



**Mukwana v Adjudication & 3 others (Petition 8 of 2019)
[2025] KEELC 7049 (KLR) (16 October 2025) (Judgment)**

Neutral citation: [2025] KEELC 7049 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
PETITION 8 OF 2019
EO OBAGA, J
OCTOBER 16, 2025**

BETWEEN

ISAAC NABIBIA MUKWANA PETITIONER

AND

DIRECTOR LAND ADJUDICATION 1ST RESPONDENT

COUNTY LAND REGISTRAR UASIN GISHU 2ND RESPONDENT

JOSEPH KIPTIONY KIPRONO 3RD RESPONDENT

HON ATTORNEY GENERAL 4TH RESPONDENT

JUDGMENT

Introduction

1. The Petitioners filed this petition against the Respondents claiming the following reliefs:
 - a. That a declaration do issue that the decision, acts and omissions by the Respondents jointly and severally are a breach of law and a breach of Article 10, 40 and 47 of *the Constitution* of Kenya, 2010 in respect of the land parcel known as Uasin Gishu/Illula Scheme/307 are a nullity and no legal effect.
 - b. That an order of certiorari do issue to forthwith remove into the honourable court and quash the decisions of the 1st and 2nd Respondents entering a restriction on the register of the land parcel known as Uasin Gishu/Illula Scheme/307 on 27th April, 2009 as entry No. 4 on the register and cancelling the register of the late Edward Kurumba Mukhwana as the proprietor of the said land as contained in entries numbers 5 and 6 of the register therein.



- c. That an order of mandamus does issue to compel the 2nd Respondent to cancel the entries numbers 4, 5 and 6 on the register and re-enters the fact of the proprietor of the land as Edward Kurumba Mukhwana.
- d. That an order of eviction does issue against the 3rd Respondent to remove him together with any persons brought on the land parcel known as Uasin Gishu/Illula Scheme/307 by him coupled with the assessment of mesne profits, general damages and an order for the payment of the same and an award of damages be made for the breach of the rights under Articles 10, 40 and 47 of *the Constitution* of Kenya, 2010.
- e. That the costs of the petition be sourced by the Respondent.

Background

2. The Petitioners are sons of Edward Kurumba Mukhwana who passed away on 4th March, 1989 (deceased). Grant of letters of administration in respect of his estate were given to the Petitioners on 23rd November, 2007. One of the Petitioners Charles Mukhwana Gala passed away on 8th December, 2015 and was substituted by the remaining Petitioner Isaac Nabibia Mukhwana on 18th September, 2017.
3. The deceased had been allotted two plots at Ilula Settlement Scheme by the Settlement Fund Trustee. The two plots were plot 306 and 307 which were adjacent to one another. The two plots were amalgamated and became plot No. 306 with a combined acreage of 5.1 hectares. This amalgamation left number 307 hanging. The settlement Fund Trustee then assigned plot NO. 307 to the 3rd Respondent whose original plot number was 320. This plot was far away from the combined plot 306 and 307 which became plot 306. Plot 307 was 2.2 Hectares.
4. During processing of titles, it was discovered that despite plot 306 and 307 being amalgamated forming 5.1 hectares, the deceased had again processed a separate title for plot 307 measuring 2.2 hectares. The deceased was asked to surrender the title for plot 307 for cancellation but he did not. The land Registrar was forced to publish a Gazette Notice Number 11693 of 23rd September, 2011 intimating his intention to dispense with the original title held by the deceased. The title held by the deceased in respect of plot 307 was cancelled and entries accordingly endorsed in the register. This is what prompted the Petitioners to file this constitutional petition.

Petitioner's Contention

5. The Petitioner contends that the cancellation of title of the deceased was unconstitutional, amounted to abuse of office, was unlawful and a nullity on the grounds that the Land Registrar failed to adhere to and uphold the rights of the deceased as enshrined in Article 40 of *the Constitution* of Kenya.
6. The petitioner further contends that the Respondents abused their offices and exceeded the mandated legally granted to them by depriving the estate of the deceased of his property and giving the rights to the 3rd Respondent. The Petitioner states that the Respondents engaged in acts of fraud by entering conflicting entries in the register relating to land parcel known as Parcel No. Uasin Gishu/Illula Scheme/307 (suit property).
7. The Petitioner further contends that the restriction which was registered against the suit property was entered unlawfully as the Respondents had no powers to do so. He states that the Respondents colluded to deprive the deceased of the suit property by issuing notices to him well aware that he had died as his death was a matter of public knowledge his demise having been published in Gazette Notice No. 9537 of 5th October, 2007.



