



REPUBLIC OF KENYA



KENYA LAW
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**Alimahadu v Ombuya & 9 others (Environment & Land Case
4 of 2016) [2025] KEELC 4476 (KLR) (16 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4476 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 4 OF 2016
DO OHUNGO, J
JUNE 16, 2025**

BETWEEN

SAMUEL KIHAMBA ALIMAHADU PLAINTIFF

AND

DAVID OBIRI OMBUYA 1ST DEFENDANT

HERMAN AMESA OGWOGU 2ND DEFENDANT

PAUL WANYAMA INDECHE 3RD DEFENDANT

BENEDICTO KUYANDA MAYENGO 4TH DEFENDANT

REGINA IMINZA MAHIVA 5TH DEFENDANT

JOHN WEKESA WAFULA 6TH DEFENDANT

MARTIN MOTI KIHESO 7TH DEFENDANT

TOM MUYOMA 8TH DEFENDANT

AMOS NYONGESA 9TH DEFENDANT

ALPHONCE JUMBA SAKWA 10TH DEFENDANT

JUDGMENT

1. The Plaintiff moved the Court through Plaint dated 13th January 2016 in which he averred that he was the registered proprietor of the parcel of land known as Kakamega/Lugari/67 (the suit property) and that the Defendants had trespassed into the suit property between the years 2008 to 2014 and erected structures thereon. He therefore prayed for judgment against the Defendants for their eviction from the suit property and for costs of the suit.



2. The Defendants filed Amended Statement of Defence and Counterclaim amended on 13th January 2020 through which they denied the Plaintiff's allegations of proprietorship and trespass. The 1st to 8th and 10th Defendants averred that on diverse dates between the years 2002 and 2014, they purchased and occupied respective portions of the suit property from Mary Mbaisi who was then then proprietor. They prayed for an order compelling the Plaintiff to transfer to the 1st to 8th and 10th Defendants their respective portions and that titles be issued to them. They further prayed for costs of the suit.
3. At the hearing, the Plaintiff adopted his witness statement dated 13th January 2016 and produced copies of the documents listed as item numbers 1, 3 to 5 in his list of documents dated 13th January 2016. He stated in the statement that he was the registered proprietor of the suit property and that the Defendants had entered and occupied it without his consent. He added that the First Defendant was in occupation of 2.5 acres, the Second and Third Defendants 0.75 acres, the Fourth, Fifth and Sixth Defendants 0.25 acres each, the Fifth Defendant 0.5 acres, the Seventh and Eighth Defendants 0.75 acres each while the Ninth Defendant was in occupation of 1 acre.
4. The Plaintiff went on to testify that he previously litigated over the suit property with Mary Mbaisi, his step mother, in the Court of Appeal in Civil Appeal No. 27 of 2013 (Kisumu) and that the Court of Appeal decided in his favour. He added that he was unable to reside on or have any activity in the suit property out of fears for his safety and due to threat posed by the Defendants. That although the Defendants claim that they purchased portions of the suit property, they neither purchased from him nor paid any purchase price to him. The Plaintiff's case was then closed.
5. David Obiri Ombuya, the First Defendant, testified as DW1 and stated that he was residing on the suit property as of the date of his testimony. He adopted his witness statement dated 30th October 2017 and produced a copy of a sale agreement between him and Mary Mbaisi. He stated in the statement that on 22nd March 2008, he entered into an agreement with Mary Mbaisi pursuant to which the latter undertook to sell to him a 1 acre portion of the suit property at a consideration of KShs 210,000 which he paid in full and took possession. That later, Mary Mbaisi sold to him more land and that he was in occupation of a total of 2.5 acres of the suit property. He added that he had developed on the portion his own home as well as homes of his sons with families and crops thereon. Under cross-examination, he stated that he did not conduct any search prior to the agreement.
6. Martin Moti Miheso (DW2) stated that he was residing on the suit property as of the date of his testimony and that he too had purchased the portion he was occupying from Mary Mbaisi on 22nd December 2007. He equally did not conduct any search prior to the transaction. He added that he had developed the portion to the value of KShs 5,000,000.
7. Herman Amesa Ogwogu (DW3) equally testified that he was residing on the suit property as of the date of his testimony and that he purchased the portion he was occupying from Mary Mbaisi. He too did not conduct any search before transacting with Mary Mbaisi through a sale agreement dated 4th April 2009.
8. Alphonse Jumba Sakwa (DW4), Regina Iminza Mahiva (DW5), Paul Wanyama Indeché (DW6), Mboya Jacob Omuyoma (DW7) and John Wekesa Wafula (DW8) all testified that they purchased their respective portions of the suit property from Mary Mbaisi through various sale agreements. DW7 further stated that his correct names are Mboya Jacob Omuyoma and not as captured in the Plaintiff.
9. The Defence case was then closed. Thereafter, directions for filing and exchange of written submissions were given. In compliance, the Plaintiff filed written submissions dated 25th January 2024 while the Defendants filed written submissions dated 20th June 2024.



