



**Mulwa v Kathanzu & 4 others (Environment and Land Case Civil Suit  
175 of 2016) [2025] KEELC 7567 (KLR) (4 November 2025) (Judgment)**

Neutral citation: [2025] KEELC 7567 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND CASE CIVIL SUIT 175 OF 2016  
AY KOROSS, J  
NOVEMBER 4, 2025**

**BETWEEN**

**SICILY MIKUI MULWA ..... PLAINTIFF**

**AND**

**JOHN MULWA KATHANZU ..... 1<sup>ST</sup> DEFENDANT**

**DAVID MUTINDA MUTUKU ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**DAVID MUTINDA MUTUKU ..... PLAINTIFF TO THE COUNTERCLAIM**

**AND**

**JOHN MULWA KATHANZU ..... 1<sup>ST</sup> DEFENDANT TO THE COUNTERCLAIM**

**SICILY MIKUI MULWA ..... 2<sup>ND</sup> DEFENDANT TO THE COUNTERCLAIM**

**JUDGMENT**

**Background of the case**

1. This suit was initially filed by a plaintiff dated 27/10/2016, which was later amended with an amended plaintiff on 24/04/2022. The substance of the matter in dispute concerns the land parcels allegedly known as L.R. nos. Masinga/Kangonde/2352 and 2353 (“suit properties”). The plaintiff and the 1<sup>st</sup> defendant are married, while the 2<sup>nd</sup> defendant is believed to have purchased parts of the alleged suit properties.
2. In her amended plaintiff, the plaintiff asserted that at all material times, the suit properties were registered in the 1<sup>st</sup> defendant’s name and were allegedly acquired by both of them in 1982, which was during the subsistence of their marriage, as they reportedly married in 1981. According to her, she discovered suspicious agreements that appeared to adversely affect the suit properties, prompting her to register



cautions against them as she had not consented to dealings over them. She maintained that the 2<sup>nd</sup> defendant did not occupy Masinga/Kangonde 2352 until 2018, which was during the subsistence of this suit. Consequently, she sought the following reliefs from this court: -

- a. An order of eviction against the 2<sup>nd</sup> defendant, his agents, servants, assigns, and those acting under his instructions in respect of L.R. no. Masinga/ Kangonde/ 2352 and L.R.no. Masinga/ Kangonde/2353.
  - b. Costs of the suit and interests thereon.
  - c. General damages for loss of use.
3. The suit was contested by the 2<sup>nd</sup> defendant's further amended defence and counterclaim dated 2/08/2023, which marked the culmination of previous amendments. The 1<sup>st</sup> defendant denied all the allegations in the amended plaint, maintained that he was a stranger to some of the assertions, and challenged the plaintiff to provide strict proof. He also stated that other parts of the suit properties had been sold to different persons who were in occupation, and that the plaintiff was aware of his purchase, making him a bona fide buyer without notice.
4. He maintained that he purchased the various portions of land in Masinga/Kangonde 2352 from the 1<sup>st</sup> defendant through agreements for sale, with the first agreement dating back to 2013. These agreements were written, signed, and witnessed, and he paid a consideration totalling Ksh 3,340,000/-. He averred that the parcels of land he purchased fell within an adjudication section and did not have subsisting title documents. He stated that he had developed the purchased portions well before 25/05/2017 or 2018, which was when he was served with court orders and pleadings. He maintained that these court orders were subsequently vacated on 3/03/2022. He alleged that the institution of the suit was malicious because the plaintiff only waited for him to complete his construction before filing the suit.
5. He reiterated the above averments in his counterclaim. Additionally, he asserted that his purchased portions were not matrimonial property. He stated that despite the agreements, the 1<sup>st</sup> defendant had yet to transfer the purchased portions to him, which measures 0.8070 ha on Masinga/Kangonde 2352. Ultimately, he sought the following reliefs: -
- a. Declaration that the property is not classified as matrimonial property under the definition in Section 6 of the Matrimonial Properties Act.
  - b. Declaration that the plaintiff is an innocent purchaser for value from the registered owner who, having paid the agreed purchase price and taken possession, is entitled to the land.
  - c. Specific performance and an order for the land title for Masinga/Kagonde/2352 to be subdivided, separating the portion sold and occupied or developed by the 2<sup>nd</sup> defendant, measuring 0.8070 Hectares.
  - d. An order directing the plaintiff to remove the caution/restriction registered against title Masinga/Kagonde/2352, and in default, the same shall be removed by the Land Registrar, Machakos.
  - e. The 1<sup>st</sup> defendant be ordered to hive off the purchased portion from Masinga/Kagonde/2352 and transfer it to the 2<sup>nd</sup> defendant; failing which, subdivision and transfer shall be carried out and registered.
  - f. General damages for inconvenience and loss of business.
  - g. Costs of the suit.



