



Okwatta (Suing as the Lawful Attorney of Tabitha Mumbua) v Kisimba & 2 others; Kisoka (Interested Party) (As the Lawful Attorney of Nicodemus Ojwang Odhuso) (Environment & Land Case 261 of 2017) [2025] KEELC 4490 (KLR) (16 June 2025) (Judgment)

Neutral citation: [2025] KEELC 4490 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 261 OF 2017
DO OHUNGO, J
JUNE 16, 2025**

BETWEEN

MARTIN OKWATTA PLAINTIFF

SUING AS THE LAWFUL ATTORNEY OF TABITHA MUMBUA

AND

NICODEMO KISIMBA 1ST DEFENDANT

WYCLIFFE OUMA KISIMBA 2ND DEFENDANT

THE LAND REGISTRAR, KAKAMEGA 3RD DEFENDANT

AND

ADAMS OMONDI KISOKA INTERESTED PARTY

AS THE LAWFUL ATTORNEY OF NICODEMUS OJWANG ODHUSO

JUDGMENT

1. Litigation commenced in this matter on 20th July 2017 when Martin Okwatta, suing pursuant to a Power of Attorney donated to him by his mother Tabitha Mumbua, filed Plaintiff dated 21st June 2017. The Plaintiff averred in the Plaintiff that the Defendants were the registered owners of land parcel numbers Kisa/Muhaka/8X4 and 8X5 respectively which parcels were subdivisions of Kisa/Muhaka/7X6 which was owned by his mother Tabitha Mumbua.
2. The Plaintiff further averred that his mother never consented to any subdivision or transfer of Kisa/Muhaka/7X6 and that any transfer, subdivision or dealings were fraudulent and irregular. The Plaintiff therefore sought judgment against the Defendants jointly and severally for:



- a. An order cancelling the titles on land parcels KISA/MUHAKA/8X3, KISA/MUHAKA/8X4, and KISA/MUHAKA/8X5 restoring them to the original land parcel KISA/MUHAKA/7X6 and further an order cancelling any dealings on land parcel KISA/MUHAKA/7X6 thus restoring the said land parcel to the names and ownership of the plaintiff's mother.
 - b. An order of permanent injunction restraining the 1st and 2nd defendants from accessing, ploughing, entering, encroaching or interfering in any other manner whatsoever with land parcels number KISA/MUHAKA/8X3, KISA/MUHAKA/8X4, and KISA/MUHAKA/8X5.
 - c. Costs of this suit.
 - d. Interest at court rates.
 - e. Any other relief that this Honourable court may deem just in the circumstances.
3. The First and Second Defendants filed Statement of Defence dated 10th January 2018 through which denied the Plaintiff's allegations and averred that they were bona fide purchasers for valuable consideration. They added that they were lawfully issued with titles in respect of parcel numbers Kisa/Muhaka/8X4 and 8X5 respectively and that the Plaintiff participated in the process of subdivision. They further gave notice of an objection that the suit contravened the Limitation of Actions Act and urged the Court to dismiss it with costs.
 4. Adams Omondi Kisoka filed an application seeking to join the suit as an Interested Party in his capacity as a holder of Power of Attorney donated to him by Nicodemus Ojwang Odhuso. The application was allowed by consent on 17th May 2018.
 5. Tabitha Mumbua passed away on 30th November 2020 and was substituted by Martin George Otieno Okwatta, pursuant to an order made by the Court on 2nd June 2021. Martin George Otieno Okwatta is the same person as Martin Okwatta who filed the Plaint.
 6. The Third defendant filed Memorandum of Appearance dated 7th November 2023 but did not take any other step in the matter.
 7. At the hearing of the matter, Martin George Otieno Okwata (PW1) adopted his witness statement. He stated that land parcel number Kisa/Muhaka/7X6 was registered in the name of his mother on 20th January 1998 and that around the year 2016 his family discovered that the said parcel had been closed upon subdivision into parcel numbers Kisa/Muhaka/8X3, 8X4 and 8X5. That Kisa/Muhaka/8X3 was registered in his mother's name on 21st December 2006 while Kisa/Muhaka/8X4 and 8X5 were registered in the names of Wycliffe Ouma Kisimba and Joshua Nicodemo Kisimba a.k.a Nicodemo Kisimba, respectively.
 8. PW1 further stated that Kisa/Muhaka/7X6 was a subdivision of Kisa/Muhaka/669 which was originally registered in the name of Nicodemus Ojwang' Odhuso who sold a portion to his mother in 1997 and that alongside the discovery of the subdivision of Kisa/Muhaka/7X6, they also discovered that the portion that his mother was using on the ground was on paper registered in the name of Nicodemus Ojwang' Odhuso as Kisa/Muhaka/7X5. He added that they want Kisa/Muhaka/7X6 back in the name of his mother as per the purchase transaction and that his mother had had dementia since the year 2016.
 9. Rowland Leonard Okwata (PW2) testified that Tabitha Mumbua was his aunt while PW1 was his first cousin. He adopted his witness statement in which he stated that he knew Nicodemus Ojwang Odhuso



