

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI**  
**ELC NO. 260 OF 2017**

**SAMMY WAMBUA MWATU (Suing as the administrator and personal representative of the estate of the late Philip Mwatu Ithuka).....PLAINTIFF**

**-VERSUS-**

**GEORGE MUTUKU KYENGO (Suing as the administrator of the estate of Pascal Kyengo Mutevu).....1<sup>ST</sup> DEFENDANT**

**MARY MUTHEU MUTETI (Suing as the administrator of the estate of Maurice Muteti Mutevu)..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By a further amended plaint dated 24<sup>th</sup> July, 2020, the Plaintiff sought the following reliefs:

a. **Permanent injunction restraining the Defendants, their agents, servants or anybody claiming through them from entering, disposing, alienating, constructing or in any way using land parcel No 90 measuring 22 ft x 100 ft located at Mukuyuni Market within Okia location.**

aa. **The cancellation of title deed of land parcel No. Okia/Mukuyuni/1974**

aaa. **An order directing the Land Registrar to revoke the existing title and register all that land known as Plot No. 90 measuring 22 ft x 100 ft under the names of the Plaintiff.**

aaaa. **Damages for loss of mesne profits.**

b. **Damages for loss of trespass over land.**

bb. **An order directing the Land Registrar to excise and issue distinct title to Mukuyuni Market Plot No. 90 measuring 22 feet by 100 feet out of land registration number Okia/Mukuyuni/1974 in the names of the Plaintiff.**

c. **Cost of this suit.**

**d. Interest on (aaaa), (b) and (c) above at court rates.**

**e. Any such other or further relief as this honourable court may deem fit and just to grant.**

2. The Plaintiff is the administrator of the estate of his late father Philip Mwatu Ithuka who passed away on 3<sup>rd</sup> February, 2018 (deceased). The deceased purchased a plot No. 90 measuring 22 ft x 100 ft at Mukuyuni market from Mukuyuni Grinding Company Limited on 6<sup>th</sup> September, 1996.
3. The plot was transferred from Mukuyuni Grinding Company Limited on the same day of purchase. The deceased was given an allotment letter on 1<sup>st</sup> October, 2011. The deceased started paying rates to the County Government of Makueni.
4. The Plaintiff testified that the 1<sup>st</sup> Defendant irregularly obtained title No. Okia/Mukuyuni/1974 which included the deceased's plot. In or about May, 2014, the Defendants invaded the deceased's plot and started constructing on it.
5. The Plaintiff states that the Defendants have since the invasion jointly occupied the plot and have prevented the estate of the deceased from accessing it.
6. The 1<sup>st</sup> Defendant is the administrator of the estate of his late father Pascal Kyengo Mutevu who passed away on 28<sup>th</sup> November, 2020. His father is the registered owner of LR No. Okia/Mukuyuni/1974. The 1<sup>st</sup> Defendant stated that his father has never sold any plot to anyone and that the Plaintiff's claim to plot No. 90 which is alleged to be part of his father's land is not genuine. He stated that his father never sold any part of his property to the County Government of Makueni.
7. The parties were directed to file written submissions. The Plaintiff filed submissions dated 25<sup>th</sup> April, 2025. The Defendants filed their submissions dated 28<sup>th</sup> July, 2025.

8. The Plaintiff submitted that the 1<sup>st</sup> Defendant did not obtain his title in a genuine way. He relied on the case of **Munyu Maina –vs- Hiram Gathia Maina** where it was held as follows:

**“We have stated that when a registered proprietor root to title is challenged, it is not sufficient to dangle the instruments 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”.**

9. The Plaintiff further relied on the case of **Dina Management Limited –vs- County Government of Mombasa & 5 others (Petition [8 E010] of 2021) 2023 KESC 30 (KLR)** where it was held as follows:

**“110. Indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible. The first allocation having been irregularly obtained, HE Daniel Arap Moi had no valid legal interest which he could pass to Bawazir & Co. (1993) Ltd, who in turn could pass to the Appellant.**

**111. Article 40 of the Constitution entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired. Having found that the 1<sup>st</sup> registered owner did not acquire title regularly, the ownership of the suit property by the Appellant thereafter cannot be protected under Article 40 of the Constitution. The root of the title having been challenged, as we already noted above the Appellant could not benefit from the doctrine of bonafide purchaser.**

**112. We therefore agree with the Appellate court that the Appellant's title is not protected under Article 40 of the Constitution and the land automatically vests to the 1<sup>st</sup> Respondent pursuant to Article 62 (2) of the Constitution. We hasten to add that, the suit property, by its very nature being a beach property, was always bound to be attractive and lucrative. The Appellant ought to have been more cautious in undertaking its due diligence”.**

10. The Plaintiff also relied on the case of **Daudi Kiptugen –vs- Commissioner of Lands & 4 others (2015) eKLR** where it was held as follows:

**“.....the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title. If this were not the position then all one would need to do is to manufacture a lease or a certificate of title at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated herein”.**

11. The Defendants submitted that the 1<sup>st</sup> Defendant acquired his title in a lawfully way. They relied on Section 26(1) of the Land Registration Act which provides as follows:

**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.**

12. The Defendants further submitted that the Plaintiff had filed a boundary dispute claim disguised as a land claim. They submitted that the dispute in issue was a claim over boundary between LR No. Okia/Mukuyuni/1974 and Okia/Mukuyuni/592 belonging to the County Government of Makueni. They submitted that this court has no jurisdiction to entertain the issue of a boundary dispute.

