

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT
KAKAMEGA
ELCA CASE NO. E053 OF 2024

WYCLIFFE KHASAKHALA NEONDO.....1ST
APPELLANT

JOSEPH OMURUNGA INDETYE.....2ND
APPELLANT

VERSUS

JOHN KHANGALA MACHENGO.....
RESPONDENT

JUDGMENT

Introduction

1. This appeal is a challenge against the Judgement of Hon. Edwin Wasike (PM) delivered on 29th August 2024 vide Butere PMC ELC No. 17 of 2019. In the impugned Judgement, the trial court dismissed the appellants' counter claim for adverse possession and allowed the

respondent's claim, therefore granting orders of injunction and eviction against the appellants.

Background

2. By a plaint dated 29th May 2019, the plaintiff sought the following orders against the defendants for eviction order and permanent injunction against the defendants in regard to parcel Nos. Marama/Shibembe/294 and 1101.
3. The plaintiff averred that on 20th March 2014 he purchased parcel Nos. Marama/ Shibembe/ 294 from Jenifer Matioli and Yunes Atenya at a total consideration of Kshs. 500,000/= which he paid in full. That at the time of sale the two parcels were registered in the name of the late Seth Namiba Ashuma. That the transaction was approved by the consent of the land control board issued on 4/12/2017. That Jenifer Matioli the legal representative of the estate of Seth Namiba Ashuma executed all transfer documents and that on 14/6/2018 the plaintiff was registered as owner of parcel No. 1101

and on 4/7/2017 he was registered as owner of parcel No. 294.

4. That while the defendants have no legal interest in the two parcels, they had trespassed thereon. That when Jennifer conducted succession in respect of the deceased the 2nd defendant raised objection but the same was disallowed.
5. In a defence and counterclaim dated 25/6/2019, the 1st and 2nd defendants denied the plaintiff's claim and stated that the plaintiff had obtained registration of the suit property through fraud, misrepresentation and conspiracy. They maintained that they had been in a quiet, peaceful and uninterrupted occupation of the two properties for 39 years and had acquired the same by adverse possession.
6. Wycliffe Khasakhala Neondo sought to be joined to the suit as a 3rd defendant, which prayer was allowed by the trial court. In his defence, he denied the plaintiff's claim and stated that he was the registered proprietor of the two suit property because although his official name is Wycliffe Khasakhala Neondo, he was also known as

Ashuma Namiba, a name he was given by his grandfather Seth Namiba Ashuma, who had him registered as owner of the two parcels of land when he was 4 and 8 years old respectively.

7. The suit proceeded by way oral evidence. The plaintiff presented two witnesses, while the defendants presented three witnesses.

Plaintiff's evidence

8. PW1 was John Khangala Machengo. He adopted his witness statement as his evidence in chief. His testimony was that he purchased parcel Nos. 294 and 1101 from Jenifa Matioli and Yunis Atenya. That at the time of purchase, the land was registered in the name of Seth Namiba Ashuma the father of the two vendors. That he paid a total of Kshs. 500,000/=. He produced documents attached to his list of documents. That the defendant trespassed on his land.

9. In cross examination, he stated that he facilitated Jenifa and Yunis to carry out succession proceedings. That he conducted search on the suit property and the same was registered in the name of Seth Namiba Ashuma. That

when he purchased the land the 2nd defendant had not constructed on the land. That he came on the land in 2015.

10. PW2 was Reuben Chebii, a Court Administrator at Butere Law courts. He produced the court file in Kakamega HCC Succession Case No. 549 of 2016 as an exhibit. On cross examination he stated that the letter from the Ministry of Immigration and Registration of Persons dated 24/7/2023 led to issuance of death certificate of Seth Namiba Ashuma. That marked the close of the plaintiff's case.

