



REPUBLIC OF KENYA



**Tala & another v Bungoma County Council & 15 others (Environment and Land
Case 129 of 2001) [2025] KEELC 7233 (KLR) (23 October 2025) (Judgment)**

Neutral citation: [2025] KEELC 7233 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND CASE 129 OF 2001
EC CHERONO, J
OCTOBER 23, 2025**

BETWEEN

AZINA MAMACHAI TALA 1ST PLAINTIFF

BENJAMIN WAFULA BARASA 2ND PLAINTIFF

AND

BUNGOMA COUNTY COUNCIL 1ST DEFENDANT

DANIEL MUJERA MUHANJI 2ND DEFENDANT

WEBUYE MUNICIPAL COUNCIL 3RD DEFENDANT

MARGARET N SITATI 4TH DEFENDANT

RICHARD MAKHASO MSIAKI 5TH DEFENDANT

NANCY WAMBOI KINUTHIA 6TH DEFENDANT

PATRICK WAFULA KAMWESSAR 7TH DEFENDANT

WIGE INVESTMENT 8TH DEFENDANT

ASHTON MAKONJO 9TH DEFENDANT

JACQUILINE AWINO 10TH DEFENDANT

PATRICK WAFULA WANJALA 11TH DEFENDANT

HALIMA ASIL MOHAMED 12TH DEFENDANT

RODAH NANJALA BARASA 13TH DEFENDANT

FREDRICK KADI THOMAS-DECEASED 14TH DEFENDANT

JACKSON JUMA WENANI 15TH DEFENDANT

JOAB SHIUNDU MACHESO 16TH DEFENDANT



JUDGMENT

Background.

1. Pursuant to the leave of the court issued on 22/04/2013, the Plaintiffs Amended the plaint dated 16/07/2011 and withdrew their case against Bungoma County Council, Margaret N. Sitati, Nancy Wamboi Kinuthia, Patrick Wafula Kamwessar, Wige Investment, Ashton Makonjo, Jacqueline Awino, Halima Asil Mohamed, Fredrick Kadi Thomas and Jackson Juma Wenaniandmaintained their claim against the rest of the defendants for orders under paragraph 18 of the plaint;
 - a. The Plaintiffs claim therefore against the Defendants jointly and severally of for an order that the Defendants appropriation of Ndivisi/Muchi/1372 was unlawful and the same be set aside and their registration as proprietors thereof be cancelled that the subdivision of the Plaintiffs acres in Ndivisi/Muchi/1372 into 4209, 4210, 4227, 4232, 4229, 4224, 4225, 4218, 4222, 4212, and 4214 and their transfers to Messers Daniel Mujera Muhanji, Richard Makhaso Msiaki, Patrick Wafula Wanjala, Roda Nanjala Barasa and Joab Shihundu respectively be set aside and the land registrar Bungoma do cancel the said registration from the register and re-register the Plaintiffs as I the absolute proprietors thereof and further that an injunction do issue restraining the Defendants by themselves or their agents or servants from entering, cultivating, building, fencing, alienating, selling or otherwise interfering with the plaintiff's quite possession and enjoyment of the aforesaid parcels of land plus costs and interests of the suit.
2. It was the 1st Plaintiffs claim that she is the personal representative of the estate of Yahya Tala Kilwake who died in June 1989. That on 20/10/1970, Bungoma County Council acquired and reserved for public use 4 Hectares (10 acres) for use by the residence of Webuye Town as a cattle watering point/ cattle dip comprised in L.R No. Ndivisi/Muchi/1372. That the said land was acquired from; Yahya Tala Kilwake-2 acres, Alfayo Wakaliha-6 acres and Benjamin Barasa Chengoli- 2 acres. That the need for a cattle dip was later overtaken by urbanization and Bungoma County Council failed to compensate the above land owners and instead, surrendered back the land proportionately and the Land Registrar was directed to revert back the land in the names of the original owners.
3. That the 1st and 2nd Defendants failed to transfer the said land as directed and fraudulently subdivided it and transferred it to themselves and third parties. The Plaintiffs set out particulars of fraud against the 1st and 2nd Defendants. That the subdivision of the 1st Plaintiff's 2 acres yielded to 16 plots registered in the names of Richard Makhaso Msiaki-Ndivisi/Muchi/4209(0.04ha), Daniel Mujera Muhanji Ndivisi/Muchi/4224(0.04ha), Patrick Wafula Wanjala- Ndivisi/Muchi/4218(0.05ha), Rodah Nanjala Barasa Ndivisi/Muchi/4223(0.05ha) and Joab Shihundu- Ndivisi/Muchi/4214(0.06ha). That in 1997, the 1st Plaintiff was threatened with eviction and her attempts to register a caution over the land were thwarted by the Land Registrar at the time who was one of the allotees of her land.
4. In their defence, the 1st and 3rd Defendants filed their defence dated 21/06/2023 denying all the averments made by the Plaintiffs including the jurisdiction of this Honourable Court.
5. The suit was agreed to proceed by way of oral evidence.
6. PW1 Azina Mamachai Tala adopted her witness statement dated 04/06/2021 as her evidence-in-chief and further produced into evidence 18 items contained in her list of documents dated 05/06/2024 as P-Exhibit 1-2 and 4-18 while items 3 & 4 were marked MFI 3 & 4. She testified that she resides in 2 acres out of the 10 acres of the suit property. She testified that she did not have letters of administration



