Osoro & another (Suing as Legal Representative of Osoro Matara - Deceased) v Mbeche (As Legal Representative of the Late Daniel Ombachi Mogeni) & 2 others (Environment and Land Appeal E011 of 2023) [2025] KEELC 5662 (KLR) (30 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5662 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ENVIRONMENT AND LAND APPEAL E011 OF 2023

M SILA, J

JULY 30, 2025

BETWEEN

DANIEL OMEKA OSORO ..... 1ST APPELLANT

ALBERT NYAKUNDI OSORO ..... 2ND APPELLANT

SUING AS LEGAL REPRESENTATIVE OF OSORO MATARA - DECEASED

AND

YUSUF ORWENYO MBECHE (AS LEGAL REPRESENTATIVE OF THE LATE DANIEL OMBACHI MOGENI) ..... 1ST RESPONDENT

LAND REGISTRAR, KISII CENTRAL DISTRICT ..... 2ND RESPONDENT

THE HON ATTORNEY GENERAL ..... 3RD RESPONDENT

(Arising from an appeal from the judgment of Hon. P.K Mutai, Principal Magistrate, delivered on 18 September 2023 in the suit Kisii CMCC/ELC No. 128A of 2021)

JUDGMENT

1. The suit from which this appeal emanates from was commenced through a plaint filed on 11 March 1999, in the High Court at Kisii, by one James Nyangaresi Osoro on behalf of the estate of Osoro Matara (deceased). The grant issued to the said James Nyangaresi Osoro was revoked on 26 June 2018 and the appellants herein, Daniel Omeka Osoro and Albert Nyakundi Osoro were duly appointed as the new administrators. They applied to substitute the original plaintiff, which application was allowed and pursuant to that event, the plaint was amended on18 February 2021 so that the appellants were now reflected as the new plaintiffs. The case however remained the same as that filed in 1999.

2. In the plaint the appellants sued Daniel Ombachi Mogeni, the Land Registrar and the Honourable Attorney General, as 1st , 2nd and 3rd defendants respectively. Daniel Ombachi Mogeni remained alive

until this appeal was filed. He died before this appeal could be finalized and he was substituted by Yusuf Orwenyo Mbeche, who now continues the suit on behalf of the original 1st respondent.

3. The case of the appellants was that Osoro Matara owned the land parcel West Kitutu/Bomatara/1579 measuring 3.39 Ha (hereinafter simply referred to as parcel No. 1579). They contended that in 1986, Osoro Matara, through an agreement, sold to the original respondent 0.44 Ha acres out of this land parcel No. 1579. They pleaded that this transaction received the requisite consent of the Land Control Board and there was no other agreement. They averred that out of that agreement the land parcel No. 1579 was to be subdivided into two parcels, i.e the parcel West Kitutu/Bomatara/1620 and West Kitutu/Bomatara/1621 (hereinafter simply referred to as parcels No. 1620 and 1621), and the latter was to measure 0.44 Ha. They contended that without a sale agreement and without consent of the Land Control Board, the original 1st respondent conspired with the 2nd respondent to cause the land parcel No. 1621 to read 0.61 Ha instead of 0.44 Ha. They further pleaded that they also conspired to create a parcel No. 1622, purporting that it was also subdivided from the parcel No. 1579, which was caused to be registered in the name of the original 1st respondent. Two particulars of fraud were pleaded being :

    i. Causing the register to indicate that LR No. West Kitutu/Bomatara/1621 measures 0.61 Ha instead of 0.44 Ha as purchased by the original 1st defendant in absence of the requisite Land Control Board consent and in the absence of any land sale agreement in respect of the increased acreage i.e 0.17 Ha.

    ii. Causing the creation of a new register LR No. West Kitutu/Bomatara/1622 in the name of the 1st defendant without the requisite Land Control Board consent and in the absence of any land sale agreement between the late Mr. Osoro Matara and the 1st defendant.