Defendants' evidence

11. DW1 was Wycliffe Moses Chibole. He stated that he did not know the plaintiff and that the 1st defendant was his neighbor. That the 3rd defendant was his grandson. He adopted his statement dated 2/6/2022 as his evidence in chief. His testimony was that Namiba Ashuma gave the 3rd defendant land before he died, as he had no male child. That parcel No. 294 was registered in the name of the 3rd defendant as confirmed by the mother in the Succession case No. 56 of 2013. That the grandfather

remained with parcel No. 313. That Namiba Ashuma died in 1965. That the 3rd defendant's biological father stayed with the 3rd defendant at Irechea in Mayala.

12. That one acre of parcel No. 295 was wrongly captured in parcel No. 294 and that on submission of 295, it created parcel No. 1101 which was registered in the name of Ashuma Namiba on 14/10/1970. That in 1977 Flora Ochole tried selling parcel No. 294 at Kshs. 28,000/= to one peter Neondo but that the family resolved to have the consideration refunded to the buyer and that he is the one that refunded the same. That the family resolved that he takes a half-acre of parcel No. 294. That he began tilling the land and put up a semi-permanent structure in 2003. That he has lived on the said portion of land since 1977 with the consent of the 3rd defendant. That the plaintiff has never used the land and that the land is owned by the 3rd defendant.

13. In cross examination he stated that he resides on parcel No. 294 since 1977. That he was born on his father's land parcel No. 396. That he did not witness the sale of land to Neondo. That Seth Namiba is his cousin

and his wife was called Flora Ochola. That on refunding Ksha. 28000/= he took over the land. That Seth Namiba had three daughters who conducted succession proceedings for the father's estate. That he purchased parcel No. 294 and settled thereon. That the 3rd defendant is a son of Jenifer. That Wycliffe Khaskale Neondo is also called Ashuma Namiba. In reexamination, he stated that John Neondo is the father of Wycliffe Khasakala Neondo.

14. DW2 was Joseph Omurunga Indetae. He adopted his witness statement as evidence. His testimony is that he belongs to Marama clan. That in 2000 the 3rd defendant's family had a memorial for celebrating the lives of Flora Ocholi and Seth Namiba and needed money. That he gave them cash of kshs. 6000/= a cow valued at ksh. 20,000/= and a ram valued at kshs. 4,000/= all totaling to Kshs. 30,000/=. That when the family was unable to refund the said amount by 2007 the 3rd defendant agreed to give him part of parcel No. 1101 measuring 140*110. That he put up permanent structure on the land with consent of the 3rd defendant since 2007 without interruption.

15. On cross examination he stated that he lives on 140 feet by 110 feet on parcel No. 1101. That he found the 2nd and 3rd defendants on the land. That Seth Namiba's children conducted succession proceedings in bad faith.
16. DW3 was Wycliffe Khasakala Neondo. He relied on his witness statement dated 20/6/2022 as his evidence in chief and produced documents attached to the list of documents dated 20/6/2022. His evidence was that his name was Wycliffe Khasakhala Neondo alias Ashuma Namiba. That on 30/9/1966 and 14/10/1970 he was registered as owner of land Parcel Nos. 1101 and 294. That the land was in his name until when the plaintiff transferred it to his name through Butere Succession case No. 56 of 2013.
17. That he was not around when transaction regarding the suit property was done. That he had to claim what is legally his as he is Ashuma Namiba alias Wycliffe Khasakhala Neondo and he is not Seth Namiba Ashuma who died in 1965. That the green card for the suit property has the name Ashuma Namiba and not Seth Namiba Ashuma. That Seth Namiba Ashuma and Ashuma

Namiba are not one and the person. That he wishes to have the two parcels of land by deleting the plaintiff's name from the register. That the plaintiff's suit be dismissed and his counterclaim allowed. He produced CPE certification for 1977; school identity card from Bushiangala secondary school for 1979; affidavit, copy of national identity card, green card and a letter.

