

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ELC CASE NO. E040 OF 2022

SUSAN KAVULI KING'OO MUSIMBAPLAINTIFF

-VERSUS-

JULIUS MAWEU KATHUMADEFENDANT

JUDGMENT

1. Vide the amended Plaint dated 15th March, 2023, the Plaintiff sought the following orders: -

- 1) **A declaration that the Plaintiff is a bonafide purchaser for value of Land Parcel KONZA SOUTH BLOCK 2/207 and the Defendant is holding the title in trust for the Plaintiff.**
- 2) **An Order directing the Defendant to transfer Land Parcel KONZA SOUTH BLOCK 2/207 to the Plaintiff within two (2) months and in default the Deputy Registrar of this Honourable Court to execute all the relevant documents to effectively transfer Land Parcel KONZA SOUTH BLOCK 2/207 to the Plaintiff.**
- 3) **An order of permanent injunction do issue restraining the Defendant by himself, his agents, servants and/or any other person acting under his authority from trespassing, encroaching or interfering with the quiet possession of the Plaintiff over Land Parcel KONZA SOUTH BLOCK 2/207.**
- 4) **Costs of this suit and interest.**

2. The Defendant filed a further amended Statement of Defence and Counterclaim on 23rd February, 2024 seeking the following orders: -

- 1) **A declaration that the Plaintiff suit herein is defective bad in law.**
 - 2) **A declaration that the Plaintiff is the rightful owner of Land Parcel No. KONZA SOUTH BLOCK 2/207 formerly Plot No. 2/28.**
 - 3) **An order of eviction to issue against the Defendant, their agents or servants from the suit land.**
 - 4) **General damages for trespass and mesne profits.**
 - 5) **Costs of the suit.**
 - 6) **Any other relief the court may deem fit to grant.**
3. The Plaintiff called three witnesses at the hearing of her case. PW1 (Susan Kavuli Musimba) adopted her statement filed in court on 5th May, 2023 as her evidence in chief. She went on to produce the list and bundle of documents dated 7/12/2023 as PEX 1 – 4. Again, she produced further lists and bundle of documents dated 20/3/2023, 20/5/2023 and 7/11/2024 as PEX 5 – 6, PEX 7 and PEX 8 – 12 respectively.
4. PW1 stated that she purchased land parcel No. Konza South Block 2/207 which measures 10 acres from the Defendant for Kshs.1,000,000/= which was paid in instalments of Kshs.100,000/=. She added that they had initially entered into an agreement for land Parcel No. Konza South Block 2/208 with the Defendant for Kshs.500,000/=. It was her case that she has tried to pursue the Defendant to give her the title deed without success. She further stated that she took immediate possession of both parcels of land upon purchase. She urged the court to order the Defendant to give her title to the land and costs of the suit.
5. On cross-examination by Mr. Mutisya PW1 stated that the Plot number was not indicated in her PEX 9 which is the agreement dated 1/11/2005. PW1 stated that she was not laying any claim to land Parcel No. Konza South Block 2/208.

6. In re-examination, PW1 stated that the Parcel No. Konza South Block 2/207 was captured in PEX 12 and that the document was signed by herself and the Defendant. She reiterated that land Parcel No. Konza South Block 2/208 was in the name of Rosaline Mbaika Itule who had sold it to the Defendant and in turn to him by the Defendant.
7. PW2, Joshua Nzomo Kimeu adopted his statement dated 5/5/2023 as his sworn evidence in chief. He stated that he was one of the witnesses who attested the transaction between the Plaintiff and the Defendant. He explained that the transaction involved a ten-acre parcel of land in Konza and that the Plaintiff paid Kshs. 80,000/= in PW2's presence. He clarified that the ten-acre piece of land was known as Parcel No. Konza South Block 2/207.
8. In cross-examination, PW2 stated that he witnessed the agreement in respect of land Parcel No. Konza South Block 2/207 although he was not the one who typed the said agreement marked as PEX 1. He further stated that according to the agreement the acreage indicated was 2.0 hectares which is equivalent to 5 acres. It was his contention that page two of the agreement showed his signature yet he did not witness the agreement for five acres. He maintained that the only agreement he had witnessed was for 10 acres.
9. On re-examination by Mr. Muthiani, PW2 was referred to PEX 1 which he positively confirmed to have signed in respect of the transaction for land Parcel No. Konza South Block 2/207.
10. PW3, Daniel Ndunda Munyao adopted his statement dated 5/3/2025 as his sworn evidence in chief. He stated that he came to know the Defendant in court but he knew where the suit property is located. He averred that the Plaintiff started utilizing the land about twenty years back growing mango trees, maize and papaya. He went on to state that the land is fenced with barbed wire.