4. In the suit, they asked for the following orders :

    a. An order directing the 2nd respondent to rectify the register in respect of West Kitutu/ Bomatara/1621 to reflect that it measures 0.44 Ha instead of 0.61 Ha.

    b. An order directing the 2nd respondent to cancel the register of the land parcel West Kitutu/ Bomatara/1622.

    c. An order directing the 2nd respondent to rectify the register in respect of the land parcel West Kitutu/Bomatara/1620 to reflect the acreage of 2.95 Ha and not 1.43 Ha.

    d. General damages and/or exemplary damages and/or aggravated damages jointly and/or severally for the fraud perpetrated.

    e. Costs of the suit.

5. The original 1st respondent filed defence. The alleged fraud was denied and it was also pleaded that the suit is time barred pursuant to the *Limitation of Actions Act*, Cap 22, Laws of Kenya.

6. On the part of the 2nd and 3rd respondents, they filed defence wherein they denied all matters in the plaint.

7. With the formation of the Environment and Land Court, the matter was transferred from the High Court to the Environment and Land Court. On its part, the Environment and Land Court (Mutungi J) transferred the case to be heard by the Magistrates' Court in Kisii. That is how the matter ended up being heard and determined by the Magistrates' Court. I just need to mention that while the case was before the High Court, the judge had asked for a report of the Land Registrar which was prepared in 2002 and placed on record.

8. PW – 1 was Albert Nyakundi Osoro, the 2nd appellant. He had a pre-recorded witness statement which he adopted as his evidence and he also produced the exhibits they rely on. In his written statement, he stated that his late father, Osoro Matara, had sold to the original 1st respondent two portions of land measuring approximately 0.44 Ha and 0.25 Ha from the land parcel No. 1579. He stated that his father applied to the Kisii Municipal Council for subdivision and on 24 January 1986 the Municipal Council wrote to the Commissioner of Lands regarding the said subdivision. He stated that when the Physical Planning Department drew the plots, they made a mistake so that instead of the portion 'C' measuring 0.25 Ha, they measured 0.63 Ha. He stated that owing to this mistake by the Physical Planning Department, the surveyor who went to survey the land followed the same error. He stated that he checked the registry index map and discovered that this mutation was never used but instead it was a different mutation form which was used to make the map. He further stated that his late father only executed one transfer form, that regarding the parcel No. 1621. He added that he obtained official searches which indicated the acreage of the parcels No. 1620, 1621 and 1622 respectively as 1.43 Ha, 0.61 Ha, and 1.46 Ha, instead of 2.63 Ha, 0.44 Ha and 0.25 Ha. He stated that the original 1st respondent increased the acreages of the portions of land that he bought from his late father. Only two questions were put to him in cross-examination and he answered them by saying that he did not sell the plot and he did not sign anything in relation to the plots.

9. I need to mention at this juncture that among the exhibits produced were two mutation forms. There was one dated 3 March 1986 subdividing the land parcel No. 1579 into three portions as follows :

> A – 2.32 Ha
>
> B – 0.44 Ha
>
> C – 0.63 Ha
>
> Total acreage 3.39 Ha.
>
> The second mutation form was dated 6 July 1987, noted to be a "corrected version" of the previous mutation form for reason that a mistake was detected after the amended Registry Index Map was released. This one subdivided the land as follows
>
> 1620 – 1.43 Ha
>
> 1621 – 1.46 Ha
>
> 1622– 0.61 Ha
>
> Total acreage of 3.5 Ha.
>
> In addition to the above, the appellants produced a document dated 22 January 1986, said to have emanated from the Municipal Engineer, Municipal Council of Kisii indicating a recommendation for subdivision of the parcel No. 1579 to produce plot B measuring 4320m2 (0.432 Ha) and a plot C measuring 2520m2 (0.252 Ha).

10. PW – 2 was Paul Moses Osoro. He also relied on a pre-recorded witness statement. In it, he stated that by an agreement entered into in 1986 or thereabout, the original 1st respondent purchased a portion of land from the land parcel No. 1579. He stated that the agreement was for purchase of land measuring 0.44 Ha and that the requisite consent to subdivide and transfer was granted. He stated that this portion bought was registered as the parcel No. 1621 while his father remained with the parcel No. 1620 measuring 2.95 Ha. He alleged that in collusion with the 2nd respondent, the 1st respondent altered the register to reflect his land parcel No. 1621 as measuring 0.61 Ha instead of 0.44 Ha. He contended that at no other time was there another sale agreement. He mentioned that there were clear

boundaries on the ground but that the original 1st respondent started claiming some other parts and destroyed the boundary between the parcels No. 1621 and 1622. He wanted the acreage of the parcel No. 1621 rectified to read 0.44 Ha, the register of the parcel No. 1622 cancelled, and for rectification of the acreage of the parcel No. 1620 so that it reads 2.95 Ha.

