



**Mutisya (Suing as the Administrator of the Estate of Johnstone Mutisya Munee) v Daud & another (Environment and Land Case E044 of 2022) [2025] KEELC 5688 (KLR) (30 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5688 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND CASE E044 OF 2022**

**NA MATHEKA, J**

**JULY 30, 2025**

**BETWEEN**

**FELIX MUSAU MUTISYA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF JOHNSTONE MUTISYA MUNEE) ..... PLAINTIFF**

**AND**

**YUSF MOHAMMED DAUD ..... 1<sup>ST</sup> DEFENDANT**

**ABEY ABDINOOR OSMAN ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By a plaint dated 9<sup>th</sup> June 2022 the Plaintiff avers that he is the administrator of the Estate of the late Johnstone Mutisya Munee who is the owner of all that property known as LR. No.12715/148 situated in Machakos County. The Plaintiff states that the suit property initially belonged to Syokimau Farm Limited. Syokimau Farm Limited, a private Company, who was the original owner of all that property known as LR. No. 7149/11/R and the suit property is a result of the subdivision of LR. No. 7149/11/R. The Company floated shares for sale and members of the public were allowed to buy 10 shares equivalent to 5 acres. The Plaintiff further states that the property known as L.R. No. 12715/148 is one of properties which belonged to Syokimau Farm Limited.
2. The Plaintiff further avers that Johnstone Mutisya Munee expressed interest to acquire the suit property and his name entered in the register and complied with the company policy, rules and procedures on allotment, the issuance of share certificates and demarcation of land and subsequently was allocated the property. The Plaintiff further avers that Johnstone Mutisya Munee became member No. 219 and was allocated shares Nos. 2181-2190, beacon No. 49. The Plaintiff further states that for anyone to process a title from Syokimau Farm Ltd being a private property, he/she must possess a genuine share certificate, subscription fees and letter of allotment issued by Syokimau Farm Ltd. There is no way a title could be issued without the said documents. The suit property which belong



to Johnstone were part of the entire property owned by Syokimau Farm Ltd which was private land and only the directors had power to allocate land to the shareholders. The Plaintiff avers that he has been in quiet possession, enjoyed uninterrupted ownership, proprietorship and active occupation over the property LR. No. 12715/148 without any interruption of ownership, proprietorship and or occupation whatsoever. That the title to the stated plot is still owned by Johnstone with an official search over the property confirming the same. The Plaintiff states that on or about the 3<sup>rd</sup> June, 2022, while inspecting the suit property, he realized that the Defendant was developing the parcel of land without his knowledge by erecting flats. That the Defendant's aforesaid acts are an affront to the doctrine of sanctity of title and in essence, constitutes a grievous violation of the Applicant's constitutional right as registered owner of the suit property, to enjoy quiet possession thereof to the exclusion of everyone else.

3. The Plaintiffs prays for Judgment against the Defendants jointly and/or severally for:
  - a. An order of declaration that the Plaintiffs are the legal and beneficial owner of the property title known as LR. No. 12715/148 by reason whereof they are entitled to occupation and quiet possession thereof as proprietor to the exclusion of Defendant and any other person whatsoever.
  - b. A permanent injunction against the Defendant by themselves, their servants and or any other person or body from entering upon, occupying, trespassing and or otherwise meddling into the Plaintiff's suit property known as LR. No. 12715/148.
  - c. A declaration that the Plaintiffs are entitled to exclusive and unimpeded right of possession and occupation of the suit property
  - d. A declaration that the Defendant whether by itself or its servants or agents or otherwise howsoever, are wrongfully in occupation of the suit property and is accordingly, a trespasser on the same;
  - e. A declaration that the Defendant, whether by itself or its servants or agents or otherwise howsoever, is not entitled to remain on the suit property;
  - f. General damages for trespass;
  - g. Costs of this suit together with interest thereon at such rate and for such period of time as this Honourable Court may deem fit to grant; and
  - h. Any such other or further relief as this Honourable Court may deem appropriate.
4. The 1<sup>st</sup> Defendant avers that the Plaintiff is a stranger to him and does not know the property LR. No. 12715/148 indicated the Plaintiff. The 1<sup>st</sup> Defendant denies the averments and further avers that he is the legal owner of the property LR. No. 12715/14011 and 12715/14012. The 1<sup>st</sup> Defendant admits that he had made development in the property LR. No. 12715/14012 and denies that he had to seek the approval of the Plaintiff as that was his property. The 1<sup>st</sup> Defendant contends that he is the registered owner of the said property having duly followed the due process of purchase of the said property and its eventual registration in his name. The 1<sup>st</sup> Defendant therefore contends that it is his constitutional right to enjoy quiet possession of his property to the exclusion of others that has been violated. The 1<sup>st</sup> Defendant avers that in the event there was fraud involved in the purchase of the property that he is an innocent purchaser of value.
5. The 2<sup>nd</sup> Defendant states that the property known as L.R. No. 12715/148 was registered in the name of one James Wambua Makau and not the Johnstone Mutisya Mune. The 2<sup>nd</sup> Defendant avers that