8. The Petitioner goes on to contend that failure by the Respondents to give notices to the administrators of the deceased's estate was contrary to the provisions of Article 47 of *the Constitution* of Kenya. The Petitioner states that the cancellation of the title held by the deceased was contrary to the provisions of the Registered *Land Act* and the *Land Adjudication Act* as the court was not involved in issues of a cancellation order.

The 1st, 2nd and 4th Respondents' Contention

9. The Respondents opposed the Petitioner's petition based on a replying affidavit sworn on 9th November 2020. The Respondents contend that the Petitioner's petition is misconceived as it is clear that the deceased had been allotted plot 306 and 307 which were amalgamated and he obtained title under plot 306 measuring 5.1 hectares. Plot 307 measuring 2.2 hectares was then given to the 3rd Respondent whose original number was 320. This happened because the original area list ran upto plot 319. Plot 307 which was allotted to the 3rd Respondent is not adjacent to plot 306 held by the deceased. Issue of title for plot 307 to the deceased was erroneous as parcel 306 and 307 had been amalgamated and the deceased given title for plot 306 measuring 5.1 hectares.

The 3rd Respondent's contention

10. The 3rd Respondent neither entered appearance nor filed any submissions.

Parties' Submissions

11. The Petitioner filed submissions dated 6th December, 2024. The 1st, 2nd and 4th Respondents filed submissions dated 23rd December, 2024.

Petitioner's Submissions

12. The Petitioner submitted that the Respondents violated the sanctity of title which is protected by Article 40 of *the Constitution* by cancelling the deceased's title. The Petitioner relied on the case of Attorney General & Another –vs- Rahim Khan Afzalkhan Ratumkhan & 4 others (2019) eKLR in which the Court of Appeal held as follows:

“ 50. The Respondents having established that they were the registered proprietors of the suit property, the natural consequence was that their rights thereon were protected under *the Constitution*. The Supreme Court in *Rutongot Farm Ltd v-s- Kenya Forest Service & 3 Others* (2018) eKLR, expressed this position thus:

‘Once proprietary interest has been lawfully acquired, the guarantee to protection of the right to property under Article 40 of *the Constitution* is then expressed in the terms that no person shall be arbitrarily deprived of property. The same guarantee existed in Section 75 of the repealed Constitution’.

51. The inviolability of that right was also succinctly appreciated by this court in *Chief Land Registrar & 4 Others vs Nathan Tirop Koech & 4 Others* (2018) eKLR as follows:

‘Land ownership and land rights is both a historical and emotive subject in Kenya. A right to hold property is a constitutional right as well as a human right and no person can be deprived of his property except in accordance with the provisions of *the Constitution* or Statute. The condition precedent to taking away anyone's property is that the authority must ensure compliance with *the Constitution* and Statutory provisions’.



13. The Petitioner also relied on the case of Republic Vs Land Registrar – Mombasa & 3 others Exparte Alladina Properties Limited (20198) eKLR where Justice Muriithi held as follows:

“The power to rectify the register of titles for reason of fraud or mistake is the preserve of the court under Section 143 of the Registered Land Act... These clauses show that the only occasion in which the Registrar could have interfered with the titles was where there was an error or omission not materially affecting the interest of any proprietor. The Land Registrar of Mombasa had no power to revoke the Applicant’s title. Indeed, Section 28 of the Registered Land Act does not give any powers to the Respondents to revoke titles in case of an illegal allocation or fraud or nullity if at all it is established. The title can only be declared null and void by court of law after determination”.

14. The Petitioner further submitted that the Respondents did not follow the provisions of law before registering a caution against the title held by the deceased. The Petitioner relied on the case of Dinkar Kumar Patel & Another –vs- Attorney General & 2 others (2014) eKLR where Justice Olao stated as follows:

“It is clear from the provisions of Section 76 of the new Land Registration Act and Section 136 of the repealed Registered Land Act under which the suit land was registered that before placing any restriction on a parcel of land, the Land Registrar must direct enquiries, serve notices and hear the persons to be affected. That is the bare minimum requirement of the Land Registrar exercising his powers under the law. That is what natural justice is all about. A party whose rights are likely to be affected by the exercise of powers by the Land Registrar in restricting a parcel of land must be given an opportunity to be heard. In this case, the land Registrar failed to do so.

