The sale agreement dated 20/1/2006 does not define the suit land and indicate who the registered owner was. It however refers to the earlier agreement dated 9/3/2005. The said agreement defines the parcel number and includes particulars of the parties, consideration, and acreage. It has the signatures of the parties and their witnesses.
23. From the copy of the records, the 1<sup>st</sup> defendant as of 2005 and early 2006 was the registered owner of the suit land. He could therefore enter into the sale agreements with the plaintiff or any other person such as PW 1 and 2, to offer for sale, receive consideration and undertake to effect transfers in favour of the purchasers for the 2 acres. Equally, the 1<sup>st</sup> defendant could show and put into vacant possession the purchasers of the 2 acres while awaiting formal transfers and registration to be effected.
24. Entry number 9 of the copy of the record shows that the plaintiff on 29/2/2012, registered a caution expressing the purchaser's interest. The defendants have not denied the encumbrance on the title register in the amended defence dated 30/1/2023. It is also captured in the witness statement of the plaintiff dated 28/2/2022. Other than generally alleging that the 1<sup>st</sup> defendant did not sign the sale agreement(s) or the plaintiff dealt with strangers in the alleged sale, the 1<sup>st</sup> defendant did not specifically plead any fraud, forgery or misrepresentation of facts. His signatures and particulars are captured in the sale agreements. It is the 1<sup>st</sup> defendant who offered to sell, signed the sale agreements, put the purchaser(s) into vacant possession and obtained consideration for the same. The copy of the records indicates that the 1<sup>st</sup> defendant had the capacity to enter into the sale agreement.



25. The facts of the sale were captured in the KLDT/25/2008. The 2<sup>nd</sup> defendant had objected to the sale for lack of spousal consent, and consideration of Kshs. 253,000/=. These facts were confirmed by the parties before the panel of elders. The tribunal award was only set aside by the court simply because of lack of jurisdiction. The court did not determine the issue of ownership, sale and transfer. The previous court only determined the critical issue of whether the Land Disputes Tribunal had jurisdiction to entertain a claim on registered land.
26. Therefore, the plea of res judicata and time limitation are improperly invoked. There was no valid decree over the pleaded issues here in, determining the same on merits and with finality, between the same parties by a court of competent jurisdiction. See *Maina Kiai & 2 others -vs- Independent Electoral and Boundaries Commission & another* [2016] KEHC 7738 (KLR).
27. Going by the evidence tendered by the plaintiff, in support of his amended plaint, I find that the claim is substantiated on a balance of probabilities. The documentary evidence tendered shows that there were valid sale agreements between the 1<sup>st</sup> defendant and the plaintiff. A consideration that was paid has not been denied by the 1<sup>st</sup> defendant. In the witness statement dated 12/5/2020, the 1<sup>st</sup> defendant admits in the second to last paragraph that he sold the land, which sale was unfortunately resisted by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants for lack of spousal consent.
28. The 1<sup>st</sup> defendant admits that he transferred the land to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants out of family pressure. The 1<sup>st</sup> defendant has not offered to refund the monies that were paid to him. The 1<sup>st</sup> defendant admits the caution lodged on 29/2/2012 on account of the purchaser's interest. Coming to the witness statements by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, they termed the sale as purported to the plaintiff, hence her move to object to it and block the buyer from taking vacant possession.
29. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants admit suing both the plaintiff and her husband before the Land Disputes Tribunal. From the defendants' statements, there is an admission of material facts that the sale took place. Admitted facts need not be proved by any other evidence.
30. It is the 1<sup>st</sup> defendant who unfairly obtained a benefit of the consideration from the plaintiff and could not deliver the subject matter. The doctrine of unjust enrichment militates against, allowing the 1<sup>st</sup> defendant to retain both the land and the consideration against conscience that he should keep it. In *Madhupaper International Ltd & Another -vs- KCB Ltd & Others* [2003] eKLR, the court said that such a legal principle need not be pleaded by parties since a party should do justice and restore the benefit to the giver. This court can reverse the 1<sup>st</sup> defendant's unjust enrichment to avoid unlawful benefit; of retaining both the money and the land as held in *Chase International Investment Co-op & Another -vs- Laxman Keshra & Others* [1978] KECA 7 [KLR].
31. The actions of the 1<sup>st</sup> defendant are both unconscionable, inequitable and unjust. The defendants are therefore estopped in law from denying that the 1<sup>st</sup> defendant could not and did not enter into the sale agreement(s) with an intention of selling and transferring 2 acres of the suit land therein under his name.
32. There can be no right without a remedy in law. The defendants have not pleaded any restriction or testified that if specific performance is ordered it will cause severe hardship to them. In *Caltex (K) Ltd -vs- Rono Ltd* [2016] KECA 457 [KLR], the court cited *Gharib Suleiman Gharib -vs- Abdurahman Mohamed Agil C.A. No. 112 of 1998*, that specific performance is based on the existence of a valid and enforceable contract, especially where a party cannot obtain sufficient remedy by award of damages.
33. In *Willy Kimutai Kitilit -vs- Michael Kibet* [2018] KECA 573 [KLR], the court cited *Macharia Mwangi Maina & Others -vs- Davidson Mwangi Kagiri* [2014] eKLR, that the action of receiving full



purchase price and putting the respondent into possession created contractive trust, hence the court granted specific performance. The court observed that under Sections 39, 40, 41, 42 and 161 of the Land Act, the court has powers to grant a purchaser some relief. The court said that the doctrines of equity are subscribed in Section 3(3) of the Law of Contract Act and Section 38(2) of the Land Act and the Land Control Board Act. The court said that equity is one of the natural values and principles under Article 10 of the Constitution and therefore lack of land control board consent does not preclude the court from enforcing equitable principles to avoid unjust and inequitable retaining of land already sold to the respondent.

34. In my view, the plaintiff deserves the following orders which are hereby granted:-

- a. Declaration that the transfer of Land Title No. Kwanza/Kwanza Block 3/Luhya/270 into the names of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants on 4/10/2006 inclusive of 2 acres of land that he had bought was illegal and fraudulent.
- b. Rectification of the register for Land Title No. Kwanza/Kwanza Block 3/Luhya/270, by way of cancellation of title deed issued to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants for the same to revert to the name of the 1<sup>st</sup> defendant to enable him to transfer the 2 acres into the plaintiff's name within 2 months from the date hereof.
- c. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants to execute the subdivision and transfer forms for the 2 acres of land in favour of the plaintiff within 2 months and in default, the Deputy Registrar of the court to do so.
- d. Permanent injunction restraining the defendants, their agents or servants from trespassing, entering, fencing, dealing, selling or in any manner interfering with the plaintiff's quiet use, possession or interest in the 2 acres being part of the Title No. Kwanza/Kwanza Block 3/Luhya/270.
- e. Costs to the plaintiff.

35. Orders accordingly.

**JUDGMENT DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 17<sup>TH</sup> DAY OF JUNE 2025.**

In the presence of:

Court Assistant - Dennis

Teti for the plaintiff present

Ndinyo for the defendant absent

**HON. C.K. NZILI**

**JUDGE, ELC KITALE.**