for her late husband Yahya Tala Kilwake and that at no time was the Bungoma Municipal Council registered as the owner of the suit land. That her deceased husband gave the county council 2 acres of the suit land to construct a water dip.

7. 1st and 3rd defendants' case: DW1 Cleophas Wanyonyi Waswa adopted his witness statement dated 21/05/2024 as his evidence-in-chief. He also produced into evidence items contained in his list of documents dated 03/07/2023 containing 3 items as D-Exhibit 1-3. He testified that the suit land parcel NO. Ndivisi/ Muchi/1372 was set aside and Registered in the name of Bungoma County Council during the Land Adjudication period and that he was not aware that the 1st Plaintiff resides in the land. That the land was set aside as a Webuye Cattle watering point.
8. At the close of both the plaintiffs and the defendants case, the Parties agreed to file submissions.
9. At the time of preparing this judgement, the plaintiffs had not filed their submissions.
10. The 1st and 3rd defendant filed submissions dated 22/07/2025 wherein they submitted that this Honourable court lacks jurisdiction to hear and determine this suit for being time barred since the suit was filed over 30 years after the cause of action arose and that the plaintiff lacks locus standi to institute the current suit. Reliance was placed inter alia in the cases of Anaclet Kalia Musau v Attorney General & 2 Others [2020] eKLR and Julian Adoyo Ongunga –Vs- Francis Kiberenge Abano Migori Civil Appeal No.119 of 2015.
11. It was further submitted that the documents produced by the 1st Plaintiff were copies of public documents which were not certified as required by the provisions of Sections 68 (2) (c) and 80 of the Evidence Act. Further that the Plaintiffs have not presented any admissible evidence that they or any deceased person held any proprietorship rights before land adjudication and even after adjudication. Reliance was placed in the case of Kitelo & 2 others v County Government of Bungoma & another [2022] KLR. They concluded that the claim by the plaintiffs herein is fatally defective, incompetent, bad in law and an abuse of this Honourable Court's process and should be dismissed with costs.
12. It is noteworthy that the 14th Defendant filed submissions dated 24/06/2025. However, the record reflects that the said 14th defendant did not file a statement of defence. It is trite that submissions itself do not constitute pleadings, and in the absence of a defence, this Court finds that consideration of the said submissions would amount to an academic exercise. The submissions are therefore disregarded.

Analysis and determination.

13. It was the Plaintiffs case that her husband one, Yahya Tala Kilwake donated 2 acres of his land to the Bungoma County Council in the year 1965 for the purpose of creating a cattle deep. That the project did not pull through due to urbanisation and the construction of the Pan Paper Mills which saw the project transferred to another area. That the County council of Bungoma later issued a letter to the effect that they had not purchased any land and therefore the said 2 acres ought to have reverted back to them. Instead, the Defendants are accused of sharing the said 2 acres amongst themselves and fraudulently obtaining titles. It was her evidence that she resides in 2 acres of the suit land since the year 1999.
14. The 1st and 2nd Defendants case was that the suit property was registered in the name of Bungoma County Council during the Adjudication period on 02/10/1970 and the same was reserved for public use. That there is no evidence that prior to the said registration, the suit property belonged to individuals, amongst them the Plaintiff.
15. Having considered the pleadings, the evidence tendered and the rival submissions by the parties, the issue that commend for determination in my view are;