11. Cross-examined, PW-2 testified that he does not know who changed the mutation forms. Nevertheless he was not involved in the sale transaction.

12. With the above evidence the appellants closed their case.

13. DW-1 was the original 1st respondent. He also relied on a pre-recorded witness statement. His statement was to effect that he purchased the land parcels No. 1621 measuring 0.44 Ha and No. 1622 measuring 0.63 Ha. He stated that before he got title Mr. Osoro Matara decided to sell to him an additional portion that he had earmarked for his son Oriki. He stated that Mr. Osoro Matara approached the Lands and Survey Departments to take additional measurements which led to the amended mutation that Mr. Osoro Matara signed. He stated that the amendment took place before the documents were presented for registration and issuance of title deeds. He asserted that the title deeds were properly issued in 1987 and not 1986. He produced the amended mutation which he claimed led to amendment of the map and issuance of title deeds. He stated that the land he bought that was earmarked for Mr. Osoro Matara's son is not included in his parcels of land but he had settled on it and constructed a temporary house. He stated that he surrendered this parcel on the request of the Land Registrar upon his visit in 2002. Cross-examined he testified that they wrote a sale agreement which covered both parcels of land. On the mutation forms he stated that there were mistakes which were rectified and Mr. Osoro signed the same.

14. DW – 2 was Benard Oketch, from the Survey Department. He testified mainly on the two mutation forms dated 3 March 1986 and 6 July 1987. He testified that the first mutation form was presented for registration on 3 March 1986. There were alterations made leading to the second mutation form of July 1987 and it was said that this is a corrected version. There was no correspondence regarding correction of the mutation form. He testified that there is a procedure to be followed in amending a map but he did not see the procedure having been followed. He did not have the reasons which led to the second mutation form though he testified that the owner signed it. Regarding the Physical Planner's proposed subdivision, his evidence was that it was ambiguous as it did not give the positions. He could see that the first mutation size showed the land parcel No. 1579 as 3.32 Ha whereas the second mutation form showed the same land as 3.5 Ha which was not within a margin of error.

15. With the above evidence the original 1st respondent closed his case. No evidence was tendered on behalf of the 2nd and 3rd respondents. Counsel were invited to file submissions culminating into the impugned judgment.

16. In his judgment, the trial Magistrate narrowed down the dispute to the two mutation forms. He found the second mutation form dated 6 July 1986 to have issues. He found that it has alterations which are not countersigned. He held that it was this altered mutation form that led to the issuance of titles to the parcels No. 1620, 1621 and 1622. In his opinion, it was the first mutation form which was authentic. He did not find any fraudulent dealing regarding the parcel No. 1622 save for the increase in size. He indeed found that the parcel No. 1622 was captured in the first mutation form which is genuine. He found that this first mutation form was not impeached. The appellants' case thus succeeded on the issue of rectification of the register to reflect 2.32 Ha, 0.44 Ha, and 0.63 Ha respectively for the parcels No. 1620, 1621 and 1622. He directed the titles to be cancelled to reflect this position. He did not make any award for general or aggravated damages which he disallowed but awarded the appellants the costs of the suit.

17. Aggrieved, the appellants have filed this appeal on the following grounds :

    i. The trial Magistrate erred in holding that the 1st respondent bought part of the land parcel No. 1622.

    ii. The trial Magistrate erred in not holding that the 1st respondent's titles to the parcels No. 1621 and 1622 were obtained fraudulently or through misrepresentation of which he was a party.

    iii. The trial Magistrate erred in not holding that the acquisition and registration of the parcels No. 1621 and 1622 were obtained illegally, unprocedurally, and/or through a corrupt scheme.

    iv. The trial Magistrate erred in directing the 2nd respondent to rectify the register to reflect different measurements which measurements are uncertain and/or incorrect and/or unreliable.

    v. The trial Magistrate erred in holding that the first mutation form was not impeached or disowned by the appellants when the evidence on record discloses otherwise.

    vi. The trial Magistrate made a decision against the weight of evidence.