the Plaintiff was never registered as the owner of the LR. No. 12715/148 as he sold his interest to one James Wambua Makau who had purchased the shares from him and hence was duly registered as the lawful owner. Further the 2<sup>nd</sup> Defendant contends that the Plaintiff has never been in occupation of the land and hence he cannot purport to have enjoyed quite possession. The 2<sup>nd</sup> Defendant avers that the Plaintiff is an illegal trespasser, who is hell bent to use all unorthodox means to interfere with the suit property, with the sole aim of frustrating the different transactions between the 2<sup>nd</sup> Defendant and the 1<sup>st</sup> Defendant among other innocent purchasers for value.

6. The court has considered the pleadings, evidence presented before it, submissions made as well as the authorities relied upon by the parties. The issues for determination are:

- a. Who is the lawful proprietor of the land parcel known as L.R No. 12715/148?
- b. What orders should this court issue?

7. The [Land Registration Act](#) is very clear on issues of ownership of land and Section 24(a) of the [Land Registration Act](#) provides as follows;

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

8. Section 26 (1) of the [Land Registration Act](#) states as follows;

“The Certificate of Title issued by the Registrar upon registration ... 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... 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.”

9. The Plaintiff led evidence that the suit property initially belonged to Syokimau Farm Ltd. Syokimau Farm Limited, a private company, who was the original owner of all that property known as LR. No. 7149/11/R and the suit property is a result of the subdivision of LR. No. 7149/11/R. That the Company floated shares for sale and members of the public were allowed to buy 10 shares equivalent to 5 acres. Johnstone Mutisya Munee expressed interest to acquire the suit property and his name was entered in the register and he complied with the Company policy, rules and procedures on allotment, the issuance of share certificates and demarcation of land and subsequently was allocated the property. Subsequently, Johnstone Mutisya Munee became member No. 219 and was allocated shares Nos. 2181-2190, beacon No. 49. The beacon number was also the provisional plot allotted to the shareholder. For anyone to process a title from Syokimau Farm Ltd being a private property, he/she must possess a genuine share certificate, subscription fees and letter of allotment issued by Syokimau Farm Ltd. There is no way a title could be issued without the said documents. That the suit property which belonged to Johnstone were part of the entire property owned by Syokimau Farm Ltd which was a private land and only the directors had powers to allocate land to the shareholders. The Plaintiff has been in quiet possession, enjoyment uninterrupted ownership, proprietorship and active occupation over the property LR. No. 12715/148 without any interruption of ownership, proprietorship and/or occupation whatsoever. The title to the stated plot is still owned by Johnstone with an official



search over the property confirming the same. The Plaintiff stated that on or about the 3<sup>rd</sup> June, 2022, while inspecting the suit property, he realized that the 1<sup>st</sup> Defendant was developing the parcel of land without his knowledge by erecting flats. The 1<sup>st</sup> Defendant's aforesaid acts are an affront to the doctrine of sanctity of title and in essence, constitutes a grievous violation of the Plaintiff's constitutional right as registered owner of the suit property, to enjoy quiet possession thereof to the exclusion of everyone else. That Johnstone has never sold the property or the interest in the property to anyone and the assertion that he sold the same to one James Wambua Makau is a lie. Johnstone attended all meetings as a shareholder in Syokimau Farm Ltd and has never parted with the suit property.