18. In cross examination, he stated that his name as per his national identity card is Wycliffe Khasakala Neondo. That his identity card has an "alias" and that his school identity card has the name Ashuma Namiba which he was given by his grandfather. That he was four years old when parcel No. 294 was registered in his name and eight years when parcel No. 1101 was registered in his name. That Seth Namiba Ashuma was his grandfather and is different from Ashuma Namiba. That he was aware of succession proceedings which were done fraudulently without his knowledge. That parcel No. 294 is registered in the plaintiff's name and that the process was fraudulent because he was indicated as having been died. That he lives on the suit property. In reexamination he

stated that he had produced an affidavit to show his other name. That marked the close of the 1st, 2nd, and 3rd defendant's case.

19. Upon consideration of the pleadings, evidence and submissions, the trial court found that the plaintiff had proved his case as the lawful owner of the two suit properties and granted the orders sought by the plaintiff. The trial court dismissed the counter claim and found that they were using the backdoor to hold on to the plaintiff's parcel as they only raised their claim after being sued. Further that a child cannot claim adverse possession against a parent.

20. Aggrieved by the trial court decision, the applicants herein appealed against the same vide Memorandum of Appeal dated 13/9/2024 citing 9 grounds of appeal as follows;

a) The learned magistrate erred in law and fact in erroneously relying on the evidence of the plaintiff (respondent herein) to the effect that at the time the plaintiff (Read Respondent) purchased the suit parcels-

MARAMA/SHIBEMBE/ 294 and 1101- the parcels were registered in the names of SETH NAMIBA ASHUMA when the official search on record showed that the two parcels belonged to ASHUMA NAMIBA.

- b) The learned magistrate erred in law and fact by totally assuming the interest and stake held by the 3rd defendant (1st Appellant) in the two parcel of land and why he had the power to give out by way of sale the parcel number MARAMA/SHIBEMBE/ 1101 to the 1st Defendant (2nd Appellant) and a portion of MARAMA/SHIBEMBE/ 1101 to the 2nd Defendant, which he did as the original owner of the two parcels.**
- c) The learned magistrate erred in law and fact in disregarding the evidence of the 3rd Defendant (1st Appellant) on the fact that he was registered as the first owner of land parcel number MARAMA/ SHIBEMBE/ 294 to the 2ND Defendant, which he did as the original owner of the two parcels.**

- d) THAT the trial court erred in law and fact by disregarding the evidence on record that the 1st Appellant WYCLIFFE KHASAKHALA NEONDO is one and the same person as ASHUMA NAMIBA.**
- e) The learned magistrate erred in law and fact in dismissing the Appellants irrebuttable claim for adverse possession when the 1st and 2nd Defendants had openly, continuously and adversely since 2007 and 1977, respectively.**
- f) The learned magistrate erred in law and fact in upholding the legality of the titles obtained by the Respondent yet he bought land that belonged to the 3rd Defendant (1st appellant) and at the time of purchase the 1st and 2nd Defendants were already on the suit land.**
- g) The learned magistrate erred in law and fact in disregarding the evidence adduced by the 1st and 2nd Defendants (2nd Appellant) regarding the succession in the estate of the late Seth Namiba being Succession Cause Number 9 of 2000 as against Succession Cause 56 of 2013 at Butere**

& 549 of 2016 (Kakamega) that resulted in the illegal and unlawful grant of letters of administration and certificate of confirmation of grant that resulted to transfer of the 1st Appellants parcel to the Respondent.

h) THAT the trial court erred in law and in principle by erroneously concluding that the two parcels of land belonged to one SETH NAMIBA ASHUMA yet there was no guidance or an ALIAS name to indicate that one Seth Namiba Ashuma was the same person as Ashuma Namiba.

i) The Learned magistrate erred both in law and principle by being biased towards the uncorroborated evidence produced by the Respondent against the evidence produced by the Appellants.

21. The appellants sought the following orders;

a) That the appeal be allowed.

b) That the findings or decision in the Butere ELC 17 of 2019 be set aside or vacated and allow the counterclaim filed by the appellants herein in trial court.

c) That the costs of this appeal be paid by the respondent.

d) That this honorable court be pleased to grant such other reliefs that may appear just and fit to grant.

22. The appeal was disposed by way of written submissions. On record are submissions filed by the appellants dated 26/3/2025 and those of the respondent dated 15/7/2025.

