



REPUBLIC OF KENYA



**Nyongesa v Ngedi (Environment and Land Appeal E011 of 2023)
[2025] KEELC 6962 (KLR) (15 October 2025) (Judgment)**

Neutral citation: [2025] KEELC 6962 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND APPEAL E011 OF 2023**

CK NZILI, J

OCTOBER 15, 2025

BETWEEN

RRCHARD NYONGESA APPELLANT

AND

JOSEPH JUMA NGEDI RESPONDENT

*(Being an appeal from the Judgment and Decree of Hon. S.N. Makila
(PM) delivered on 08/03/2024 in Kitale CMC ELC No. 16 of 2019)*

JUDGMENT

1. The appellant, who was the defendant at the lower court, had been sued at the lower court by a plaintiff dated 7/3/2019. The respondent had sought:
 - a. Declaration that he is the rightful and legal owner of Land Parcel No. Kolongolo/Kolongolo/Block 4'B²/18 measuring 1.9 Ha.
 - b. Eviction order.
 - c. Mesne Profits.
2. The respondent claimed that he became the registered owner of the land after purchasing it in 1981, from Jamin Esapwa, took possession, but left it out of persistent insecurity to his family in 1989, which land initially was 8 acres, the defendant occupying a separate piece of land measuring 5 acres.
3. The appellant opposed the suit through an amended defence and counterclaim filed on 9/9/2021. He averred that his late father owned 185 shares equivalent to 11 ½ acres in Kolongolo Farmers' Co-operative Society Ltd, out of which 3 acres were on a wetland, leaving 8.3 acres.
4. It was averred that his father purchased a parcel of land from one Jared Muliro in 1972, as per a share certificate issued in 1977, and later transferred the land to him in 2008, to hold in trust for his siblings,



later registered as Kolongolo/Kolongolo/ Block 4'B'/19, measuring 5.3 acres, instead of the initial acreage, since the respondent had unlawfully registered himself 3 acres as Kolongolo/Kolongolo/ Block 4'B'/18.

5. The appellant averred that he had been in possession, together with his siblings and the family of the respondent, of the suit land, openly, uninterrupted and peacefully, since 1972 to the exclusion of the respondent.
6. By way of a counterclaim, the appellant reiterated the contents of the defence. He blamed the respondent for unlawfully registering the suit land through collusion, sought for cancellation of the titles to the two parcels of land for the issuance of one title for 8.3 acres of the land.
7. The appellant sought:
 - a. Declaration that he is the owner of 8.3 acres of the land, cancellation of the two titles, and issuance of a proper title deed.
8. By way of a reply to the defence and defence to the counterclaim dated 25/9/2021, the respondent denied the alleged illegal registration of the suit land, or the land having been part of the appellant's late father's share or entitlement out of the Society shareholding. The respondent denied the alleged uninterrupted occupation of his land by the appellant, his family, or siblings since 1972.
9. At the trial, Joseph Juma Ngedi testified as PW1. He relied on a witness statement dated 7/3/2019 as his evidence-in-chief. He produced a title deed, share certificate, chief's letter, survey fee receipts, and receipt for Kolongolo as P. Exhibits. No. (1), (2), (3), 4(a), (b), (c), and (d), and 5(a), (b), (c), and (d) respectively.
10. Briefly, he told the court that in 1981, he purchased 3 acres of land from Jamin Esapwa, took vacant possession and later obtained a title deed for the land but in 1989, he relocated after his house was destroyed and out of insecurity posed to his family, PW1 said that after sometime he went back only to find that the appellant had trespassed into his land, whereof he sought intervention of the area local administration, who issued notices to the appellant to vacate and only contain himself to his 5 acres of land, which has distinct boundaries.
11. PW1 said that the trespass began in 1997. PW1 said that he lawfully acquired his title deed, and there was no police report made by the appellant against him over any illegal registration of title. PW1 said that he lawfully acquired the land upon purchase as per P. Exhibits. No. 3-7.
12. Richard Muliro Nyongesa testified as DW1. He relied on a witness statement dated 11/6/2019 as his evidence-in-chief and produced a share certificate and title deed as D. Exhibit No. (1) and (2). DW1 told the court that he did not know any land owned by the respondent; otherwise, his parcel of land measuring 8.3 acres belonged to his late father and siblings, which they have continuously occupied since 1972. He termed the respondent's claim as baseless both in fact and law; otherwise, he had no relationship with him.
13. DW1 said that the respondent had never lived on the land, which his late father bought shares from Kolongolo Farmers' Co-operative Society Ltd, equivalent to 11 acres of land, but whose title only reflects 5 ½ acres, after 3 acres were allegedly illegally registered in the name of the respondent.
14. Equally, DW1 said that he became the trustee of the land after his father became ill in 2002. DW1 said that the two titles should be cancelled to reflect the ground reality as 8 acres. DW1 said that he obtained his title on 6/6/2017 from the society and the lands office.