18. The appeal was argued by way of written and brief oral submissions and I have taken note of the submissions presented.

19. At the outset, I wondered why the appellants filed this appeal, because as far as I could see they did succeed in their argument that there was an irregular alteration of the land pursuant to the second mutation form. I indeed asked Mr. Bosire Gichana, learned counsel for the appellants, what it is that his clients are appealing against. His submission was that the rights of his clients go beyond what was awarded.

20. I have analysed the case. In the pleadings, the case of the appellants was that their late father, Osoro Matara, only sold land measuring 0.44 Ha to the original 1st respondent, which is the parcel No. 1621. They however raised two issues; first that the original first respondent altered the acreages so that the parcel No. 1621 reads 0.61 Ha instead of 0.44 Ha. The second issue was the contention that their late father never sold the parcel No. 1622. In their plaint they alleged that it was the respondents who caused the creation of this parcel No. 1622 in name of the original 1st respondent without the requisite Land Control Board consent and in absence of a sale agreement.

21. Thus, as far as I can see, there are two limbs to this appeal, the first being whether the trial court erred in upholding the first mutation form and finding that there was indeed created three parcels of land, and the second limb is whether the trial court erred in not upsetting the title of the original 1st respondent on the parcel No. 1622 save only on the issue of acreage.

22. There is of course some attempt within this appeal to impugn the title to the parcel No. 1621, as discernible in grounds (ii) and (iii) of the memorandum of appeal, but in their pleadings the appellants admitted sale of the parcel No.1621 only that they said it should measure 0.44 Ha. Given that position, this court cannot interrogate the title of the original 1st respondent in respect of the parcel No. 1621 save only for the acreage.

23. On the first limb, I do not see how it cannot be alleged that it was the original 1st respondent in collusion with the Land Registrar, who created the parcel No. 1622. This land was not created in isolation; it was indeed created at the same time that the parcels No. 1620 and No. 1621 were created, which was pursuant to the mutation form dated 3 March 1986. In ground (iv) and (v) of the Memorandum of Appeal, it is contended that the trial Magistrate erred in directing rectification of the register to reflect

measurements which were uncertain, incorrect and/or unreliable, and further that the trial court erred in finding that the first mutation form was not impeached or disowned. There is no substance in this argument. First, there is no other mutation form that was produced by the appellants to indicate a proposed subdivision to only two parcels of land i.e to parcel No. 1620 and 1621. There could probably have been a basis to argue that there was no intention to create a third parcel of land if a mutation form indicating a proposed subdivision to only two parcels of land was exhibited, but none was. There was the document said to be from the Kisii Municipal Council, Planning Department. I could not quite understand its place and neither was it explained, because the land appears to be freehold land outside the Municipality. Whatever the case, that document, being a planning document, cannot supercede the actual mutation done by the surveyor and signed by the land owner. Neither was the consent to subdivide as issued by the Land Control Board exhibited by the appellants. If such consent had been exhibited, then we would have a basis to say that there was only consent to subdivide into two portions and not three. Neither did the appellants call for the records held by the Land Registrar in respect of the three parcels of land to demonstrate any fraud in creation of three rather than two subdivisions out of the parcel No. 1579. It is absurd for the appellants to try and contest this first mutation form, because if they do, then they have nothing at all to demonstrate how the land parcel No. 1579 was to be subdivided and their entire case would collapse, given that there is a presumption that a title is properly issued unless shown otherwise.

24. In fact, when they testified, the contention of the appellants was on the second mutation form and not the original mutation form. This is clearly demonstrated in the evidence of PW -2, Paul Moses Osoro. He testified as follows :

> "We have mutation forms. First mutation forms are in agreement with consent. Second mutation form was changed. It was changed from 2.43. There were changes at the Lands office."
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> This evidence above speaks for itself. In it, it is discernible that what the appellants had an issue with was the second mutation form and not the first. There is therefore no basis upon which to allege that the court was wrong in finding that the first mutation form was not impeached, for that was the evidence of the appellants.