6. The 1<sup>st</sup> defendant did not enter an appearance or file a defence.

### **Issues for determination**

7. Having considered the pleadings and the evidence presented by the parties during the hearing on the merits and issues as outlined in the filed submissions, the following issues for determination arise: -
- a. Whether the plaintiff and the 2<sup>nd</sup> defendant proved that the suit properties belonged to the 1<sup>st</sup> defendant.
  - b. Whether the plaintiff proved that the suit properties were matrimonial property.
8. Having outlined the issues to be decided, this court will now summarise the parties' evidence related to these issues as identified.

### **Hearing and evidence**

9. The matter eventually proceeded for a hearing on 23/01/2025, during which the plaintiff testified as PW1 and her evidence was led by Stephen Nyaga (PW2). The evidence was composed of witness statements, oral testimonies, and several produced documents, which were marked as PExh. 1-21.
10. The plaintiff's testimony reiterated her amended plaint. Furthermore, she stated that the suit properties originated from the Kangode Registration Adjudication Section and that title documents were issued in 1995 in the 1<sup>st</sup> defendant's name, with an agreement between them that it would be registered in his name. Using proceeds from her salary and savings, she built a structure on Masinga/Kangonde 2352 in 1998, which she rented to tenants and used the income to educate her children.
11. She testified that one of the suit properties had the homestead of her late mother-in-law, Agnes Mwikali Kathanzu ("Agnes") and the other her matrimonial home. She questioned the various agreements for sale, stating that they were unsigned and failed to disclose the subject matter of the agreements. To demonstrate the existence of the suit properties and a caution, she produced copies of an alleged certificate of official search and an alleged caution that were unsigned, unstamped, and not sealed. She also presented a preliminary index diagram (PID) for the Kangode Registration Section.
12. During cross-examination, she stated she had no evidence of her involvement in purchasing the suit properties or that rent was ever paid to her. She also found it difficult to specify when the suit properties were registered. She was referred to her supporting affidavit on record, sworn on 27/10/2016, which claimed that the suit properties were registered in 1982. Most importantly, this affidavit conflicts with the averments in the amended plaint, as it states she married in 1982 and that, by 2015, she was aware that the 1<sup>st</sup> defendant intended to sell family land. She also admitted that the 2<sup>nd</sup> defendant took possession of his purchased portions immediately after buying them. In re-examination, she maintained that she got married in 1982, the suit property was bought in 1983, and the 2<sup>nd</sup> defendant commenced construction in 2018.
13. PW2, who was allegedly a representative of a former tenant, Full Gospel Church, testified that the 1<sup>st</sup> defendant owned the suit properties and that he entered into an oral lease agreement with the 1<sup>st</sup> defendant, who had authority from the plaintiff. He stated that the church paid rent of Ksh. 300/- per month. Nevertheless, the structure was demolished, and the church was relocated to Masinga/Kangonde/2353.
14. On cross-examination, he stated that his junior entered into the written lease agreement, but there was no evidence of rent payment to either the plaintiff or the 1<sup>st</sup> defendant. He admitted that he had never seen the title deed of the suit properties and did not know the exact parcel of land where the church



was situated or where Agnes's and the plaintiff's matrimonial homes were located. Still, he knew they were not far from each other. He also conceded that he could not prove that the plaintiff authorised the 1<sup>st</sup> defendant to enter into the lease.

