



**Aswani v Ashioya (Environment and Land Case 15 of 2024)
[2026] KEELC 238 (KLR) (22 January 2026) (Judgment)**

Neutral citation: [2026] KEELC 238 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE 15 OF 2024**

E ASATI, J

JANUARY 22, 2026

BETWEEN

ANDREW ASWANI PLAINTIFF

AND

DAVID ASHIOYA DEFENDANT

JUDGMENT

1. Vide the Complaint dated 30th September 2023, the Plaintiff herein filed the suit at the Environment and Land Court at Busia as Busia ELC Case NO. E012 of 2023 against the Defendant and seeking for orders that;
 - a. He be granted an order to Oye Ashioya to pay him 14% of the value of his four (4) plots at a cost of One Million Two Hundred Kenya Shillings each i.e., Four Million Eight Hundred Thousand Kenya Shillings for eight years.
 - b. That having paid Oye Ashioya the sum of Kshs. 580,000/- (Five Hundred and Eighty Thousand Kenya Shillings) as legal fees to transact the business for him, a declaration order that he pays the Plaintiff back his Kshs. 580,000/- plus 14% interest for 8 years.
 - c. A declaration that the Plaintiff is the owner of parcel number Bukhayo/ Mundika/12883 and not the Defendant.
 - d. Costs of the suit.
 - e. Any other further relief the Court may deem fit to grant.
2. The Plaintiff's case as contained in the Complaint (i) that the Defendant was his personal advocate between the year 2015 and 2023. That the Defendant was engaged in dubious manner that he exchanged and transferred the Plaintiff's title in respect of L. R. No. Bukhayo Mundika/12883 into his name without the Plaintiff's consent and knowledge. Further that the Defendant received a total of Kshs. 580,000/-



for the said transaction at the land's office in the year 2016. That the Defendant transferred to himself the Plaintiff's land measuring 0.21 Ha that is four (4) plots without the Plaintiff's consent. He therefore sought for the Court's intervention.

3. In response to the Plaintiff's claim, the Defendant filed Defendant's Defence dated 8th December 2023 which was later amended and replaced with the Defendant's Defence and Counterclaim dated 11th February 2025 vide which he denied the Plaintiff's claim and claimed for Kshs. 600,000/- which he claimed to have paid to the Plaintiff as part purchase price and interest thereon at 14% since 2016 to the date of final payment and costs of the Counterclaim.

The evidence

4. The Plaintiff who testified as PW1 adopted the contents of his witness statement dated 30/9/2023 as his evidence in chief. He had stated in the said witness statement that the Defendant and him engaged in a business between the year 2015 for a period of 8 years. That the Defendant had denied him access to his title deed for L.R. NO. Bukhayo /Mundika/12883 which the Defendant acquired fraudulently, that on 13th May 2023, the Defendant wrote to the Plaintiff returning the title deed for No. Bukhayo/Mundika/12883 together with the transfer forms duly signed. That the title deed was in the Defendant's name despite having paid him all the legal fees to transact the business for him.
5. The Plaintiff also relied on the contents of a further witness statement titled additional evidence dated 7th November 2024 wherein he stated that the Defendant filed a case against him in the Small Claims Court at Kakamega namely; SCC COMM CASE NO. E197 OF 2023 and another case in the Chief Magistrate's Court at Busia namely Small Claims Court Case NO. E 026 of 2023. That the case at Kakamega Small Claims Court was struck out and that case No. E026 of 2023 failed with costs.
6. The Plaintiff produced exhibits as listed in his list of documents dated 30/9/2023 namely; his identity card, payment receipt from Ashioya Oye David & Co. Advocates, letters from Ashioya Oye David Ref. No. OA/GEN/2023 and copy of title deed for Bukhayo/Mundika/12883.
7. On cross examination, the Plaintiff stated that the receipts he produced showed that the payments he had made to Ashioya Advocate were for disbursements that he had never sold his land to the Defendant and he never received any payment from the Defendant. That he did not transfer his land to the Defendant.
8. On behalf of the Defendant, two witnesses testified. DW1 was the Defendant. He stated that he is an advocate of the High Court of Kenya. He adopted the contents of his witness statement dated 18/6/2025 as his evidence in chief. He had stated in the said witness statement that the Plaintiff was one of his clients for whom he handled over 10 files ranging from land matters, claims for money he had lent out and succession cause. That the Plaintiff was not paying fees up front but in instalments hence he ended up having a big bill on legal fees. That he handled for the Plaintiff a succession cause NO. 3 of 2014 where the Plaintiff was claiming for 3 acres of land as a purchaser of L.R. No. Bukhayo/Mundika/1254 from the estate of Joseck Wafula Mudidwa. That he successfully pursued the matter on behalf of the Plaintiff and handed the Plaintiff title deed for Bukhayo/Mundika/11940 and L.R. NO. Bukhayo /Mundika/11942. That because the Plaintiff was having difficulties in securing the outstanding fees, he approached the Defendant with a proposal that he sells to the Defendant part of the Plaintiff's land and that they set off part of the purchase price from the legal fee outstanding, but in the meantime the Defendant be paying the Plaintiff money as and when the Plaintiff was in need because the land sale price had been agreed at Kshs. 2 million and the Plaintiff owed the Defendant about Kshs. 1 million. That the Defendant commenced payments as agreed wherein he paid to the Plaintiff or the Plaintiff's agent a total of Kshs. 741,500/-.