Appellants' submissions

23. Counsel for the appellant submitted that the appellants had proved a claim for adverse possession having occupied the suit property for over 12 years. Counsel relied on sections 7 and 13 of the Limitation of Actions Act and the case of **Mtana Lewa v Kahindi Ngala Mwaghandi [2015] e KLR.**

24. It was further contended for the appellant that the sale of the suit property between the respondent and the Jenifa and Yunis contravened section 45 of the Law of Succession Act. That the suit property was unprocedurally included in the succession of the estate of Namiba Ashuma when the rightful owner was Ashuma Namiba the 1st appellant.

Respondent's submissions

25. The respondent argued that the respondent having exhibited evidence that he was the registered proprietor of the suit property, which he acquired by valuable consideration, his rights thereto are indefeasible. That the appellants rights were extinguished when the respondent acquired the suit property. The respondent relied on the case of the estate of **Cecilia Wanjiku Kibiche z9deceased) [2019] e KLR** and argued that he was entitled to the orders sought. It was his argument that the trial court was right in arriving at the findings made.

Analysis and determination

26. The court has carefully considered the appeal, parties' rival submissions and the entire record. This being a first appeal, the duty of this court is to re-assess and re-evaluate the evidence tendered before the trial court and make its own independent conclusions bearing in mind that it had no advantage of seeing or hearing witnesses and therefore make due allowance for that.

27. The duty of the first appellate court was discussed in the case of *Gitobu Imanyara & 2 Others v. Attorney General [2016] eKLR*, where the Court of Appeal stated as follows;

“An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must consider the evidence, evaluate it itself and draw its own conclusions, although it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”

28. Having considered the grounds of appeal raised in the Memorandum of Appeal, my view is that the same raise three main issues for this court’s determination, namely;

- a. Whether the appellants proved their claim as contained in their counterclaim.**
- b. Whether the respondent proved that he acquired the suit property lawfully.**
- c. Whether the trial court was right in arriving at its decision.**

29. It is not disputed that the respondent is the registered proprietor of parcel Nos. 294 and 1101 having been so registered on 4th July 2017 and 14th June 2018 respectively. While the respondent herein pleaded that he lawfully purchased the two properties from Jenifa Matioli and Yunes Atenya on 20th March 2014 when the said properties were still registered in the name of Seth Mamiba Ashuma the vendors' late father, the appellants stated that the registration of the two parcels in the respondent's name was through fraud, conspiracy and misrepresentation. That they had been on the suit properties for over 39 years and counterclaimed for a declaration that the transaction leading to the respondent's registration as owner of the suit property was tainted with illegalities hence his title should be nullified and the respondent restrained from holding himself as a lawful proprietor thereof. The 1st appellant who was the 3rd defendant in the lower court, pleaded that the suit properties were registered in his name in 1966 and 1970 when he was 4 and 8 years old respectively and that they should revert to him. The

pleadings are clear and while the appellants argued that they were entitled to a counterclaim of adverse possession, that was not sought in the counterclaim. In any case, a claim for adverse possession is a claim based on limitation of time and can only be directed against the true owner of the land. As the appellant insisted that the suit property belonged to the 1st appellant, if they were to make a claim for adverse possession, they would be expected to raise it against the 1st appellant and not the respondent as a claim for adverse possession cannot be raised against a person said to have fraudulently acquired the disputed property.

30. Section 26 of the Land Registration Act provide for indefeasibility of title as follows;

“Certificate of title to be held as conclusive evidence of proprietorship

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the

land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b)Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

31. Therefore, unless there is proof that the acquisition of title by a registered proprietor was by fraud, misrepresentation, illegality or corruption, registration vests in a proprietor of land, absolute and indefeasible rights.