11. It was PW3's evidence that the Plaintiff later leased the land to a Chinese company which grows moringa trees, aloe vera and does bee-keeping. PW3 stated that he comes from a nearby farm near the suit property which is along Mombasa Road.
12. In cross-examination, PW3 stated that he had never seen the title deed to either land Parcel No. Konza South Block 2/207 or land Parcel No. Konza South Block 2/208. He further stated that he knew that the Plaintiff was the owner of the suit property because she was using it.
13. The Defendant called three witnesses at the hearing of his case. DW1, Julius Maweu Kathuma adopted his statement dated 22/2/2023 as his evidence in chief. It was the DW1's case that he did not enter into any sale agreement with the Plaintiff. When referred to PEX 12, DW1 stated that he did not sign the said document. He maintained that the document was a forgery.
14. DW1 explained that when he intended to sell land Parcel No. Konza South Block 2/208, the Plaintiff only paid Kshs.200,000/= leaving a balance of Kshs.300,000/= which she has never cleared. DW1 stated that he signed the agreement for land Parcel No. Konza South Block 2/208 which his wife also signed. DW1 further stated that land Parcel No. Konza South Block 2/207 measures 10 acres whereas land Parcel No. Konza South Block 2/208 measures 5 acres.
15. DW1 averred that it was his wife who had allowed the Plaintiff to use land Parcel No. Konza South Block 2/208. It was the Defendant's prayer that the court grants an eviction order, damages for trespass and mesne profits.
16. On cross-examination by Mr. Muthiani, DW1 stated that the agreement for land Parcel No. Konza South Block 2/207 produced as PEX 5 was a forgery. It was his evidence that he did not go to the Directorate of Criminal Investigations

(DCI) to report the forgery. When referred to PEX 12, DW1 again stated that the document was a forgery but he had not reported the case to any authority.

17. Upon being referred to PEX 7, DW1 stated that his lawyer's confirmation that DW1 had received Kshs.500,000/= from the Plaintiff was a mistake. He reiterated that it was his wife who had allowed the Plaintiff to enter land Parcel No. Konza South Block 2/207. DW1 stated that he was not aware if the Plaintiff had been using land Parcel No. Konza South Block 2/207 for over 20 years. DW1 averred that whereas the letter PEX 7 indicated that the Plaintiff had been utilizing land Parcel No. Konza South Block 2/208 for 15 years, he had not sued the Plaintiff nor the Chinese company said to have been using the land for 7 years.

18. DW1 averred that he was aware that the Plaintiff had registered a caution on the two properties in the year 2007. DW1 further averred that he did not know Joshua Nzomo who signed the agreement dated 15/6/2007 which he described as a forgery.

19. In re-examination, DW1 stated that land Parcel No. Konza South Block 2/208 is in the name of Rosalia Mbaika. He further stated that he had requested the Plaintiff to vacate his land before his lawyer wrote a demand letter to her.

20. DW2, Rose Mwikali Kathuma adopted her statement dated 22/2/2024 as her evidence in chief. She averred that the Defendant is her husband and that the suit property is theirs. It was her evidence that the Plaintiff approached her in 2007 when she wanted to lease land Parcel No. Konza South Block 2/208. She averred that the land measures 10 acres and that she was initially reluctant to lease out the land but that she caved in after the Plaintiff's insistence.