15. Upon the conclusion of the plaintiff's case, the 2<sup>nd</sup> defendant's case commenced, and the 2<sup>nd</sup> defendant testified as DW1 and his evidence was led by Paul Kathinzi Musembi (DW2), Stephen Mwonga Kathanzu (DW3), Stephen Mutinda Mutua (DW4), and Boniface Mutuku Mwoka (DW5). They relied on their respective witness statements, oral testimonies, and documents produced as Dex. 1-9.
16. The 1<sup>st</sup> defendant took the stand and reiterated the assertions in the defence and counterclaim. Furthermore, to support his claim, he submitted translated sale agreements; the first, dated 26/01/2013, demonstrated that a portion of "plot 2352" was sold, with the contract executed by the parties, witnessed, and the purchase price paid. The second, dated 19/05/2013, did not specify the land being sold aside from its size and an alleged map; it indicated that it was executed and witnessed, and the purchase price paid. The third, dated 19/09/2015, described the land as plots nos. 5, 6, 7, and 8. This document does not indicate that it was executed and witnessed, but it does show that the consideration was settled. The last, dated 04/04/2016, described the purchased properties as "plots in the front row marked 'y'," "four plots marked '2'," "0.68 of an acre," and "the shop." It shows the contract was executed, witnessed, and the purchase price paid. He maintained that all these purchased portions were within Masinga/Kangonde/2352. He also produced a similar PID to that of the plaintiff.
17. On cross-examination, he averred that the description of the property being purchased as "plot 2352" in the first sale agreement was inserted much later, and that the initial agreement had left the plot no. blank, as the purchased portions initially lacked title documents. However, by 19/09/2015, when he entered into the second agreement, such title documents already existed. He admitted that during all the transactions involving the purchase of various plots, the plaintiff did not participate. Moreover, he stated that he never conducted an official search on the purchased portions and that, at the time of purchase, a church occupied a structure, which was later vacated after either he or the 1<sup>st</sup> defendant gave them notice, and he subsequently demolished the occupied structure. He further stated that the purchased portion and the 1<sup>st</sup> defendant's family land were adjacent to each other.
18. DW2, who was related to the 1<sup>st</sup> defendant, testified that the plaintiff was the wife of the 1<sup>st</sup> defendant and stated that he witnessed some of the sale agreements. He further testified that the plaintiff neither participated in the various transactions nor was the title deed ever shown to him. He stated that the 1<sup>st</sup> defendant bought the suit properties, and his (1<sup>st</sup> defendant's) home was on the family's ancestral land, which was separate.
19. DW3, a brother of the 1<sup>st</sup> defendant and said to have witnessed some of the agreements, testified that the 1<sup>st</sup> defendant purchased the suit properties in a year he could not remember. Like the other witnesses who testified earlier, he stated that the plaintiff did not take part in the sale agreements.
20. DW4, an alleged surveyor, testified that he, together with the plaintiff's surveyor, measured the portion occupied by the 2<sup>nd</sup> defendant, which was 0.8070 ha within Masinga/Kangonde/2352. He did not supply an expert report or a practising licence to verify his claim that he was a surveyor. DW5 testified that he was present when DW4 conducted the survey.

## Submissions

21. After the hearing concluded, and at the request of the parties, except for the 1<sup>st</sup> defendant, who did not participate in the proceedings, the parties argued their respective cases through written submissions. The court sincerely appreciates the thorough and well-prepared submissions received from the law



firms of Ms Agnes Wanjiku Maina & Co. Advocates, representing the plaintiff, dated 5/05/2025, and from Ms P.K. Mbabu & Co. Advocates for the 2<sup>nd</sup> defendant, dated 9/06/2025. Therefore, in its analysis and determination, the judgment will carefully consider the arguments presented in the rival submissions, along with the relevant law and judicial precedents that have been cited.