32. In the case of **Munyu Maina v Hiram Gathiha Maina, Civil Appeal No239 of 2009**, the Court of Appeal held that;

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as

proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

33. Where a party alleges fraud, they must specifically plead the particulars thereof and strictly prove the same. The standard proof of fraud is slightly higher than the standard required in ordinary civil cases of the balance of probability. However, that standard is slightly below the standard of proof in criminal cases of beyond reasonable doubt. In the case of **Kinyanjui Kamau -vs George Kamau [2015] e KLR** the court expressed itself as follows; -

“...it is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo -vs- Ndolo [2008]1 KLR (G & F) 742 wherein the court stated that: “...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 was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in Criminal Cases...”

34. In the instant case, the appellants herein enumerated particulars of fraud, conspiracy and misrepresentation on the part of the respondent as follows; that the registration was procured through fraud tainted with illegality; that there were no valid transfer of land forms; that he misled the chairman of the land control board into issuing an invalid consent; that he did not involve the 2nd appellant and his co-defendant in the acquisition of his titles; that he failed to disclose to the chairman of the Land Control Board that the 2nd appellant and his co-defendant were in actual occupation of the suit properties; that he disregarded the appellant's interest; that he executed transfer of titles on the basis of a grant issued in Succession case No. 549 "B" of 2016 when the

land was not available and the 1st appellant accused the respondent of having a sale and transfer by misrepresentation and concealment of material facts that the owner of the land was dead when he was alive.

35. At the core of this dispute is the identity of the 1st Appellant, one Wycliffe Khasakhala Neondo. This person stated that he is called Wycliffe Khasakhala Neondo of National identity card number 69***33. He produced his national identity card. He maintained that he is also known as Ashuma Namiba, a name he was allegedly given by his grandfather Seth Namiba Ashuma. That he was born in 1962 and was registered as owner of the two parcels of land in 1966 and 1970 when he was aged 4 years and 8 years respectively, being a first registered owner. To demonstrate that his name was also Ashuma Namiba, he produced a CPE certification from KNEC showing that one ASTHUMA NAMIBA sat for the Certificate of Primary Education (CPE) in 1977 at Shibembe Primary School. He also produced a school identity card from Bushiangala Secondary school for 1979. In addition, he produced an “affidavit of name”

dated 7th June 2022 where he swore that he is officially known as Wycliffe Khasakhala Neondo and also known as Ashuma Namiba and that he lost his CPE certificate and was seeking a duplicate copy of the same in the name of ASHUMA NAMIBA.

36. I have considered the narration by the 1st appellant who was the 3rd defendant in the lower court. His explanation that he was called Ashuma Namiba, even got two titles of land registered in his name in 1966 and 1970 respectively, then after high school “left home” and assumed the name Wycliffe Khasakhala Neondo, is a narration that is in my view, not credible. This is because the issue of his other name being Ashuma Namiba appears to have been eerily silent between 1979 to 2022 when he swore an affidavit that those two names referred to one and the same person. This is a period of a deafening silence of 43 years. It is apparent that there is nowhere else where the 1st appellant ever referred to himself as Ashuma Namiba, and were it not for the suit filed by the respondent herein, the allegation that Ashuma Namiba was also his name would probably have

not arisen. I did not see any evidence to create the nexus between the National identity card of Wycliffe Khasakhala Neondo and Ashuma Namiba. I do not think that an affidavit sworn in 2022 would reasonably create the required nexus. The certification of KCE and the school identity card from Bushiangala Secondary School, in my view alone are no sufficient proof that Wycliffe Khasakhala Neondo and Ashuma Namiba is one and the same person. If the 1st appellant used that name in high school as he alleges, it is my view that the need to refer to that name would reasonably have arisen much earlier than when this suit was filed. I do not think a person who has two properties in his name would have another different set of three names and never ever refer to the names on his titles for a period of 43 years.