who sold a portion of his land to Tabitha Mumbua. That in the year 2016, when Nicodemus Ojwang Odhuso wanted to sell a portion of his land, they discovered after conducting a search that the portion which Tabitha Mumbua had occupied and tilled since 1997 was registered in the name of Nicodemus Ojwang Odhuso while the portion he wanted to sell had been erroneously registered in the name of Tabitha Mumbua as Kisa/Muhaka/7X6. That they also discovered that Kisa/Muhaka/7X6 had been subdivided into Kisa/Muhaka/8X3, 8X4 and 8X5 and which subdivisions had been registered in the names of Tabitha Mumbua, the Second Defendant and the First Defendant, respectively.

10. PW2 further testified that Tabitha Mumbua had had dementia from the year 2016 and that the land she was occupying on the ground was erroneously registered in the name of Nicodemus Ojwang Odhuso. That their efforts to resolve the matter through the Chief's office had been unsuccessful. He also stated that he did not know who signed the transfers.
11. The Plaintiff's case was then closed.
12. Parties opted to start defence hearing with the testimony of Adams Omondi Kisoka (DW1) who had joined the suit as an Interested Party in his capacity as a holder of Power of Attorney donated to him by Nicodemus Ojwang Odhuso. He adopted his witness statement in which he embraced the Plaintiff's claim and even adopted PW1's testimony. He stated that Nicodemus Ojwang Odhuso was the registered owner of Kisa/Muhaka/669 and added that upon its subdivision into Kisa/Muhaka/7X5 and 7X6 the subdivisions were erroneously interchanged during registration such that Kisa/Muhaka/7X5 was registered in the name of Nicodemus Ojwang Odhuso while Kisa/Muhaka/7X6 was registered in the name of Tabitha Mumbua.
13. DW1 further stated that Nicodemus Ojwang Odhuso was supposed to be the registered owner of Kisa/Muhaka/7X6 while Tabitha Mumbua was supposed to be the registered owner of Kisa/Muhaka/7X5 and that the Defendants subdivided Kisa/Muhaka/7X6 fraudulently without Nicodemus Ojwang Odhuso consent or authority. He added that he was in the process of effecting rectification in the register with a view to transposing Kisa/Muhaka/7X5 and 7X6 and that he cannot do so unless Kisa/Muhaka/8X3, 8X4 and 8X5 are cancelled and Kisa/Muhaka/7X6 restored. He also testified that he does not object to Tabitha Mumbua becoming the registered owner of Kisa/Muhaka/7X5 while he becomes the registered owner of Kisa/Muhaka/7X6 so as to reflect the situation on the ground. The Interested Party's case was then closed.
14. Joshua Nicodemo Kisimba (DW2) stated that he is the First Defendant herein and adopted his replying affidavit which he filed on 10th October 2017. He stated that he was the registered proprietor and in possession of parcel number Kisa/Muhaka/8X5 while the Second Defendant was the registered proprietor and in possession of parcel number Kisa/Muhaka/8X4. That they purchased the two parcels from Nicodemus Ojwang Odhuso.
15. DW2 further testified that although the sale transactions through which both he and the Second Defendant acquired their parcels with Nicodemus Ojwang Odhuso, the registered proprietor of Kisa/Muhaka/7X6 which birthed their parcels was Tabitha Mumbua. He added that there was a mix-up in plot numbers and that he is the one who processed the subdivision that resulted in their titles. He also testified that he attended the Land Control Board with Nicodemus Ojwang Odhuso and that there was no sale agreement between him and Tabitha Mumbua.
16. Jotham Njega Kisoka (DW3) adopted his witness statement dated 10th December 2018 and further testified that Nicodemus Ojwang Odhuso subdivided Kisa/Muhaka/669 into two, sold the lower portion to Tabitha Okwata and later sold the upper portion to the First Defendant. I adopt it.



