



REPUBLIC OF KENYA



**Sumbule v Makayo & another (Environmental and Land Originating Summons
36 of 2011) [2025] KEELC 8422 (KLR) (4 December 2025) (Judgment)**

Neutral citation: [2025] KEELC 8422 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 36 OF 2011
EC CHERONO, J
DECEMBER 4, 2025**

BETWEEN

BAFFIN SUMBULE PLAINTIFF

AND

TOM WANYONYI MAKAYO 1ST DEFENDANT

JULIUS MAKHAPILA WANYAMA 2ND DEFENDANT

JUDGMENT

1. The Plaintiff, vide an Originating Summons dated 28/04/ 2011 seeks for orders that he be declared the bonafide purchaser for value of LR No. E.Bukusu/W.Sang'alo/1531(hereinafter "the suit land"), that he ought to be included as a beneficiary in the estate of the deceased and that upon confirmation, the 1st Defendant be ordered to transfer the suit land to him. It was his case that he purchased the suit land from the 2nd defendant, a son to one Justo Wanyama Khaemba who had purchased the land from Makayo Kituyi Kimusare whose estate is represented by the 1st Defendant.
2. That the 2nd Defendant sold the 4.01 Ha at a consideration of Kshs. 620,000/= which was fully paid and he occupied the said land after the 2nd Defendants family vacated. That the 1st Defendant now has instituted succession proceedings including the suit land as part of the estate of Makayo Kituyi Kimusare and purporting to transfer it to the estate of Justo Wanyama Khaemba as opposed to him in a bid to deprive him of his land.
3. The 1st Defendant filed a replying affidavit sworn on 20/07/2011 in which he stated that he is the administrator of the estate of Makayo Kituyi Kimusare, the original proprietor of the suit land and who sold to one Justo Wanyama Khaemba in 1976 who entrusted the said land to the 2nd Defendant who is his son. That the doctrine of adverse possession cannot apply in the Plaintiffs case and states that he purchased the land n 15/11/1999 and took possession on 13/01/2000 as 12 years have not yet lapsed and moreover, his occupation was not peaceful as he admits to violence at some point.



4. The 2nd Defendant filed a replying affidavit sworn on 27/06/2011 where he stated that his late father allowed him to stay in the suit land on the understanding that the land would be transferred to him eventually. That in that strength, he negotiated for the sale of the land at a consideration of Kshs.620,000/= which was paid leaving a balance of Kshs.350,000/= which he states remains outstanding to date. That the Plaintiff took possession of the land in the year 2000 and erected semi-permanent structures. That he is not aware of the intention by the 1st Defendant to transfer the suit land to him as alleged by the Plaintiff. He claimed that the signature in the documents presented by the Plaintiff is forged and that the orders sought cannot be issued as he claims no proprietary interest in the suit land.
5. The Defendants herein filed another suit being Bungoma ELC Case No. 3 of 2012(Tom Wanyonyi Makayo-for the estate of Joseph Simiyu Makayo, Nathan Khaemba Wanyama, Reuben W. Wanyama, Andrew S.Wanyama and Albert Khaemba-all for the estate of Justo Wanyama Khaemba vs. Baffin Sumbule and Julius Mkaphila) which was consolidated with the instant suit. They had filed a plaint dated 26/04/2012 seeking to have the agreement between the Plaintiff and the 2nd Defendant herein declared null and void ab initio and for the eviction of the Plaintiff from the suit land. The 1st Defendant (the Plaintiff herein) filed a defence dated 30/05/2012 where he reiterated the facts stated in preceding paragraphs. The 2nd Defendant (the 2nd Defendant herein) filed a defence dated 14/05/2012 where he reiterated the facts in the preceding paragraphs save that he averred that he sold the land for Kshs.600,000/= but was paid Kshs.350,000/= leaving a balance of Kshs.250,000/=
6. The parties agreed that the suit proceed by way of viva voce evidence.
7. PW1 Baffin Juma Sumbule adopted as his evidence in chief his supporting affidavit sworn on 28/04/2011 and his witness statement in in ELC 03 OF 2012 dated 30/05/2012. He produced into evidence his list of documents filed in ELC 03 of 2012 dated 30/05/2012 which contained 10 items as P-Exhibit 1-10. He testified that the sale to him was done secretly and that he knew the 2nd Defendants brothers who are his neighbours and were aware of the transaction.
8. PW2 Lynette Nasimiyu Wafula adopted her witness statement dated 04/09/2020 as her evidence in chief. That the Plaintiff is her neighbour in the suit land since the year 1998.
9. DW1 John Makayo Kitute adopted his witness statement dated 08/05/2021 as his evidence-in-chief. He stated that he is the administrator of the estate of Tom Wanyonyi Makayo. He referred to his list of documents containing 3 items dated 26/04/2012 which he produced as D-Exhibit 1-3. He testified that the suit land is registered in the name of Joseph Simiyu Makayo who sold the land to Justus Wanyama Khaemba. That a consent from the Land Control Board was obtained for transfer from Joseph Simiyu Makayo to Julius Makhapila Wanyama. He confirmed that the Plaintiff is the one in possession of the land.
10. DW2 Nathan Khaemba adopted his witness statement filed on 03/05/2012 as his evidence-in-chief. He stated that the vendor who sold the land to the Plaintiff had no authority to do so. He testified that the Plaintiff took possession and occupation of the suit land in the year 2000. That a succession cause was first done for the estate of Joseph Simiyu Makayo involving LR No. E.Bukusu/N.Sang'alo/1529 and later in the year 2006 another succession cause was done involving the suit land which is underway.
11. At the close of the case, directions were taken for the parties to file their respective submissions.
12. The Plaintiff filed submissions dated 18/09/2025 where he submitted that he has been in occupation of the suit land since the year 2000 when the 2nd Defendant granted him vacant possession. That despite alleging that the documents presented by the him were forged, no evidence was led to support this