15. DW1 said that it could be true that the respondent was also a shareholder in the society, as per the receipts produced. DW1 said that after obtaining his title to the land, he did not raise any complaints with the said office which processed it regarding the size or file any suit in 2017, for he did not know the respondent, nor report any fraud against him to the police. DW1 insisted that the respondent's title was illegally obtained.
16. Patrick Muliro and Wilfred Kimaliro testified as DW2 and 3. As mother and brother to DW1, and based on the witness statement dated 11/6/2019, as their testimonies in chief, they told the court that they did not recognize the respondent; otherwise, the land was purchased by the deceased husband and father in 1972. DW1 and DW3 confirmed that the land occupied by them is 8.3 acres and was transferred to DW1 in 2002 to hold in trust. DW2 and DW3 have confirmed occupying the land uninterrupted since 1972 to date.
17. After reviewing the evidence, the trial court rendered its judgment in favour of the respondent. The appellant, by a memorandum of appeal dated 5/4/2023, faults the same for:
 1. No finding the claim time-barred.
 2. Not finding the registration as fraudulent.
 3. For upholding the respondent's purported sale agreement, yet it violated Cap 23 and Cap 302.
 4. For dismissing the counterclaim.
 5. For applying the wrong law.
18. In support of the grounds, the appellant relies on written submissions dated 5/8/2025, isolating 4 issues for the court's determination. It was submitted that where a court is faced with two compelling titles, the courts should look at the one procedurally and legally obtained based on the root of the title. Reliance is placed on *Munyu Maina -vs- Hiram Gathiha Maina*, Civil Appeal No. 239 of 2009.
19. In this case, the appellant submits that the respondent did not go beyond the instrument to prove the legality of his title on how he bought the land from Jared and Jamin Esapwa in 1981. Reliance is placed on *Dina Management Ltd -vs- County Government of Mombasa & 5 others* [2023] KESC 30 (KLR).
20. The appellant submitted that the applicant's father had a clear intention to create a trust, including the land allegedly registered in the name of the respondent. Reliance is placed on *Knight -vs- Knight* (no citation), *Mwangi* (suing on his own behalf and behalf of Joseph Mwangi Wainaina (deceased) -vs- Kamau & Others, ELC No. E010 of 2021 [2023] KEELC 17250 [KLR] and *Mbui Mukanga -vs- Gerald Mutwiri Mbui* CA No. 286 of 2000.
21. The appellant submitted that the suit was time-barred. Reliance is placed on Section 7 of the *Limitation of Actions Act*, *Mukuru Munge -vs- Florence Shingi Mwawana & Others* [2016] eKLR and *Bosire Ongoro -vs- Royal Media Services* [2015] eKLR.
22. The appellant submitted that the respondent had no better title as against him. Reliance is placed on *Alberta Mae Gacie -vs- Attorney General & Others* [2006] eKLR and *Atinga -vs- Ogumbo & Others* ELC No. 26 of 2019 [2014] KEELC 1570 [KLR].
23. Again, the appellant submitted that the trial court should have cancelled the respondent's title under Section 80 of the *Land Registration Act*, given the uninterrupted occupation of the land by him for 47 years.