17. Lastly, Nelson Otieno Odhiambo who was the Land Registrar Kakamega as of the date of trial testified as DW4. He produced copies of parcel files in respect of Kisa/Muhaka/8X3 to 8X5 and stated that the said parcels were created on 21st December 2006 when Kisa/Muhaka/7X6 was subdivided. That prior to the subdivision, the registered proprietor of Kisa/Muhaka/7X6 was Tabitha Mumbua Okwata. That the registered proprietors of Kisa/Muhaka/8X3 to 8X5 as of the date of his testimony were Tabitha Mumbua Okwata, the Second Defendant and the First Defendant, respectively.
18. DW4 further testified that Tabitha Mumbua Okwata signed the mutation form for subdivision of Kisa/Muhaka/7X6 and the transfer form for Kisa/Muhaka/8X5. He could not however produce the transfer forms in respect Kisa/Muhaka/8X4, saying that they may have been misplaced at the registry. He emphasised however that the titles in respect of Kisa/Muhaka/8X3 to 8X5 are genuine and that Tabitha Mumbua Okwata never lodged any complaint with his office concerning legality of the said titles. He also stated that according to the register in respect of Kisa/Muhaka/8X4, the initial registered proprietor of the said parcel was Tabitha Mumbua Okwata who transferred it to the First Defendant and that the First Defendant later transferred it the Second Defendant. DW4 also stated that his attendance and testimony in the matter was as a witness and not as the Third Defendant. The First and Second Defendants' case was then closed.
19. Considering that there was no appearance by the Third Defendant despite evidence of service of hearing notice being availed, Counsel for the Plaintiff urged the Court to close the Third Defendant's case. The application was supported by Counsels for the First and Second Defendants as well as Counsel for the Interested Party. The Third Defendant's case was therefore closed.
20. Directions for filing and exchange of written submissions were then given. The Plaintiff filed submissions dated 14th February 2024, the First and Second Defendants filed submissions dated 8th December 2024 while the Interested Party filed submissions dated 15th May 2024.
21. I have carefully considered the parties' pleadings, evidence including exhibits and the submissions. The issues that emerge for determination are whether the Plaintiff's case is barred by the *Limitation of Actions Act*, whether the Interested Party was properly joined in the suit, whether fraud and irregularity have been established and whether the reliefs sought are available.
22. In their Statement of Defence dated 10th January 2018, the First and Second Defendants gave notice of an objection that the suit contravened the *Limitation of Actions Act*. Even though they did not pursue the issue further and did not even raise it in their final submissions, I have found it necessary to address the issue for the reason that notwithstanding any position taken by parties, the Court must satisfy itself that it has jurisdiction since jurisdiction is the entry point in any matter that the Court is called upon to determine. Without it, the proceedings come to a certain end and the court cannot take any further step. See Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR.
23. Jurisdiction cannot be conferred even by consent of the parties or by innovation whether in drafting of pleadings or on the part of the Court. If the Court proceeds in a matter in which it lacks jurisdiction, even if the parties cheer, urge and nudge it on, its determination would amount to a nullity. The Supreme Court reiterated the position in Benson Ambuti Adegga & 2 others v Kibos Distillers Limited & 5 others [2020] eKLR.



24. There is no dispute that that Plaintiff's suit is a claim for recovery of land. In that regard, Section 7 of the *Limitation of Actions Act* provides as follows:

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

25. The effect of a suit being barred by *Limitation of Actions Act* is that the Court is thereby deprived of jurisdiction to hear and determine it. The Court of Appeal emphasised as much in *Divecon v Samani* (1995 – 1998) I EA 48 where it stated:

No one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action.

26. Not surprisingly, the Plaintiff has argued that the cause of action accrued in the year 2006 and that the suit is not barred since it was filed in the year 2017.