13. The Defendants relied on Section 18 and 19 of the Land Registration Act. The Defendant further submitted that the particulars of fraud attributed to the 1<sup>st</sup> Defendant were not proved and that the 1<sup>st</sup> Defendant obtained his title after the adjudication process was completed and that there was no complaint raised during the process of land adjudication.

14. I have carefully considered the Plaintiff's case as well as the Defendant's case. I have also considered the submissions by the parties as well as the authorities cited. There are only two issues for determination. The first is whether the Plaintiff's suit was a claim based on a boundary dispute which would have divested this court of jurisdiction to hear it. The second issue is whether plot No. 90 measuring 22 ft x 100 ft is comprised in title No. Okia/Mukuyuni/1974.

15. The Defendant's claim is that his deceased father had purchased a plot measuring 22 ft x 100 ft known as plot No. 90 from Mukuyuni Grinding Company Limited in 1996. His contention is that when the 1<sup>st</sup> Defendant processed title, he included his plot No. 90. The issue in contention is not a boundary dispute between LR. No. Okia/Mukuyuni/1974 and Okia/Mukuyuni/592 which is said to belong to the County Government of

Makueni. I therefore find that the dispute in this case is not a boundary dispute which will have taken away this court's jurisdiction to hear the case.

16. The Plaintiff's case is that the plaintiff's father purchased a plot measuring 22 ft x 100 ft from Mukuyuni Grinding Company Limited on 6<sup>th</sup> September, 1996. The Plaintiff produced a sale agreement which was signed by members of Mukuyuni Grinding Company Limited who acknowledged receipt of the purchase price of Kshs.40,000/=.
17. The Plaintiff also produced a duly filled transfer form notifying the County Government of Makueni that the plot had changed from Mukuyuni Grinding Company Limited to Philip Mwatu Ithuka. The transfer form was signed on the same day the agreement for sale was made.
18. The Plaintiff's evidence is that his father processed the transfer and was given an allotment letter by County Government of Makueni on 31<sup>st</sup> October, 2011.
19. The Plaintiff did not adduce any evidence to show that plot No. 90 which he was claiming falls within LR No. Okia/Mukuyuni/1974. The 1<sup>st</sup> Defendant's father obtained his title for Okia/Mukuyuni/1974 on 27<sup>th</sup> July, 2007. The land measures 0.42 hectares which is equivalent to 1.038 acres.
20. There is no contention that the plaintiff owns plot No. 90 measuring 22 ft x 100 ft at Mukuyuni market. The origin of this plot which later changed to plot 55 as a new number has its origin from County Council of Makueni which is the predecessor of the Government of Makueni County. Government of Makueni County is said to own LR No. Okia/Mukuyuni/592 which borders LR No. Okia/Mukuyuni/1974.
21. There is no dispute between the 1<sup>st</sup> Defendant and the Government of Makueni County. If the Plaintiff's plot is within the land owned by the Government of Makueni County, there is no basis upon which the Plaintiff can claim that his plot falls within LR No. Okia/Mukuyuni/1974 without evidence that the 1<sup>st</sup> Defendant annexed part of LR No. Okia/Mukuyuni/592

belonging to Government of Makueni County thus affecting the Plaintiff's land.

22. The evidence which was adduced by the Defendants is that plot 1974 existed in the year 2000. The Government of Kenya acquired a portion measuring approximately 0.056 of plot No. 1974 for the construction of Katumani/Wote road. What remained of plot No. 1974 is what the 1<sup>st</sup> Defendant's father registered as LR No. Okia/Mukuyuni/1974 in 2007.

23. The Plaintiff listed particulars of fraud which he attributed to the 1<sup>st</sup> Defendant's father. He did not adduce any evidence to prove any of the alleged particulars of fraud. Fraud is a serious allegation which must be proved by evidence.

24. It is the Plaintiff who was alleging that his plot No. 90 was within LR No. Okia/Mukuyuni/1974. The evidential burden was on him to adduce evidence that that was the position. The Plaintiff does not allege that the 1<sup>st</sup> Defendant is the one who sold land to him. His case is that he purchased plot 90 from Mukuyuni Grinding Company Limited which had been allotted the land by County Council of Makueni. If the Plaintiff was to succeed, he should adduce evidence to show that plot No. 90 fell within land held by government of Makueni County and that the 1<sup>st</sup> Defendant's father had unlawfully processed title which annexed it to his land. Without this evidence, there is no basis upon which this court can find that plot No. 90 now known as plot 55 falls within parcel No. Okia/Mukuyuni/1974.

25. From the above analysis, I find that the Plaintiff has failed to prove his case on a balance of probabilities. The Plaintiff's suit is dismissed with costs to the Defendants.

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**HON. E. O. OBAGA**  
**JUDGE**

**JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT  
TEAMS THIS 27<sup>TH</sup> DAY OF NOVEMBER, 2025.**

**IN THE PRESENCE OF:**

Mr. Mapesa for Plaintiff.

Mr. Kituku for Defendants.

Court assistant – Steve Muysoki

ORIGINAL