24. The respondent relies on written submissions dated 11/8/2025. It is submitted that the appellant has no basis to raise the defence of time limitation when the entry to the land was forceful, as per the chief's letter dated 22/2/2019, and that the defence of adverse possession was never pleaded in the lower court. The respondent submitted that the title deed was issued in 2017, hence the suit was not time-barred.
25. As to fraud, the respondent submitted that fraud was either pleaded or evidence tendered to sustain it under Section 107 of the *Evidence Act*. Reliance was placed on *Moses Parantai & Another (suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) -vs- Stephen Njoroge Macharia [2020] eKLR*.
26. The respondent submitted that the appellant obtained his title to the land ahead of his on 6/6/2017 as opposed to 8/12/2017, and therefore, if at all he was occupying more acreage, as alleged, it makes no sense why he did not obtain title for the entire land, the only inference being he was aware of illegal occupation of the 3 acres belonging to him.
27. As to the validity of the sale agreement, the respondent submitted that he produced the paper trail towards acquiring the land, procedurally and legally, hence the trial court cannot be faulted for that holding.
28. In *Ciero & Another -vs- Njanja & Others Civil Appeal 111 of 2022 [2025] KECA 1541 [KLR] (3rd October 2025)* (Judgment), the court said the mandate of the appellant court of first instance is to analyze and re-assess the evidence on record and reach its own conclusion, but, as held in *Gitobu Imanyara -vs- Attorney General [2006] eKLR*, it has to give credit to the lower court, which saw and heard the witnesses testify.
29. Having looked at the lower court record, the issues calling for my determination are:
 - (1) If the appellant pleaded and tendered evidence on, or is raising new issues that were not canvassed before the trial court.
 - (2) If the appellant has a meritorious appeal.
 - (3) What is the order as to costs?
30. Parties are bound by their pleadings, and issues for the court's determination flow from the pleadings.
31. In *Barmasai -vs- Rono & Others Civil Appeal E068 OF 2023 [2025] KECA 1489 [KLR] (19th September 2025)* (Judgment), the court said that the general rule is that courts should determine a case on the issues that flow from the pleadings, unless on an issue framed by the parties for courts determination as per *Odd Jobs -vs- Mubia [1970] EA 476*. The court said parties must confine themselves to their pleadings unless amended during the hearing. The court declined to entertain on appeal a plea of limitation, since it had not been pleaded or canvassed before the trial court, and hence had no benefit of addressing its mind to the said issue. The court was emphatic that the plea of limitation could not be introduced on appeal.
32. In this appeal, the appellant relies on grounds No. (1), (2), and (3) regarding statute-barred claims, fraud, and voidable sale agreements. In the amended defence and counterclaim dated 25/8/2021, there was no pleading on the plea of limitation, extinguishment of title held by the respondent on account of adverse possession, and overriding interests, including trust, voidable sale agreement, or fraud.
33. Even though the respondent in paragraph 9 pleaded uninterrupted, continuous, peaceful occupation of the land since 1972, that did not mean that he was advancing the doctrine of adverse possession. Evidence was also not advanced on the same. Further, paragraph 12 attacked the suit on defectiveness.



- The plea of statute-barred claim was not specifically pleaded, and no evidence was advanced on the same.
34. Coming to the counterclaim at paragraph 15, the only trust pleaded is with respect to Parcel No. 19 and not Parcel No. 18. Unlawfulness is not the same as fraud. Fraud, as held in *Vijay Morjaria -vs- Nansigh Madhusing Darbar & Another* [2000] eKLR, must be specifically pleaded. Fraud and illegality cannot be inferred. The particulars of fraud were not pleaded and proved in the trial. See *Arthi Highway Developers Limited -vs- West End Butchery Limited & 6 others* [2015] eKLR. Evidence to sustain the alleged fraud, trust, or illegality was also not advanced at the hearing. Written submissions cannot replace pleadings or amount to evidence. Written submissions dated 15/12/2022 and 21/11/2022 are the ones that raised the issues.
 35. Leave to rely on new issues or grounds on appeal and advance new issues through written submissions was not sought and obtained before this court.
 36. Courts have held that adverse possession may be introduced by way of a counterclaim or defence. See *Kosgei -vs- Mugun (Civil Appeal E121 of 2021)* [2025] KECA 1507 (KLR) (19 September 2025) (Judgment), citing with approval *Gulam Miriam Noordin -vs- Julius Charo Karisa* [2015] KECA 188 [KLR].
 37. The respondent had sought orders of eviction, mesne profits, for trespass, and a declaration that the land belongs to him. Unlike in *Wabala -vs- Okumu* [1997], LLR 609 [CAK], the appellant's defence and counterclaim did not speak to adverse possession for the action on eviction. The appellant, like in *Bayete Co. Ltd -vs- Kosgey* [1998] LLR 813, did not make a specific plea of adverse possession or declaration of the respondent as holding the title on an account of trust.
 38. A counterclaim under Order 7 Rule 3 of the Civil Procedure Rules is a separate suit. It stands or falls regardless of the main suit. See *County Government of Kilifi -vs- Mombasa Cement Ltd* [2017] KECA 633 [KLR]. The appellant faults the trial court for dismissing his counterclaim. A case succeeds or fails based on its strengths, but not the weaknesses of the opposite side. The appellant says that the respondent did not justify the claim to be entitled to the reliefs sought; otherwise, his paper trail to how he became the owner of the land through purchase and the eventual registration of the title was illegal and against the law.
 39. It is trite that when a title is under attack, it is not enough to waive the instrument without showing that the process of acquisition was regular, procedural, and legal. See *Dina Management -vs- County Government of Mombasa (supra)*, *Torino Enterprises -vs- Attorney General* [2023] KESC 79 [KLR] and *Hubert L. Martin & Others -vs- Margaret J. Kamar & Others* [2016] eKLR.
 40. As indicated above, the appellant pleaded the illegality of the title held by the respondent. He did not plead to the illegality of the sale agreements or share certificates, or receipts used by the respondent to obtain title on 8/12/2017. In the administrators of the estate of *Administrators of the Estate of Letoire Ole Ntirori (deceased) & Others -vs- Mwangi & Others Civil Appeal E620 of 2024* [2025] KECA 1585 [KLR] (3rd October 2025) (Judgment), the court emphasized that fraud has to be specifically pleaded and proved on a balance higher than the balance of probabilities required in civil cases.
 41. Casting doubts on the sale agreements, receipts, share certificates, and the title held by the respondent without availing tangible and cogent evidence is what the appellant did. The law on land sale agreements before June 2003 required evidence of part performance coupled with acknowledgment notes. See *Peter Mbiri Michuki -vs- Samuel Mugo Michuki* [2014] eKLR.
 42. In *Sehmi & another -vs- Tarabana Company Limited & 5 others; Mbugua Ng'ang'a & Co. Advocates (Applicant)* [2024] KESC 9 (KLR), the court observed that a certificate of title under the [Land](#)