27. Accrual of cause of action is tied to the point in time when it became necessary for the Plaintiff to commence recovery proceedings. This is in line with the definition of the word “accrue” in Black’s Law Dictionary (10th Edition) to mean “to come into existence as an enforceable claim or right.” Thus, the twelve years limitation period is to be calculated from the date parcel number Kisa/Muhaka/7X6 was subdivided into Kisa/Muhaka/8X3 to 8X5 and registered in the Defendants’ names.

28. A perusal of the certificate of official search in respect of Kisa/Muhaka/7X6 reveals that the said parcel was closed on 21st December 2006 upon subdivision into Kisa/Muhaka/8X3 to 8X5. Indeed, the certified copies of the registers which the First and Second Defendants produced confirm that position. Logically, the Plaintiff could only discover the fact of subdivision and closure after it had happened. PW1 testified that they learnt of the subdivision and closure of Kisa/Muhaka/7X6 in the year 2016. This suit was filed on 20th July 2017. By that date, twelve years had not elapsed since subdivision and closure of Kisa/Muhaka/7X6 or even since discovery by the Plaintiff. I have no difficulty in finding and holding, as I now do, that the suit is not barred by the *Limitation of Actions Act*, and that this Court therefore has jurisdiction to hear and determine it.

29. I now turn to the second issue for determination, as to whether the Interested Party was properly joined in the suit. The First and Second Defendants have submitted that the Interested Party ought not to be a party in this matter since the Power of Attorney donated to him by Nicodemus Ojwang Odhuso is in respect of parcel number Kisa/Muhaka/7X5 which is not a subject matter of this suit. Essentially, the First and Second Defendants are contending that the Interested Party has no locus standi. Locus standi is defined in Black’s Law Dictionary, 9th Edition (page 1026) as “the right to bring an action or to be heard in a given forum”. I have perused the said Power of Attorney, and I note that it is limited to parcel number Kisa/Muhaka/7X5.

30. The law relating to powers of attorney is that the donee must act in the name of the donor and in accordance with the terms of the power of attorney. See *Cornel L. Shisanya v Ngambeni Nursery School & 5 others* [2014] eKLR. In this case however, the issue of whether or not the Interested Party can be a party to the suit is water under the bridge.



31. As I noted earlier in this judgment, Adams Omondi Kisoka joined this suit following an application which he filed seeking to joinder. He made it clear that he wanted to join on the strength of the said Power of Attorney, a copy of which he prominently annexed to his supporting affidavit. The application was allowed after Counsels for the Plaintiff and those for the First and Second Defendants signed a written consent dated 16th April 2018. The consent was adopted by the Court on 17th May 2018. It is thus too late in the day for the First and Second Defendants to question whether the Interested Party has locus standi in the matter. The parties must live with the consequences of their own consent, whose effect is that the Interested Party properly belongs in the matter as a party.
32. The other issue for determination is whether fraud and irregularity have been established. As has been severally held by the Courts, fraud is a serious allegation and the party alleging it must plead it, particularise it, and strictly prove it to standard higher than the usual one in civil cases of proof on a balance of probabilities but lower than the criminal law standard of proof beyond reasonable doubt. See *Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR and *John Mbogua Getao v Simon Parkoyiet Mokare & 4 others* [2017] eKLR. In cases where fraud is alleged, it is not enough to simply infer fraud from the facts. See *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR.
33. The Court of Appeal stated in *John Mbogua Getao v Simon Parkoyiet Mokare & 4 others* (supra):
- The standard or burden of proof where fraud is alleged in civil matters has been held in decided cases to be of higher than the ordinary standard of balance of probabilities... Indeed, allegations of fraud are of serious nature that may carry with them penal consequences that may further infringe on a person's right to liberty hence the insistence that fraud ought to be specifically pleaded, with particulars thereof, and proved. It would be foolhardy for the appellant to dismiss allegations carrying such far reaching consequences as merely procedural. In *Emfil Ltd vs. Registrar of Titles Mombasa* (supra), this Court pronounced itself as follows on the issue:-
- “Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities. Although Article 159 enjoins the court to administer substantial justice without undue regard to procedural technicalities, Article 159 does not allow the respondents to totally ignore the rules of evidence.”
34. There is no dispute that Tabitha Mumbua was the registered proprietor of land parcel number Kisa/Muhaka/7X6. From the certificate of search that was produced in evidence, she became registered proprietor on 20th January 1998 and remained proprietor until 21st December 2006 when the said parcel was closed upon its subdivision into Kisa/Muhaka/8X3 to 8X5. The Land Registrar confirmed that position in his testimony and further stated that the current registered proprietors of Kisa/Muhaka/8X3 to 8X5 are Tabitha Mumbua Okwata, the Second Defendant and the First Defendant, respectively.
35. As registered proprietors of land, the First and Second Defendants are entitled to the rights, privileges, and benefits spelt out by the law including Article 40 of *the Constitution* which secures protection of right to property and Sections 24 and 26 of the *Land Registration Act*. Additionally, pursuant to Section 26 of the *Land Registration Act*, the Court is obligated to accept their certificates of title as prima facie evidence of proprietorship, unless the provisos under Section 26 (1) (a) or (b) are established. The only grounds upon which the titles can be nullified are fraud or misrepresentation to which the registered proprietors are proved to be a party or where it is shown that the certificates of title were acquired illegally, un-procedurally or through a corrupt scheme.