21. DW2 stated that the Plaintiff wanted to purchase the 5 acres of land at Kshs.500,000/= and that the Defendant and herself were paid Kshs.300,000/= leaving a balance of Kshs.200,000/=. DW2 stated that she had never seen any

agreement between her husband and the Plaintiff. DW2 stated that the Plaintiff paid Kshs.10,000/= but did not pay any money afterwards. DW2 stated that she was the one who leased the land to the Plaintiff.

22. In cross-examination, DW2 stated that she was aware of the payment of Kshs.500,000/= for land Parcel No. Konza South Block 2/208. She further stated that she was not aware if the Plaintiff had been on the land since the year 2005. DW2 averred that she did not report any dispute over the suit property. She further averred that the Plaintiff was undertaking bee-keeping in addition to growing moringa and aloe vera. DW2 stated that the suit properties are fenced and that she became aware of the developments therein in the year 2023.

23. DW2 averred that they asked the Plaintiff to move out of the 10-acre parcel of land but she chose to come to court instead. She added that they did not reduce the lease for 10 acres into writing and that the Plaintiff paid Kshs.300,000/= leaving a balance of Kshs.200,000/= for the 5 acres she bought.

24. When referred to PEX 5, DW2 stated that she did not know the witnesses who signed the agreement in respect of land Parcel No. Konza South Block 2/207.

25. DW3, Bonface Mumo Musyoki adopted his statement dated 22/2/2024 as his evidence in chief. He averred that the Plaintiff wanted him to sign an agreement she had made with the Defendant although DW3 was not present when the agreement was being made. He added that when the Plaintiff went to the DCIO offices and invited him to meet her there in order to sign the agreement, he declined on the basis that he was not a party when the agreement was being made.

26. On cross-examination, DW3 reiterated that he was not a party to the agreement produced as PEX 5 and that he had only accompanied the Plaintiff to the Defendant's home when the said agreement was made.

27. At the close of their respective cases, the parties agreed to file written submissions.

28. In the Plaintiff's submissions dated 3rd April, 2025, Counsel identified six issues for determination namely: -

- i) *Whether there existed a contract of sale of land between the Plaintiff and the Defendant.*
- ii) *Whether the signatures of the Defendant have been forged as he alleges.*
- iii) *Whether consideration passed between the Plaintiff and the Defendant.*
- iv) *Whether the Chinese company (the Lessee) on the land can be evicted from the land when they are non-parties to the suit.*
- v) *What is the effect of non-production of documents listed in the Defendant's list of documents as exhibits in court.*
- vi) *What remedies are available to the Plaintiff.*

29. Submitting on the first issue, Counsel pointed out that the Plaintiff and the Defendant executed a written agreement of sale dated 15th June, 2007 which is in accordance with the provisions of Section 3 (3) of the Law of Contract Act and Section 38 of the Land Act, 2012. Counsel contended that the agreement was signed by the Plaintiff and the Defendant adding that it was also duly witnessed.

30. Counsel added that the sale agreement properly identifies the suit property as land Parcel No. Konza South Block 2/207. It was argued that the Defendant had not pleaded any fraud, coercion or undue influence in respect of the sale agreement. Counsel further argued that the allegations of forgery to the

Defendant's signature were not proved and hence he is bound to the sale agreement dated 15th June, 2007.

31. Submitting on the second issue, counsel contended that the Defendant had failed to substantiate his claim of forgery to his signature with proof against the Plaintiff.

32. Submitting on the third issue, Counsel contended that consideration was paid by the Plaintiff to the Defendant and the same was duly acknowledged by signing the payment plan and the sale agreement dated 15th June, 2007. Counsel added that the Defendant's advocates wrote a letter dated 25th October, 2022 (PEX 7) confirming that the Defendant had received Kshs.500,000/= as payment for the purchase of the suit property.

33. On the fourth issue, it was submitted that the Plaintiff took possession of the suit property in 2007 immediately after purchase and in the year 2018, she leased the suit property a Chinese company for a period of fifteen years. Counsel contended that the orders of eviction sought by the Defendant are not tenable because the Chinese company is not a party to these proceedings and its right to a fair hearing would have been breached.