Registration Act is to be regarded as prima facie evidence of ownership so long as an inquiry into its legality meets the test of law. The onus was on the appellant to lead evidence on how the title held by the respondent was subject to any overriding rights or interests in his favour, unprocedurally, or illegally obtained, to be the subject to cancellation under Section 80 of the Land Registration Act. The appellant was unable to poke holes in the paper trail that the respondent had shown, showing the root he travelled until he obtained title on 8/12/2017.

43. The appellant was unable to explain why he did not complain, lodge an investigation, and return his title deed to demand from the issuing authority that it reflect the acreage of 8.3 acres based on the share certificates and receipts held by the late father. Other than D. Exhibits. No. (1) and (2), the appellant, unlike the respondent, did not avail any prior documentation to sustain his defence and counterclaim that he was denied 3.2 acres of the land in favour of the respondent at the registration of his title on 8/12/2017.
44. The appellant did not call evidence from the society or the person who sold the land to his late father in 1972, and in 1977, issued a share certificate equivalent to 11 acres.
45. The break in the chain of acquisition of the land was on the appellant's side and not on the respondent's side. The court notes that both the appellant and the respondent, in their written submissions before the trial court dated 21/11/2022 and 5/12/2022, addressed the trial court on issues which they had not pleaded on or tendered evidence.
46. Courts have insisted on strict compliance with Order 11 of the Civil Procedure Rules and the framing of the issues for determination. This is aimed at confining a trial on the issues as pleaded. For instance, paragraph 3 of the defence related to illegality. The respondent submitted on both fraud and adverse possession. He also submitted on mesne profits, yet other than praying for mesne profits, the particulars were not pleaded or evidence led by the respondent.
47. Coming to the appellant, he raised the issue of a statute-barred suit and void sale agreements through written submissions, yet it had not been pleaded or evidence led to that effect.
48. In Independent Electoral and Boundaries Commission -vs- Mutinda Mule & Others [2-14] eKLR, the court held that it has no business to make its own case or to formulate its own from the evidence before it, quite separate from what parties have postulated. Parties, therefore, should not try to formulate new claims or defences, or evidence by way of written submissions as held in D.T. Moi -vs- Mwangi Stephen Murithi & Another [2014] eKLR.
49. The upshot is that I find no merits in the appeal. It is dismissed with costs.
50. Orders accordingly.

JUDGMENT DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 15TH DAY OF OCTOBER 2025.

In the presence of:

Court Assistant - Dennis

Arunga for the Respondents – present

Lichuma for Applicants – present

HON. C.K. NZILI

JUDGE, ELC KITALE.