assertion. Reliance was placed inter alia in the case of Mbuthia Macharia Vs. Annah Mutua Ndwiga & Anor [2017] eKLR, Chase International Instrument Corporation Anor Vs. Laxman Keshra & Others [1978] KLR 143 (1977-80) 1 KLR 891 Madan JA it was argued that the Defendant had not discharged their burden of proof and their counter-claim ought to fail.

13. The Defendant filed submissions dated 29/08/2025 where he submitted that the Plaintiff ought to have filed for revocation of the summons for confirmation. It was submitted that the Plaintiff did not prove that he purchased the suit land in accordance with Section 107-109 of the *Evidence Act*. As such, it was submitted that the Plaintiff is not entitled to the orders sought. Reliance was placed inter alia in the case of Ochier & Another vs. Okoth & Another (ELCOS E024 of 2022) 2025 (KEELC) 90(KLR).

Analysis and determination.

14. The above constitutes a summary of the pleadings, the available evidence and exhibits produced, the opposing written submissions, and the cited authorities, all of which I have carefully reviewed and considered. I have also considered the relevant provisions of the law and proceed to render my determination by answering the following questions;
 - a. Whether the sale agreement dated 15/11/1999 was valid.
 - b. What reliefs are appropriate in the circumstances.

Whether the sale agreement dated 15/11/1999 was valid.

15. It is the Plaintiff's case that he entered into a sale agreement dated 15/11/1999 for the purchase of 4.01 hectares of land at a consideration of Kshs. 60,000 per acre. He averred that upon execution of the agreement and payment of the agreed purchase price, he was granted vacant possession by the 2nd Defendant who was the vendor in the transaction. The Plaintiff further testified that he took possession and occupation of the suit property in the year 2000 and has since been in uninterrupted possession having put up structures thereon. He contends that prior to entering into the sale agreement, the vendor presented to him various documents evidencing that he was in the process of obtaining title to the said land, and that it was on this assurance that he proceeded with the purchase. The Plaintiff maintains that he paid the full purchase price, although the vendor alleged that there remained an outstanding amount.
16. The Defendants, on the other hand, contended that the 2nd Defendant lacked capacity and authority to sell the suit land. It was their position that the property in question is to be registered in the name of Justus Wanyama Khaemba, who is said to have purchased it from Makayo Kituyi Kimusare, the 1st Defendant's grandfather, in 1976. Consequently, they argued that the 2nd Defendant had no proprietary interest over the land that he could lawfully transfer to the Plaintiff. In essence, the Defendants' position was that the sale amounted to intermeddling with the estate of a deceased person, contrary to Section 45 of the *Law of Succession Act* (Cap 160), and was therefore null and void.
17. It is imperative to note that neither party produced a certificate of title, green card or an official certificate of search to conclusively establish the registered owner of the suit land. This Court is therefore constrained to determine ownership based on the documentary evidence produced at the trial. The Plaintiff tendered in evidence a transfer by transmission from the estate of Makayo Kituyi Kimusare to Joseph Simiyu Makayo (P-Exhibit 2), accompanied by a Land Control Board consent dated 08/06/1999 (P-Exhibit 1). These documents were not effectively controverted by the Defendants, whose assertion is that the same were forgeries. This allegation was not supported by any expert or corroborative evidence. Consequently, this Court is persuaded that the suit land is registered in the name of Joseph Simiyu Makayo.