34. On the fifth issue, Counsel pointed out the fact that the Defendant did not produce the documents listed as in his bundle of documents when he testified on 17th March, 2025. Counsel submitted that the Defendant's list of documents does not form part of the Defendant's evidence as they have not been admitted as such. Counsel argued that Defendant's bundle of documents does not form part of the judicial record.

35. Submitting on the sixth issue, Counsel opined that the Plaintiff had established her case against the Defendant on a balance of probabilities and thus, the orders sought in the amended plaint should be granted.

36. The Defendant filed his submissions on 27th June, 2025.

37. On his behalf, Counsel submitted that this court lacked jurisdiction to hear and determine the suit on the basis that the sale agreement is alleged to have been entered on or about 15th June, 2007 which is well over fifteen years to the filing of the suit in 2022. Counsel contended that the suit contravenes the provisions of Section 7 of the Limitation of Actions Act and hence the plaint is fatally defective and the court has to down its tools.

38. In reply to the issues that were framed by the Plaintiff, Counsel submitted on the first issue that the Plaintiff had not demonstrated how Plot No. 18 measuring 5 acres had changed to Parcel No. Konza South Block 2/207 and hence, the sale agreement was a forgery. Counsel argued that the subject parcel of land that was sold to the Plaintiff was Parcel No. Konza South Block 2/208 which was initially purchased by the Defendant from Rosalia Mbaika.

39. Counsel was of the view that if land Parcel No. Konza South Block 2/207 measuring 10 acres was the subject of the sale agreement, then nothing would have been easier than stating as such in the sale agreement. Counsel submitted that the court cannot enforce a non-existent contract of sale of 10 acres.

40. Counsel argued that the sale agreement that is the subject matter of the case only speaks to one parcel of land and whilst a contract for sale of land must be clear and unambiguous, this one is not. Counsel maintained that there was insufficient evidence to prove the purchase of 10 acres of land nor payment for the same. Counsel urged the court to dismiss the Plaintiff's suit with costs and to allow the Defendant's counterclaim.

41. After a perusal of the pleadings, the evidence and submissions herein, the following particulars are not in dispute: -

- i) The suit property land Parcel No. Konza South Block 2/207 measures approximately 4.0 hectares and is registered in the name of the Defendant.

- ii) The Plaintiff took possession of the suit property by virtue of the sale agreement dated 15th June, 2007 and has remained in possession to date.
- iii) The Plaintiff leased the suit property to Eshine Agricultural Planting Co. Ltd. Vide the lease agreement dated 16th April, 2018.
- iv) The Plaintiff purchased the adjoining land Parcel No. Konza South Block 2/208 from the Defendant in or about the year 2006 and the said property is not the subject of the dispute herein.

42. The apparent issues for determination are as follows: -

- i) Whether the sale agreement dated 15th June, 2007 is valid and enforceable by this court?*
- ii) Whether the Defendant's allegations of forgery have been established?*
- iii) What are the appropriate orders in the circumstances?*

43. It is the Plaintiff's case that she is the bona fide purchaser for value of land Parcel No. Konza South Block 2/207 which she purchased from the Defendant vide the sale agreement dated 15th June, 2007 (PEX 5). In her evidence, the Plaintiff stated that she paid the full purchase price amounting Kshs.1,000,000/= for which the Defendant acknowledged (PEX 12).

44. A keen perusal of the sale agreement (PEX 5) shows a description of the land the Plaintiff was purchasing at paragraph 2 as Parcel No. Konza South Block 2/207. The essentials of a valid contract for the sale of land are stated in the Law of Contract Act. Section 3 (3) of the Law of Contract Act outlines as follows: -

No suit shall be brought upon a contract for the disposition of an interest in land unless—

(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 by a witness who is present when the contract was signed by such party:

45. In the case of Nelson Kivuvani v Yuda Komora & Another, Nairobi HCCC No. 956 of 1991 (LLR 7670 (HCK)), the court aptly held that:-

“The agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations, express or implied, of each of the parties and signed and witnessed by two witnesses who signed against their names amounts to a valid contract.”