25. In his assessment of the evidence, the trial Magistrate found that the problem was only with the alteration of the first mutation form. Indeed, there was a second mutation form dated 21 May 1987 which altered the acreages in the first mutation form. The first mutation form had acreages of 2.23 ha, 0.44 ha, and 0.63 ha respectively for the parcel numbers 1620, 1621 and 1622. The second mutation form had acreages of 1.43 ha, 1.46 ha, and 0.61 ha for the same parcels of land. The court found that the second mutation form had no support and I am unable to fault him on that. When I assess the two mutation forms, the first, dated 3 March 1986, was registered on the same date. The subdivisions No. 1620, 1621 and 1622, were first registered in name of Osoro Matara on 3 March 1986. The transfer to the original 1st respondent was on 20 June 1986. You could not alter the mutation form after the subdivision is already registered. If the registration was done on 3 March 1986, then it could only be on the basis of the mutation form existing at that time, which was the mutation form of 3 March 1986, and that mutation form bore the acreages of 2.23 Ha, 0.44 Ha, and 0.63 Ha. The register and title could not reflect any other acreage. That is why I agree with the trial court that the correct acreages of the parcels of land ought to be what was reflected in the first mutation form, i.e 2.23 Ha, 0.44 Ha, and 0.63 Ha. There is in fact no cross-appeal on this holding of the trial court from the respondents.

26. I am afraid to inform the appellants that they have failed to convince me that the trial court made any error in only approving the first mutation form and holding that there were three parcels of land

created measuring 2.23 Ha, 0.44 Ha, and 0.63 Ha as captured in the first mutation form. The first limb of this appeal therefore fails.

27. Let me now get to the second limb of the appeal, which is that there was no sale of the parcel No. 1622. The appellants of course argue that there was no Land Control Board consent and no transfer form. But as I have earlier stated, the appellants never called for the records held in the Land Registry to demonstrate that registration was actually done without a Land Control Board consent or an instrument of transfer. It was their case and the burden of proof was on them. They did not bring evidence of the manner in which the parcel No. 1622 was transferred so that they can point at any fraud in the process. Moreover, in his witness statement, PW-1, Albert Nyakundi Osoro, did explicitly state that his father sold two portions of land to the original 1st respondent only that he claimed that they measured 0.44 Ha and 0.25 Ha (clearly referring to the Planning Document of the Municipal Council). He cannot now renege to claim that there was no sale of a second parcel of land to the original 1st respondent. In any event it was never explained why Osoro Matara would opt to present a mutation form for three subdivisions if he was only selling one.

28. That aside, there is even serious doubt as to whether the entire case of the appellants was within the limitation period. In his defence, the original 1st respondent raised the issue of limitation of time and I think he may have had a point. The registration of land in his name was on 20 June 1986. It was the same day that Osoro Matara got registered as proprietor of the land parcel No. 1620 which he retained until his death. Unless evidence was presented, the assumption would be that if he registered the mutations on 3 March 1986 and he himself got registered as proprietor of the land parcel No. 1620 on the same day, then he would know of the nature of interest created, the acreages they reflect and any transfers thereof, at that time. The suit was filed on 11 March 1999 which is about 13 years later. Section 7 of the *Limitation of Actions Act*, Cap 22, Laws of Kenya, would only allow a claim on land if filed within 12 years. I realise that the trial Magistrate did not address his mind on this issue of limitation, which he ought to have addressed as it was clearly pleaded. However, given that there is no cross-appeal, I opt not to interrogate the issue and I will let it lie.

29. However, it will be seen that I am not persuaded that the appellants have presented before me any solid case to enable me upstage the judgment of the trial court. I am persuaded that the court was correct in finding that the appellants were only entitled to success on the issue of acreages and nothing else. The disputed parcels of land will need to be corrected so that they conform to the acreage and location noted in the first mutation form dated 3 March 1986 and the parties to confine themselves to the positions therein.

30. For the above reasons, this appeal is hereby dismissed with costs.

31. Judgment accordingly.

DATED AND DELIVERED THIS 30 DAY OF JULY 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Mr. Bosire Gichana for the Appellants

Mr. Omwoyo for the 1st Respondent

Mr. Wabwire, State Counsel, for the 2nd & 3rd Respondents

Court Assistant : Michael Oyuko