18. Further, the evidence produced by the Plaintiff particularly the ruling of the court in Bungoma P&A Cause No. 87 of 2006 Estate of Makayo Kituyi Kimusare (Succession Cause No. 111 of 1998) (PExhibit 9), shows that one Julius Makhapila Khaemba was entitled to 10 acres from the said estate. The existence of the succession proceedings and the said allocation to Julius Makhapila Khaemba in corroboration to the foregoing lend credence to the Plaintiff's assertion that the vendor had a beneficial interest capable of being transferred, subject to completion of administration of the estate.
19. On the validity of the agreement dated 15/11/1999, the law on the sale of land at the time did not require, as a condition precedent, an appended signature by a vendor or attestation of the signature. See Legal Notice No 189/2002 and sections 3 (7) of the *Law of Contract Act*. All that was required was an acknowledgment note by the vendor or any of his representatives. Similarly, the law further required the taking of vacant possession by the purchaser as a sign of consummation of a land transaction. Based on the foregoing, my finding therefore is that the Plaintiff made entry into the suit premises based on a valid sale agreement. It was therefore permissible for a party to take possession as a condition for the sale of land.
20. Further to the foregoing, this Court finds it difficult to accept the Defendants' version of events in light of the uncontroverted evidence that the Plaintiff was granted vacant possession of the suit property immediately after the sale, and has remained in possession and occupation since the year 2000. Both DW1 and DW2 acknowledged in their oral testimony that they were aware of the Plaintiff's occupation of the suit land. DW2 particularly testified that he resides on an adjacent parcel of land. It is therefore implausible for them to now turn around and allege that they were unaware of the transaction or that it was unlawful. Their conduct and acquiescence over the years lend credibility to the Plaintiff's case and cast serious doubt on the Defendants' assertions. In my view, such inconsistency undermines the integrity of the Defendants' claim and supports the conclusion that the Plaintiff's possession was both open and known to all.
21. Equity abhors inconsistency, and as the Court of Appeal observed in *Arthi Highway Developers Ltd v. West End Butchery Ltd & Others* [2015] eKLR. A party who has acquiesced to a state of affairs for an extended period cannot later invoke technicalities to defeat rights that have accrued in favour of another. The conduct of the Defendants and their predecessors demonstrates acquiescence and recognition of the Plaintiff's possession and interest in the land. Further, Lord Reid in *Steadman vs. Steadman* [1976] A.C. 536, 540 expressed himself therein, inter alia, that:

“If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid he will not then be allowed to turn around and assert that the agreement is unenforceable.”
22. Accordingly, on the totality of the evidence, I find that the Plaintiff's occupation was not surreptitious or unlawful, but pursuant to a transaction undertaken in good faith.

What reliefs are appropriate in the circumstances.

23. The Plaintiff sought to be declared the bonafide purchaser for value of LR No. E.Bukusu/W.Sang'alo/1531, that he ought to be included as a beneficiary in the estate of the deceased and that upon confirmation, the 1st Defendant be ordered to transfer the suit land to him. The Defendants on their part sought to have the agreement between the Plaintiff and the 2nd Defendant herein declared null and void ab initio and for the eviction of the Plaintiff from the suit land.
24. With regard to the orders sought by the Plaintiff, this Court takes cognisance of the decision in Bungoma P&A No. 87 of 2006 – In the Matter of the Estate of Joseph Simiyu Makayo, where it was



held that the mandate of the probate court under the Law of Succession Act is limited and does not extend to determining issues of ownership of property. Guided by the foregoing and the preceding discussion, this Court finds that it can only grant order no. 1 by declaring that the Plaintiff is entitled to the suit land.

24. As for orders no. 2 and 3, the jurisdiction of this Court is derived from Article 162(2) of the Constitution and section 13 of the Environment and Land Court Act. The mandates of this Court and the probate court are distinct and separate, and this Court cannot therefore encroach upon the jurisdiction of the succession court as sought by the Plaintiff in those prayers. The probate court is vested with jurisdiction to determine the assets forming part of a deceased's estate, identify the survivors and persons with beneficial interest, and oversee the distribution of the estate among them precisely the matters the Plaintiff invites this Court to address. Granting such orders would therefore amount to this Court venturing into a sphere over which it has no jurisdiction. (See *Isaac Kinyua & 3 Others v. Hellen Kaigongi* [2018] eKLR.)
24. As for the orders sought by the Defendants, this court has already found the same to be unsupported by evidence.
25. In conclusion, this Court finds in favour of the Plaintiff and hereby grants only prayer number 1 in the plaint. The Plaintiff is also awarded the costs of the suit.
26. Orders accordingly.

DATED SIGNED AND DELIVERED AT BUNGOMA THIS 04TH DAY OF DECEMBER, 2025.

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HON.E.C CHERONO
ELC JUDGE

In the presence of;

Mr. Kisiang'ani H/B for Mr. Murunga for the Plaintiff

1st Defendant/Advocate-absent.

2nd Defendant-present

Bett C/A