10. The Court of Appeal in *Munyu Maina vs Hiram Gathiha Maina* (2013) eKLR held that;

“We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant's testimony.”

11. The 1<sup>st</sup> Defendant herein submitted that he entered into a lawful Sale Agreement with the 2<sup>nd</sup> Defendant for the purchase of the suit property being Title IR 202830 LR No. 12715/14011 and 12715/114012 (original number 12715/1384818 pursuant to subdivision of IR 194541/1) vide an Agreement for sale dated 13<sup>th</sup> June, 2019. The purchase was financed through a loan facility from Gulf African Bank vide letters of offer dated 2<sup>nd</sup> May and 18<sup>th</sup> June, 2019 and a subsequent charge registered in favour of the bank, which independently vetted the transaction before disbursing funds. Prior to executing the Sale Agreement, the 1<sup>st</sup> Defendant conducted a search at the relevant Lands Registry, which confirmed that the 2<sup>nd</sup> Defendant was the registered proprietor of the parcel. The 1<sup>st</sup> Defendant in addition to carrying out a physical search and inspection of the property, did carry out an online search that verified the details of the registered owner. That following payment of the purchase price and completion of transfer formalities, the property was duly registered in the name of the 1<sup>st</sup> Defendant, who has since been enjoying quiet possession and occupation of the property.

12. The 2<sup>nd</sup> Defendant stated that he bought the suit property from one James Makau who is alive to date. He further confirmed that before he bought the property, he visited the Plaintiff herein at his home and asked him if he was aware of any plots in Syokimau owned by his father. The Plaintiff confirmed that his father did not own any property in Syokimau and that in fact they had completed the succession process for his dad and there was no listing of LR. No. 12715/13848 and LR. No. 12715/13849 in the grant. That he caused subdivision for LR. No. 12715/13848 and LR No. 12715/13849 into 36 plots measuring 50 by 100 and surrendered the two titles. The new certificates were issued numbers 12715/13996-14013 of what was formerly 12715/13848 and 12715/1401-14031 for 12715/12449 respectively. The 36 plots which were sold to various purchasers, of whom the 1<sup>st</sup> Defendant is one. That the Plaintiff has chosen to sue only the 1<sup>st</sup> Defendant while curiously omitting to sue other purchasers similarly situated. It is from the said plots that the 1<sup>st</sup> Defendant purchased two parcels being parcel No. 12715/14011 and 12715/14012. The Court of Appeal in the case of *Weston Gitonga & 10 others vs Peter Rugu Gikanga & another* (2017) eKLR held as follows as regards a bona fide purchaser:

“23. Black's law Dictionary 8th Edition defines “bona fide purchaser” as: “One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims



or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”

13. In the Ugandan case of *Katende vs Haridar & Company Limited* (2008) 2 E.A.173 it was held that;

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that:

- a. he holds a certificate of title;
- b. he purchased the property in good faith;
- c. he had no knowledge of the fraud;d.he purchased for valuable consideration;e.the vendors had apparent valid title;
- f. he purchased without notice of any fraud;
- g. he was not party to any fraud.

A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.”

14. Therefore, the principle of a bona fide purchaser is only applicable were there is a registered title to land. The Defendants have produced all the relevant certificates of title, sale agreements, rate and rent clearance certificates. The court has no reason to disbelieve the evidence adduced by the Defendants as to how they acquired their respective certificates of title. I concur with these submissions.