### **Analysis and determination**

22. The issues previously identified will be addressed shortly in a sequential manner.

### **Whether the plaintiff and the 2<sup>nd</sup> defendant proved that the suit properties belonged to the 1<sup>st</sup> defendant**

23. The parties, in their submissions, never addressed this issue. The plaintiff argued that at all material times, the suit properties were registered in the 1<sup>st</sup> defendant's name. She later stated that the title documents were issued in 1995, but then claimed that, according to the alleged certificate of official search she produced, they were issued in 2014. As for the 2<sup>nd</sup> defendant, he testified that the title documents were issued to the 1<sup>st</sup> defendant between 2013 and 2015, which was the period between the first and second agreements for sale.
24. Based on the evidence, the suit properties were allegedly created through the [Land Adjudication Act](#), which was designed to verify and document rights and interests in community land. The process involves a lengthy public procedure that includes demarcating, surveying, and recording land before its formal registration in accordance with the adjudication register. Such registrations entail the issuance of title documents under Sections 6 of the [Land Act](#), the [Land Registration Act](#), and the Registered [Land Act](#) (repealed).
25. In this case, it was expected that the plaintiff and the 2<sup>nd</sup> defendant, both of whom requested multiple reliefs concerning the suit properties, would submit certificates of official searches that were signed correctly, stamped, and sealed. However, this was not observed. The plaintiff's so-called certificate of official search is a fabricated document, as it lacks the formal features of a document issued by a land registrar. Her actions in producing this document are questionable, casting doubt on her character. The same applies to the alleged registered caution she produced, which faces a similar fate. It is also significant that the PID could not assist in determining whether the suit properties were registered.
26. Furthermore, the parties neither produced any certificate signed by an adjudication officer certifying that the suit properties were, or had become on a specific date, land within an adjudication section, nor that they belonged to the 1<sup>st</sup> defendant. The descriptions in the various agreements for sale submitted by the 2<sup>nd</sup> defendant were so vague as to identify the suit properties properly, and the unilateral insertion of "Plot No.2352" at an undisclosed date on the agreement dated 26/01/2013 cannot be regarded as valid, as it was not countersigned by the parties to the contract. Therefore, this court finds that the plaintiff and the 2<sup>nd</sup> defendant have not proven that the suit properties belonged to the 1<sup>st</sup> defendant. It also concludes that the plaintiff and the 2<sup>nd</sup> defendant have failed to demonstrate that the suit properties are registered land.
27. As this court concludes on this issue, it is worth noting that if the land remains subject to adjudication, the [Land Adjudication Act](#) allows parties to raise their grievances at various stages. Usually, this process starts with the land adjudication committee. If they are dissatisfied, they can escalate the matter to the arbitration board. If they still feel aggrieved, they can approach the land adjudication officer before making a final appeal to the minister. Refer to Sections 20, 21, 22, 26, and 29 (1) and (2) of the [Land Adjudication Act](#). Only in exceptional cases, such as those outlined in Section 30, may a party bring the issue before the court.



### **Whether the plaintiff proved that the suit properties were matrimonial property.**

28. Even if the findings on the first issue have sufficiently disposed of the entire suit and counterclaim, it is necessary to address the second issue that was raised in the submissions. The plaintiff, while citing Sections 6(1) and 12 of the *Matrimonial Property Act*, contended that the suit properties constituted matrimonial properties and asserted that the plaintiff possessed an overriding interest therein, as implied by an alleged Section 28 (a) of the *Land Registration Act*. However, the plaintiff's reliance on this provision is misplaced, as Section 28 (a) was repealed by Section 11(a) of Act No. 28 of 2016.
29. Regarding the 2<sup>nd</sup> defendant, he based his arguments on the case of Republic v Director, Kenya School of Law & 2 others; Kitsao (Ex parte Applicant) (Judicial Review Application E001 of 2024) [2024] KEHC 2975 (KLR) (22 March 2024) (Judgment) and contended that it is well-established law that parties are bound by their pleadings. He further argued that the plaintiff's pleadings did not allege that the suit properties were matrimonial. Additionally, he emphasised that it was incontrovertible that the plaintiff failed to prove that the suit properties were matrimonial, citing the case of Maloiy v Maloiy & 5 others (Environment and Land Case Civil Suit 104 of 2019) [2024] KEELC 13979 (KLR).
30. Accordingly, in Kenya, matrimonial property is now governed by the *Matrimonial Property Act*, with this court and the High Court sharing concurrent jurisdiction. When exercising such jurisdiction, this court only deals with matters related to the environment and the use, occupation, and title to land, as in the case here. The relevant Sections for this dispute are Sections 5, 6(1), 7, 9, 13, and 14 of the *Matrimonial Property Act*. These provisions are set out as follows:

- “ 5. Subject to section 6, the interest of any person in any immovable or movable property acquired or inherited before marriage shall not form part of the matrimonial property.
- 6.
- (1) For the purposes of this Act, matrimonial property means—  
(a) the matrimonial home or homes; (b) household goods and effects in the matrimonial home or homes; or (c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.
7. Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.
9. Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made.
13. Subject to this Act and any agreement between the spouses before the marriage, marriage does not affect the ownership of property other than matrimonial property to which either spouse may be entitled, or affect the right of either spouse to acquire, hold or dispose of any such property.



14. Where matrimonial property is acquired during marriage—(a)in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse; and(b)in the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal.”

31 This court concurs with the 2<sup>nd</sup> defendant that the plaintiff did not allege that the suit properties were matrimonial assets. Nevertheless, as established in the Supreme Court of Kenya’s decision in *Muthuuri & 4 others v Attorney General & 2 others* [2023] KESC 52 (KLR), this is a non-issue, as the matter regarding whether the suit properties were matrimonial property was thoroughly canvassed by the parties and was deferred for determination by this court.

32. In interpreting the previously emphasised pertinent provisions of the *Matrimonial Property Act*, the decision of *E N K v J N K* [2015] KEHC 2041 (KLR), which this court hereby adopts, stated as follows:

“What constitutes matrimonial property is stated in Section 6(1), as read with Section 14 of the Act. It is essentially the property acquired by either spouse during marriage as where the property is acquired jointly, or is registered in the joint names of the parties, the presumption would be that it is to be divided equally between them in the event of divorce. The presumption is rebuttable. Where it is acquired by one spouse or is registered in the name of one spouse, the presumption would be that the one holds the same in trust for the other. The provision in Section 14(a) does not say so, but it is subject to Section 7, so that division of such property will take into account the contribution of either spouse to its acquisition.”

33. It is established law that the burden of proof rests on the party who makes the allegation, in this instance, the plaintiff. She claimed to own immovable property allegedly acquired during the marriage. What documents, therefore, did she present to substantiate her assertions? Bank statements for the years 2020-2021 were produced; however, these did not demonstrate any correlation with the suit properties. She failed to produce any agreement indicating that she and the 1<sup>st</sup> defendant purchased the alleged suit properties. Furthermore, she repeatedly shifted her marital year from 1981 to 1982 and the purported year of purchase from 1982 to 1983. In the latter, her evidence was contradictory, unreliable and not credible. There was also no evidence that her matrimonial home was situated on these suit properties.

34. Accordingly, this court concurs with the 2<sup>nd</sup> defendant that the plaintiff has not presented any evidence demonstrating either her financial or non-financial contribution towards the acquisition of the suit properties. No receipts or bank statements have been provided to substantiate her financial involvement in the procurement, and akin to *Maloiy v Maloiy* (Supra), this court finds that the plaintiff has not proven that the alleged suit properties were matrimonial.

35. For the reasons and findings articulated above, this court ultimately concludes that neither the plaintiff nor 2<sup>nd</sup> defendant has adequately substantiated their respective claims to the required standards. The court finds no merit in their respective claim and counterclaim and, therefore, dismisses them. Given the unsuccessful nature of the plaintiff’s and the 2<sup>nd</sup> defendant’s suits, each party shall bear their own costs. Accordingly, the final orders deemed appropriate by the court are as follows:

- a. The plaintiff’s suit is hereby dismissed.
- b. The 2<sup>nd</sup> defendant’s counterclaim is hereby dismissed.



c. Each party shall bear their respective costs of the suit.

Judgment accordingly.

**DELIVERED AND DATED AT MACHAKOS THIS 4<sup>TH</sup> DAY OF NOVEMBER, 2025.**

**HON. A. Y. KOROSS**

**JUDGE**

**04.11.2025**

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Ms Kanja Court Assistant.

Miss Maina for plaintiff.

Mr. Mulwa for 2<sup>nd</sup> defendant.

N/A for 1<sup>st</sup> defendant.