9. That one of the Plaintiff's sons by the name Serulo wrote to the Defendant a letter complaining about the sale that there was a meeting of the Plaintiff's family wherein the Plaintiff's family resolved that they stop any more disposal of the land whereupon the Defendant demanded a refund of Kshs. 600,000/- which he had earlier paid to the Plaintiff. That the Defendant filed bills which were taxed at a total of Kshs. 336,275/-.
10. That a subsequent meeting resolved that the defendant transfer the land back to the Plaintiff and the Plaintiff settles the Kshs. 600,000/-
11. That consequently the Defendant transmitted to the Plaintiff transfer documents namely application for transfer, transfer forms, original title deed, the Defendants colored passport size photographs, a copy of his Identity Card and a copy of the Plaintiff's KRA Pin Certificate.
12. That the allegations of fraud are malicious. That the Plaintiff has not lived up to his undertaking of refunding the money and interest at 14%. The Defendant produced a total of 52 documents as exhibits as listed in his list of documents dated 18/6/2025.
13. On Cross-examination, the Defendant stated that the money he had paid to the Plaintiff was for the purchase of Bukhayo/Mundika/12883.
14. DW2 was one Sebastian Tikolo who adopted his witness statement dated 18/6/2025 as his evidence in chief.
15. On cross-examination, DW2 stated that the Plaintiff sold land to the Defendant but did not complete the transaction.

Submissions

16. At the close of the case, parties filed written submissions. The Plaintiff filed written submission dated 1st July 2025. He submitted that the Defendant's claim of Kshs. 600,00/- had been adjudicated upon and dismissed by Kakamega Small Claims Court and the Busia Small Claims Court and quashed on the basis that there was no proof of payment or valid contract of sale.
17. That the Defendant was paid a total of Kshs. 580,000/- for legal services. That the evidence of DW2 offends the *Evidence Act* particularly section 63 thereof as it contains no admissible or probative content from a competent witness and that the honorable court would disregard the same.
18. That the suit property remains registered in the Defendants name and can be seen from the title deed.
19. On behalf of the Defendant, written submission dated 10th August 2025 were filed by Kagna & Advocates.

Issues for determination

20. As the documents of transfer of the suit land have been executed by the defendant and surrendered to the plaintiff, I find that the only outstanding issues for determination are;
 - a. Whether or not the Defendant owes the Plaintiff the amount of money stated in the Plaintiff and interest thereon at 14%.
 - b. Whether or not the Defendant is entitled to recover the sum of Kshs. 600,000/- and 14% interest thereon from the Plaintiff is claimed in the counterclaim.
 - c. Cost of the suit and the counterclaim.