46. Similarly, in JK Patel v Spear Motors Ltd. Supreme Court of Uganda, Civil Appeal No.4 of 1991(1993) 1 KALR 40, the Court observed as follows: -

“Under the rules of the Law of Contract, particularly relating to offer and acceptance, if there has been an offer to enter into legal relations or definite terms and that offer is accepted, the law considers that a contract has been made, whether there has been an acceptance of an offer or documents that have been passed between the parties or from their conduct.”

47. It is evident from the case herein that the terms of the offer to purchase the suit property from the Defendant were clear and unambiguous. Again, the sale agreement was attested and signed by two witnesses, Joshua Nzomo Kimeu and Kennedy Mwendwa Musimba. Joshua Nzomo testified as PW2 in support of the Plaintiff’s case. Undoubtedly, the Plaintiff’s evidence was corroborated with documentary evidence and oral evidence.

48. Section 107 (1) of the Evidence Act outlines as follows: -

‘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.’

49. On the contrary, even though the Defendant disputed the genuineness of the sale agreement herein, he did not plead a case of fraud or forgery in his counterclaim. DW1 stated in his evidence that the signature appearing on PEX 5 resembled his. The said observation was repeated by DW2.

50. In the case of Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR (Civil Appeal No. 106 of 2000) Tunoi JA (as he then was) held as follows: -

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

51. Correspondingly, Section 116 of the Evidence Act outlines as follows:-

‘When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.’

52. The Defendant did not call any evidence to disprove the authenticity of PEX 5, PEX 12 or any other exhibits produced by the Plaintiff. In the circumstances, it is the finding of this court that the sale agreement dated 15th June, 2007 is valid and enforceable. It is also the finding of this court that the Defendant did not

specifically plead forgery and neither was the same allegation demonstrated at the hearing of the suit.

53. In his submissions, the Defendant went on to claim that the Plaintiff's suit was time-barred and caught by the provisions of Section 7 of the Limitation of Actions Act which 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.’

54. As earlier established, the Plaintiff performed his part of the sale agreement in that the full purchase price was paid for the suit property and the Defendant duly acknowledged. As revealed in her oral evidence, she immediately took possession after execution of the agreement and has remained in possession of the suit property. The land was subsequently leased to Eshine Agricultural Planting Co. Ltd.

55. After duly paying the full purchase price, the Plaintiff was entitled to transfer of the suit property in her name as per term (b) of PEX 5 for failing to transfer the land to the Plaintiff. In the case of **Kabogo v Gitau [2025] KECA 193 (KLR)**, the Court of Appeal observed as follows: -

“This Court (Kneller, JA) in Kenya Cargo Handling Services Ltd v David Ugwang [1985] KLR 593; [1976-1985] EA 196 stated the objective of the limitation statute when it held that:

“The Act (Limitation)...relates only to procedure. It does not divest any person of rights recognised by law; it limits the period within which a person can obtain remedy from the courts for the infringement of them. The mischief against which all Limitation Acts are directed are delay in commencing legal proceedings for delay may lead to injustice,

particularly where the ascertainment of the relevant facts depend on oral testimony.”

56. It follows from the above that the Defendant’s counterclaim seeking recovery of the suit property is caught by Section 7 of the Limitation of Actions Act since he has sought to recover land which the Plaintiff lawfully and contractually took possession of in 2007.

57. Accordingly, on the basis of the evidence produced, it is safe to surmise that the Plaintiff has demonstrated her case on a balance of probabilities. **In re Estate of Francis Waita Mbaki (Deceased) [2018] eKLR** the Court aptly held as follows:-

“The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities, the court will have in mind the factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.... Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation. Although the result is much the same, this does not mean that where a serious allegation is in issue, the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighting the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be evidence that it did occur before, on the balance of probability, its occurrence will be established.”

58. In the end, the Plaintiff’s suit against the Defendant succeeds and is allowed as prayed. On the other hand, the Defendant’s counterclaim was wholly unsubstantiated and is dismissed with costs.

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HON. E.O. OBAGA

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 2ND DAY OF OCTOBER, 2025.

IN THE PRESENCE OF:

Mr. Muthiani for Plaintiff.

Mr. Mutisya for Defendant.

Court assistant – Steve Musyoki

ORIGINAL