15. Section 26 of the *Land Registration Act* which guarantees the concept of indefeasibility of title does not extend to any property that has been found to have been unlawfully acquired. The Court of Appeal in *Attorney General vs Torino Enterprises Limited (Civil Application 84 of 2012)* (2022) KECA 78 (KLR) (4 February 2022) (Judgment) held that;

“We have considered the provisions of section 26 of the *Land Registration Act* (repealed) in light of the provisions of Article 40 of *the Constitution* which guarantees protection of right to property and it is our considered view that the concept of indefeasibility of title is subject to Article 40 (6) of *the Constitution* which states that: “The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.” Guided by the provisions of Article 40 (6) of *the Constitution*, we hold that the concept of indefeasibility or conclusive nature of title is inapplicable to the extent that title to the suit land was unlawfully acquired. See *Denis Noel Mukhulo & Another v. Elizabeth Murungari & Another* [2018] eKLR.”

16. I find that the 1<sup>st</sup> Defendant has established that they are the legitimate proprietors of the suit property and hence entitled to the same.

17. Section 109 of the *Evidence Act* Cap 80 is clear that;

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”



18. The well-known mantra “he who asserts must prove.” Was well pointed out by the Court of Appeal in Jennifer Nyambura Kamau vs Humphrey Mbaka Nandi (2013) eKLR as follows;

“We have considered the rival submissions on this point and state that Section 107 and 109 of the *Evidence Act* places the evidential burden upon the appellant to prove that the signature on these forms belong to the respondent. Section 107 of the *Evidence Act* provides that “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the *Evidence Act* provides, the burden lies on that person who would fail if no evidence at all were given on either side.”

19. In James Muigai Thungu vs County Government of Trans-Nzoia & 2 others (2022) eKLR it was held that;

“It is now settled law that whosoever asserts the existence of a legal right or liability is vested with the burden to prove it except in so far as the law may expressly exempt him or her. Section 107 of the *Evidence Act* Chapter 80 Laws of Kenya succinctly states:

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

Also, further, Section 108 of the Act states thus:

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Again Section 109 of Act refers to the burden of proof of a particular fact. It states that:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

20. The Plaintiff testified that the late father Johnstone Mutisya Munee is the owner of all that property known as LR. No.12715/148 situated in Machakos County. That he Plaintiff avers that he has been in quiet possession, enjoyed uninterrupted ownership, proprietorship and active occupation over the property LR. No. 12715/148 without any interruption of ownership, proprietorship and or occupation whatsoever. That the title to the stated plot is still owned by Johnstone with an official search over the property confirming the same. The Plaintiff states that on or about the 3<sup>rd</sup> June, 2022, while inspecting the suit property, he realized that the Defendant was developing the parcel of land without his knowledge by erecting flats. PW2 Makenzi Mutuku a former Director of Syokimau Farm stated that the suit land belonged to Johnstone and that James Wambua Makau has never been a shareholder. However, in cross examination he stated that he would not know if the suit land had been sold to a third party. The Plaintiff produced an undated search certificate showing that the suit property was transferred to Johnstone Mutisya Munee on the 1<sup>st</sup> July 1989. What is curious to note is that this property is not listed in the confirmation of grant of the Estate of Johnstone Mutisya Munee dated 5<sup>th</sup> December 2019 and issued on the 17<sup>th</sup> December 2019. In cross examination the Plaintiff admits that the 2<sup>nd</sup> Defendant paid him a visit in 2018 about the



suit land but it was not until much later when he noticed that construction was going on and he filed the instant suit in 2022. That he was last at the suit land in 2020. Lastly, it is in evidence that the suit land was subdivided into 36 plots and sold to third parties but it is only the 1<sup>st</sup> Defendant who has been enjoined in this suit. From the titles before this court the 1<sup>st</sup> Defendant's plot are only 0.0412 Hectares each and yet the Plaintiff is claiming 5 acres. The Plaintiff's case just does not add up. I find that the Plaintiff was never in possession of the suit land and it is possible that his father sold it to a third party. I find that the Plaintiff has failed to prove his case on a balance of probabilities and I dismiss it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 30<sup>TH</sup> DAY OF JULY 2025.**

**N.A. MATHEKA**

**JUDGE**