36. The First and Second Defendants' case is that they purchased their parcels from Nicodemus Ojwang Odhuso. In his testimony, the First Defendant acknowledged that they did so notwithstanding that the registered proprietor of Kisa/Muhaka/7X6 which birthed their parcels was Tabitha Mumbua and not Nicodemus Ojwang Odhuso. The First Defendant further conceded that he is the one who processed the subdivision that resulted in their titles and that he attended the Land Control Board with Nicodemus Ojwang Odhuso. In sum, the First and Second Defendants conceded that they neither transacted with nor made any payment of purchase price to Tabitha Mumbua.
37. Although the Land Registrar testified that Tabitha Mumbua subdivided Kisa/Muhaka/7X6 and transferred the subdivisions, his testimony is contrary to the position taken by the First and Second Defendants who are the ones who took part in the transaction. There is no suggestion by the Land Registrar that he was personally present during the signing of all the documents. His testimony is at best formalistic, relying almost exclusively on documents whose making he could not vouch for.
38. The issue of mix-up of parcel numbers aside, there is no credible explanation offered by the First and Second Defendants as to how they transacted on Kisa/Muhaka/7X6 which was registered in Tabitha Mumbua's name without her participation and without any consideration to her. I am persuaded that the Plaintiff has established fraud and irregularity in the subdivision of Kisa/Muhaka/7X6 into Kisa/Muhaka/8X3 to 8X5 and the registration of the subdivisions. The First and Second Defendants were party to the fraud by virtue of being involved in the subdivision process and even attending Land Control Board.
39. Despite the position taken by the Interest Party who has supported the Plaintiff's case, I am convinced that Nicodemus Ojwang Odhuso played a major part in the irregularities that took place. Unfortunately, the First and Second Defendants opted not to pursue him for any relief. As has been severally held by the Courts, parties are bound by their pleadings. The Court too is in a sense bound by the parties' pleadings since pleadings circumscribe the issues for determination and reliefs sought. See Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR. In the absence of any prayer by the First and Second Defendants for relief against Nicodemus Ojwang Odhuso, I have no jurisdiction to grant orders against him, however well-intentioned such orders may be. It will be for the First and Second Defendants to see how to properly and procedurally recover against Nicodemus Ojwang Odhuso.
40. In view of the foregoing, I find merit in the Plaintiff's case. He is entitled to the reliefs sought. I therefore make the following orders:
- a. The titles in respect of Kisa/Muhaka/8X3, Kisa/Muhaka/8X4, and Kisa/Muhaka/8X5 are hereby cancelled so as to revert to the original land parcel number Kisa/Muhaka/7X6 in the name of Tabitha Mumbua Okwata.
 - b. A permanent injunction is hereby issued restraining the First and Second Defendants from accessing, ploughing, entering, encroaching or interfering in any other manner whatsoever with land parcels number Kisa/Muhaka/8X3, Kisa/Muhaka/8X4, and Kisa/Muhaka/8X5.
 - c. The Plaintiff shall have costs of the suit and interest thereon.

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

D. O. OHUNGO

JUDGE



Delivered in the presence of:

Mr Mboya holding brief for Mr Amasakha for the Plaintiff

Mr Odhiambo for the 1st and 2nd Defendants

No appearance for the 3rd Defendant

Mr Mboya for the Interested Party

Court Assistant: B Kerubo