Analysis And determination

21. The first issue for determination is whether the Defendant owes the Plaintiff the amount of money claimed in the Plaint and interest thereon at 14%.
22. Under the provisions of Section 107 of the Evidence Act the burden of proof rests with the Plaintiff to prove his claim on a balance of probabilities.
23. The Plaintiff claims for 14% interest on a sum of 4,800,000/- for 8 years. A reading through the Plaint, the evidence and the submission by the Plaintiff discloses no basis for the said claim. It is not clear how the sum of Kshs. 4,800,000/- was arrived at. The Plaintiff also claimed for a sum of Kshs. 580,000/- and interest thereon. The Plaintiff admitted in his cross-examination that this amount was paid to the Defendant as his lawyer as disbursements. The fact that the Defendant was the Plaintiff's Advocates was not denied.
24. I find no evidence that the Defendant owes the Plaintiff the amount claimed in the Plaint or at all.
25. Regarding the suit land parcel, while it is abundantly clear from the documentary evidence produced that indeed the Plaintiff attempted to sell the suit land to the Defendant and consequently the suit land was transferred to the Defendant, there is evidence that the Defendant signed and transmitted to the Plaintiff documents that would to him cause the suit land to be transferred back to himself.
26. The Plaintiff submitted that the suit land is still in the name of the Defendant. My assessment of the evidence placed before Court is that this is so because the Plaintiff who placed a caution on the land has not presented the transfer documents signed by the Defendant to the Lands Office for transfer of the land back to him (Plaintiff).
27. In a nutshell, I find that the Plaintiff has not proved his claim on a balance of probabilities as required in civil cases.
28. The second issue is whether or not the Defendant is entitled to Kshs. 600,000/- from the Plaintiff as claimed in the Counterclaim. The documents produced by the Defendant and particularly the correspondence with the Advocates Complaints Commission, the Plaintiff's declaration accompanying the caution and correspondence with the Plaintiff's Advocates indicate that indeed the Defendant paid a sum of Kshs. 600,000/- to the Plaintiff for the purchase of the suit land which transaction was not completed.
29. The Defendant has signed transfer documents and transmitted to the Plaintiff all the requisite transfer documents. The Plaintiff ought to refund the purchase price paid to him.
30. It is not denied that the said amount of Kshs. 600,000/- has been the subject of previous litigation and the question which therefore arises is whether the claim is res-judicata. The doctrine of res-judicata is explained in Section 7 of the Civil Procedure Act as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.”
31. Copies of the proceedings of the previous (former) suit were availed to the Court by the Plaintiff. The Judgment in respect of Busia Small Claims Court Claim NO. E026 of 2023 dated 6th February 2024 shows that the Court simply downed its tools for lack of jurisdiction.



32. Further the ruling dated 16th June, 2023 in respect of Kakamega Small Claims Court Commercial Claim No. E197 of 2023 show that the Court found that the claim had been filed in a Court devoid of jurisdiction and the claim was subsequently struck out. There is no evidence that the claim was adjudicated upon and a determination of the issue in controversy arrived at.
34. I find that the Defendant is entitled to the said amount of Kshs. 600,000/- from the plaintiff.
35. For the foregoing reasons, the court finds that the plaintiff has failed to prove his claim as contained in the plaint on a balance of probabilities. The suit is dismissed.
36. On the other hand, the counterclaim is proved on a balance of probabilities. Judgement is entered in favour of the Defendant and against the plaintiff on the counterclaim for Kshs 600,000/ and interest thereon at Kshs 14% from the date of filing the suit.
37. Given the relationship of advocate-client that the parties have enjoyed in the past, each party shall bear own costs of the suit and counterclaim.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED VIRTUALLY THIS 22ND DAY OF JANUARY 2026.

E. ASATI,

JUDGE.

In the presence of:

Court Assistant.

Plaintiff present in person.

N/A for the Defendant.