10. I have carefully considered the pleadings, evidence and submissions. There is no dispute that the Plaintiff is the registered proprietor of the suit property. His proprietorship is confirmed by the judgment delivered by the Court of Appeal on 5th February 2015 in Civil Appeal No. 27 of 2013 (Kisumu). Equally, there is no dispute that the Defendants are in occupation of the suit property pursuant to sale agreements that they entered into with Mary Mbaisi without conducting any searches at the land registry. The sole issue for determination is whether the reliefs sought by the parties should issue.
11. The Defendants have argued that their entry into the suit property was not unlawful and that the Plaintiff did not act in good faith since he watched them enter and develop the portions. They have urged this Court to compel the Plaintiff to transfer the respective portions to them. On the other hand the Plaintiff has asserted his title and the attendant rights.
12. In his capacity as a registered proprietor of land, the Plaintiff is entitled to the rights, privileges, and benefits spelt out by the law starting from Article 40 of *the Constitution* which secures protection of right to property and extending to Sections 24 and 26 of the *Land Registration Act*.
13. Section 24 of the *Land Registration Act* provides 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.
14. Additionally, a registered proprietor's rights are protected by Section 26 of the *Land Registration Act* which obligates the Court to accept his certificate of title as prima facie evidence of proprietorship unless the provisos under Section 26 (1) (a) or (b) are established. Thus, the grounds on which a title can be nullified are fraud or misrepresentation to which the registered proprietor is proved to be a party and where it is shown that the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.
15. The Defendants have not sought nullification of the Plaintiff's title. They have simply prayed that the Plaintiff be compelled to transfer the respective portions to them. In doing so, they rely on the respective agreements between them and Mary Mbaisi. The Plaintiff was not party to those agreements, and they cannot be enforced against him. As the Defendants have acknowledged, they did not conduct any searches prior to entering into the agreements. If they did the requisite due diligence, they would have concluded that Mary Mbaisi had no capacity to sell the land to them.
16. The Plaintiff's case is founded on the tort of trespass. Trespass has been defined as any unjustifiable intrusion by one person upon the land of another. See Clark & Lindsell on Torts, 18th Edition, page 923. Having entered the suit property and remained thereon without the Plaintiff's permission, the Defendants are trespassers notwithstanding their agreements with Mary Mbaisi. They are not entitled to the reliefs that they sought in their counterclaim. On the other hand, the Plaintiff has established his case and is entitled to vacant possession.
17. In view of the foregoing discourse, I find no merit in the counterclaim, and I therefore dismiss it. I enter judgment in favour of the Plaintiff as follows:



- a. The Defendants to vacate the parcel of land known as Kakamega/Lugari/67 within 90 (ninety) days from the date of delivery of this judgment. In default, an eviction order to issue.
- b. The Plaintiff shall have costs of the suit.

DATED, SIGNED, AND DELIVERED THROUGH MICROSOFT TEAMS, AT NYAMIRA, THIS 16TH DAY OF JUNE 2025.

D. O. OHUNGO

JUDGE

Delivered in the presence of:

No appearance by the Plaintiff

No appearance by the Defendants

Court Assistant: B Kerubo