Further, Section 137 (1) of the Registered Land Act under which the suit land was registered has the following mandatory provisions:

‘The Registrar shall give notice in writing of a restraining to the proprietor affected thereby’.

Section 77 (1) of the new Land Registration Act also has a similar provisions as follows:

‘The Registrar shall give notice, in writing, of a restriction to the proprietor affected by the restriction’.

No such notice was issued to the Plaintiffs in this case and if there was, none was presented to court. The un-controverted evidence of Kamar Patel (PW1) was that they were not at any time summoned by the Land Registrar before the restriction was placed on the suit land and that they only learnt of the same on 30th May, 2008 when they wanted to develop it. That was clearly in violation of the law”.

15. The Petitioner also submitted that the deceased was not afforded an opportunity to be heard before his title was cancelled. He relied on the case of Sabina Nyambura Githina & Another –vs- Land Registrar, Thika Land Registry & 3 Others; Real Capital Ltd (Interested Party) (2021) eKLR where Justice Gacheru held as follows:

“The deceased being the registered owner of the suit property was entitled to a fair administrative action and further entitled to rules of natural justice before the cancellation of that title in his favour. There is no evidence produced in court that the registration of the deceased was cancelled, he was given a chance to be heard. Further, there is no evidence that the deceased was subjected to due process before his registration was cancelled or that the



cancellation was done by a competent authority. There is no doubt that a Land Registrar has no power to cancel registration of a person's title and the same can only be done by a court of law or competent tribunal. Purporting to cancel any registration therefore is acting ultra vires. As a party has the right under *the Constitution* to be afforded fair administrative action, that is fair, reasonable and be given prior notice, the court finds and holds that the 1st Petitioner was not afforded a fair administrative action”.

The 1st, 2nd and 4th Respondents Submissions

16. The Respondents submitted that the Petitioner failed to prove the allegations of fraud attributed to the Respondents. The Respondents relied on the case of Jennifer Nyambura Kamau –vs- Humphrey Mbaka Nandi (2013) eKLR where the Court of Appeal held as follows:

“We have considered the rival submissions on this point and state that Sections 107 and 109 of the *Evidence Act* place the evidential burden upon the Appellant to prove that the signature on these forms belongs to the Respondent. Section 107 of the *Evidence Act* provides that “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”. Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the Appellant to call the expert witness. The Appellant did not discharge the burden and as Section 108 of the *Evidence Act* provides, the burden lies on that person who would fail if no evidence at all were given on either side”.

17. The Respondents also submitted that the Petitioner had made allegations of fraud which were not substantiated. They relied on the case of Central Bank of Kenya Ltd –vs- Trust Bank Ltd & 4 Others NAI Civil Appeal No. 215 of 1996 (VR) where it was held as follows:

“The Appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the Appellant in this case than in an ordinary Civil Case”.

Analysis and Determination

18. The Petition was heard by way of viva voce evidence. I have considered the evidence adduced during the hearing as well as the submissions by the parties. There is no contention that the Petitioner is residing on LR. No. Uasin Gishu/Illula Scheme/306 measuring 5.1 hectares. The issues which arise for determination are firstly, whether the suit property was fraudulently registered in the name of the 3rd Respondent. Secondly, whether the suit property was erroneously registered in the name of the deceased and if so whether the 1st and 2nd Respondents were under obligation to rectify the said registration. Thirdly, was the deceased given a fair hearing before the cancellation of the title in his favour. Fourthly, was there justification in registering a restriction against title to the suit property. Fifthly, were the constitutional rights of the petitioner violated as alleged.

Whether the suit property was fraudulently registered in the name of the 3rd Respondent.

19. The burden of proof in Civil Cases was discussed in the case of Jennifer Nyambura Kamau (Supra). The burden lay on the Petitioner to prove that the registration of the suit property in the name of the 3rd Respondent was fraudulent. The Petitioner made serious allegations of fraud against the Respondents. It was incumbent upon him to prove those allegation but he did not.



20. In the case of Ndolo –vs- Ndolo (2008) KLR 742, it was held as follows:

“.....we start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him to obviously higher than that required in ordinary civil cases, namely proof was much heavier on the Appellant in this case than in an ordinary Civil Case”.