37. From the evidence on record, the registration of parcel No. 294 was a first registration. The same was done on 30th September 1966, this is before the enactment of the Land Adjudication Act. Therefore, the registration proceeded under the Land Consolidation Act Cap 383 Laws of Kenya. That process was not a one day's

process. It involved processes of adjudication, demarcation, survey and registration. The process began with giving not less than six months to any person who had an interest in land to present the same. The processes of demarcation, survey and preparation of the adjudication register were subject to several levels of dispute resolution mechanisms, including the adjudication committee, arbitration board and the resolution by the adjudication officer who had the final word on adjudication. The fact that the adjudication process up to titling took some time, meant that it was not surprising for some titles to be issued in the names of people who were already. Therefore, the fact that registration herein of the suit property in the name of Ashuma Namiba also known as Seth Ashuma Namiba happened after his demise, does not mean that anyone posing as Ashuma Namiba should be granted the land.

38. That being the position, it is clear to me that the process of registration of the suit property in the name of Ashuma Namibaw began way before 1965. It is improbable that Ashuma Namiba could reasonably have

given the name of a child who probably was either unborn or a few months or years old for registration. In addition, parcel No. 295 was subdivided to create among others parcel No. 1101. The 1st appellant did not disclose to this court in whose name land parcel No. 295 was registered. Being an 8-year-old child in 1970, he could not have effected a subdivision of parcel No. 295 for want of capacity and he did not bother to explain to the court the circumstances under which the subdivision was effected in his favour, in view of his age.

39. For those reasons, I find and hold that the person registered as owner of parcel Nos. 294 and 1101 was Ashuma Namiba also known as Seth Namiba Ashuma the father of Jenifa Matioli and Yunes Atenya. In the premises, I find and hold that Wycliffe Khasakala Neondo the 1st appellant herein is not one and the same person as Ashuma Namiba and therefore he is not the registered proprietor of the two suit properties being parcel Nos 294 and 1101. In short Wycliffe Khasakhala Neondo is an imposter. For those reasons I agree with the trial court

that indeed the 1st appellant herein was claiming the suit property through the back door.

40. The 2nd appellant and his co-defendant alleged to have been on the suit property for over 39 years. He stated that he purchased part of parcel No. 1101 measuring 140 feet by 110 feet at Kshs. 30, 000/= in 2007. No evidence of payment of the said amount was availed. In any event, the person said to have received the consideration is referred to as the family, that person is not disclosed. The 2nd appellant also mentions the 1st appellant in regard to his alleged purchase. Having been found that the 1st appellant has never owned the suit property, he could not lawfully sell it to the 2nd appellant. In any event, from 2007 to 2019 when the suit was filed is not 39 years as alleged. And importantly, no evidence was presented to show that the 2nd appellant entered the suit property in 2007 as alleged or at all or that he has any buildings on the same as alleged.

41. Having considered the allegations of fraud misrepresentation and conspiracy, I find that the same were not proved. Therefore the 2nd appellant's claim was

not proved. Besides, the respondent could not conspire with himself. It takes two or more persons to conspire. The suit property belonged to Namiba Ashuma alias Seth Ashuma Namiba. His daughters conducted succession and transferred the titles thereto to the respondent. They lawfully owned the land having received it from their father. None of the appellants had any legal claim over the suit property and none of them claimed ownership based on inheritance. I therefore find that the acquisition of the suit property by the respondent through purchase was lawful and therefore the respondent's title cannot be vitiated under section 26 of Land Registration Act.

42. Sections 24 and 25 of Land Registration Act protects interests and rights of persons registered as owners of land. The respondent being the lawful registered proprietor of the suit property is entitled to exclusive enjoyment of the same to the exclusion of third parties including the appellants herein. The appellants have no legal justification to remain on the respondent's property. They are trespassers. On that basis, I find and hold that the respondent proved his claim on the required

standard and therefore the trial court was right in allowing it.

43. In the premises, I find no merit in this appeal which I hereby dismiss with costs to the respondent.

44. It is so ordered.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA
IN OPEN COURT/VIRTUALLY THROUGH
MICROSOFT TEAMS VIDEO CONFERENCING
PLATFORM THIS 15TH DAY OF OCTOBER 2025**

**A. NYUKURI
JUDGE**

In the presence of;

Mr. Acheru for the appellants

No appearance for the respondent

Court Assistant: Delphine