- a. whether the Plaintiff has proved ownership or entitlement to 2 acres out of LR No. Ndivisi/Muchi/1372, and;
 - b. whether the Defendants fraudulently acquired and subdivided the said land.
16. The Plaintiff's case is premised on the assertion that her late husband, Yahya Tala Kilwake, together with Alfayo Wakhalika and Barasa Chemwale, donated portions of land totalling 10 acres, which became part of LR No. Ndivisi/Muchi/1372("the suit property") for use as a cattle dip in 1965. Notably, the Green Card produced as P-Exhibit 5 and D-Exhibit 1 indicates that the first registered proprietor of LR No. Ndivisi/Muchi/1372 was Bungoma County Council, registered on 02/10/1970. Under Section 24 and 25 of the *Land Registration Act*, 2012, registration vests absolute ownership of land in the registered proprietor. The Plaintiff did not tender any documentary evidence (title deed, adjudication record, or allocation register) demonstrating that her late husband yahya Tala Kilwake ever owned or held an interest in the suit land prior to 1970. The legal principle is clear: he who alleges must prove.
 17. Section 107 of the *Evidence Act*, Cap 80 Laws of Kenya, places the burden of proof on the party asserting a fact. In *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR, the Court of Appeal held that where a registered proprietor's title is under challenge, the challenger must demonstrate the root of their claim through credible evidence.
 18. It is key to note that the Plaintiff sought to rely on two letters: one dated 07/08/1989 from the Town Clerk of Bungoma County Council to the Land Registrar, and another dated 14/03/1994 from the District Commissioner directing that donor families ought to re-occupy their donated portions of land. Those letters were marked for identification but were never produced as exhibits. The law is settled that documents marked for identification have no evidentiary value unless formally produced and admitted as exhibits. In *Kenneth Nyaga Mwige v Austin Kiguta & 2 Others* [2015] eKLR, the Court of Appeal held:

“A document marked for identification only becomes part of the evidence on record when it is formally produced as an exhibit by a witness. Failure to produce it means the Court cannot rely on it in making a decision.”
 19. Accordingly, failure to produce the said letters amounted to non-reception and legal exclusion of the document and as such, this Court is restrained from considering MFI 3 and MFI 4 as part of the Plaintiff's evidence. In the end, the Plaintiff has not demonstrated that her late husband had ownership of the 2 acres or that such land formed part of the suit property before registration in the name of Bungoma County Council.
 20. Further, the Plaintiff alleged that the Defendants fraudulently subdivided the 10 acres into 52 plots and obtained titles in 1996. When one pleads fraud, Order 2 Rule 10 (1)(a) of the Civil Procedure Rules (CPR) provides that such claims have to be particularised. Fraud was specifically pleaded in the plaint herein and the particulars thereof set out. The Court of Appeal in *Vijay Marjario Vs Nansingh, Madhusingh Darbar & another* [2000] eKLR held:-

“It is well established that fraud must be specifically pleaded and the particulars of fraud alleged must be stated on the face of the pleadings. The act 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 distinctly proved and it is not allowable to leave fraud to be inferred from the facts.”



21. On the standard of proof required for claims based on fraud, the Superior courts have held that the standard of proof is higher than in the ordinary civil cases. In *Koinange & 13 others Vs Charles Karuga Koinange* 1986 KLR at page 23, the court held:

“When fraud is alleged by the plaintiffs the onus is on the plaintiffs to discharge the burden of proof. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond a reasonable doubt, something more than a balance of probabilities is required”.

22. See also the case of *Kinyanjui Kamau Vs George Kamau* [2015] eKLR where the court dismissed the appeal as it was not demonstrated that the Appellants had proved fraud to the required degree. From my examination of the record, no evidence has been led in proof of the allegations of fraud.

23. Consequently, the Plaintiff's claim which is based on alleged donation and reversion of land has no legal or evidentiary foundation. Accordingly, I find that the Plaintiff has failed to prove her case on a balance of probabilities and this suit is hereby dismissed with costs to the 1st and 3rd Defendants.

24. It is so ordered.

DATED AND SIGNED AND DELIVERED AT BUNGOMA THIS 23RD DAY OF OCTOBER, 2025.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

1st Plaintiff-present.

2nd Plaintiff-present

Mr. Shikhu for the 1st plaintiff-present

Mr. Wangila for the 1st & 3rd Defendants-present

Bett C/A.