21. The evidence which was adduced shows that the deceased was allotted plot 306 and 307 which were adjacent. The 3rd Respondent was allotted plot 320. These were provisional numbers. When survey was done, plot No. 306 and 307 were amalgamated and a title issued in the deceased’s name under 306 measuring 5.1 hectares. Plot 307 was left hanging and was assigned to plot 320 which was in the name of the 3rd Respondent but which number did not exist in the list which was finally delivered to the Land Registrar for processing of titles. It is important to note that the acreage of plot 306 and 307 which were combined on the ground did not change. It remained 5.1 hectares. Plot 320 which was assigned plot 307 which had been left hanging is not next to plot 306. It is far from plot 306 as shown in the Registry Index Map produced in evidence.
22. The area list produced shows that plot 320 is what became plot 307 and was in the name of the 3rd Respondent. On 29th July, 1983 the District Co-operative Officer wrote a letter which was introducing the deceased to the Factory Manager of Kenya Co-operative Creameries Eldoret. In that letter the deceased was said to own plot 306 and 307 whose combined acreage was about 10 acres. This letter was written before title was issue to the deceased for the combined plots which were registered under plot 306 on 23rd September, 1988.
23. When a dispute arose over registration of plot 307 in the name of the deceased, the issue was explained in correspondence from the Settlement Fund Trustee which fully explained what happened. There was therefore no fraud involved in the registration of the suit property in the name of the 3rd Respondent. Whether the suit property was erroneously registered in the name of the deceased and if so whether the 1st and 2nd Respondents were under obligation to rectify the said registration
24. The suit property was registered in the deceased’s name on 23rd September, 1988. This registration was erroneous as plot 306 and 307 had already ben amalgamated and one title issued under 306. The deceased’s family were and are still residing on plot 306 which is 5.1 hectares. They have never resided on the suit property which is far away from plot 306. The anomaly was noticed later when the deceased’s family started claiming the suit property. The anomaly having been noticed of the existence of two title in respect of the suit property both in the deceased’s name and the 3rd Respondent, the deceased was asked to surrender the title for cancellation.
25. As at the time the Land Registrar was calling for the title to the suit property from the deceased, it was not known that the deceased had passed away on 4th March, 1989 and that there were administrators appointed to administer his estate on 23rd November, 2007. As there was no response, the land Registrar proceeded to issue notice in the Kenya Gazette indicating his intention to dispense with production of the original title in the deceased’s name. The title in the deceased’s name was finally cancelled and entries made in the register to that effect. There was no need to go through the court process to rectify an erroneous omission which did not materially affect the interest of the deceased who already had his two properties registered under plot 306. This was the finding of Justice Muriithi n the case of Republic –vs- Land Registrar Mombasa and 3 others (Supra) where he held that where



there is an error or omission not materially affecting the interest of a proprietor, a Land Registrar can rectify title.

Whether the deceased was given a fair hearing before the cancellation of the title in his favour

26. While dealing with the second issue, I have stated that the Land Registrar did not know of the demise of the deceased. The notices and letters were given through the address given by the deceased. The Gazette Notice shows that it was published after the deceased failed to respond to the notices and letters. The Land Registrar cannot be faulted for this as there is no requirement in law that service be effected in person. Even if the administrators of the deceased's estate were to be informed, nothing would have changed as it is clear that the title to the suit property was erroneously given to the deceased.

Was there justification in registering a restriction against the title to the suit property

27. The Land Registrar is empowered to register restriction against title where there are grounds to do so. In the instant case, there was need to do so as the estate of the deceased was claiming the suit property which they had not occupied. The restriction had to be registered to prevent any dealings which would have adversely affected the interest of the 3rd Respondent.

Whether the Constitutional Rights of the Petitioner was violated

28. From the above analysis, it is clear that the title to the suit property was erroneously given to the deceased. The suit property legally belonged to the 3rd Respondents who has gone ahead to subdivide the suit property which he has sold to third parties. This being the case, the constitutional rights of the Petitioner under Article 40 and 47 have not been violated. The evidence which was adduced shows that if the deceased was to be given the suit property, it would have meant the 3rd Respondent losing out.

Disposition

29. It is now evident that the Petitioner's petition is devoid of merit. The same is hereby dismissed with costs to the 1st, 2nd and 4th Respondents.

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 16TH DAY OF OCTOBER, 2025.

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HON. E. O. OBAGA

JUDGE

In The Presence Of:

Mr. Mengich for the Petitioner

Court assistant - Nelima

