

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT VOI

ELCLC NO. E006 OF 2025

KIMWADU GRANTON NJAI.....

PLAINTIFF

=VERSUS=

1. COUNTY GOVERNMENT OF TAITA TAVETA

2. KATINDI MWAFUWE MWAKSHUNGI

3. MWAMBETA MWARAGASI

4. LAND ADJUDICATION OFFICER -

TAITA TAVETA COUNTY.....

DEFENDANTS

JUDGMENT

1. The Plaintiff instituted this suit vide a plaint dated 11th April 2025 seeking for the following reliefs:-

- (a) A declaration that hiving out of portions of parcel No. Chawia/Wusi-Kaya/1116 where the Plaintiff's wells are, allotting them Nos. Chawia/Wusi-Kaya/2375, Chawia/Wusi-Kaya/1198 and Chawia/Wusi-Kaya/2194 each and giving respectively to the 1st, 2nd and 3rd Defendants is**

not only unequitable but also unlawful, illegal and void.

(b) A declaration that acquisition by 1st, 2nd and 3rd Defendant of the portions of parcel of land Chawia/Wusi-Kaya/2375, Chawia/Wusi-Kaya/119 and Chawia/Wusi-Kaya/2194 where the Plaintiff's wells are amount to unjust enrichment.

(c) An order nullifying the creation of parcels of land Nos. Chawia/Wusi-Kaya/2375, Chawia/Wusi-Kaya/1198 and Chawia/Wusi-Kaya/2194 and revoking the titles of ownership in respect of the same given respectively to the 1st, 2nd and 3rd Defendants.

(d) Any or further order this Honourable Court may deem fit and just to grant.

(e) Costs of the suit.

2. The suit was contested by the 1st Defendant vide a Statement of Defence dated 30th April 2025.

The Plaintiff's case

3. It was the Plaintiff's case that the Plaintiff is the registered proprietor of all that parcel of land, situated within the Mwatate Subcounty, known as Chawia/Wusi/Kaya/1116.

Hereinafter, whenever necessary referred to as “the suit property.”

4. It was averred that this suit property is part of their ancestral land which was acquired by his father, the late Harry Njai Mwanjari during the adjudication exercise which was conducted sometimes in 1982 as the first registered owner.
5. It was further averred that the suit property is one of the property of his late father which he distributed inter vivos amongst his children and the same was given to him and duly transferred by his father and registered in his name on 6th April 2018.
6. The property has three wells which were dug by his grandfather, the late Alfred Mwanjari Njai which was and should still be part of this suit property.
7. It was stated that he took over the suit property, fenced it all round, save for some entries he left for the villagers to access these wells to fetch water and started his farming activities thereon.
8. It was further stated that he has over the period maintained these wells by having them desilted regularly

to avoid blockage and to improve quantity and quality of their waters.

9. One of these wells is right at the centre of the suit property while the other two were dug at the opposite corners of the same along its southern boundary.

10. It was also averred that without his knowledge and that of his late father who was the first registered owner, the 4th Defendant in undertaking the adjudication exercise of the subject adjudication section, hived out portions where those three wells are, caused them to be allotted distinct land references numbers and gave each of them to the 1st Defendant's predecessor, the then County Council of Taita Taveta, Katindi Mwafuwe Mwakshungi and Mwambeta Mwaragasi, the 1st, 2nd and 3rd Defendants herein.

11. It was further averred that these wells were hived out and given distinct land reference numbers, beginning with the one at the centre which was allotted Chawia/Wusi-Kaya/2375 which is registered in the name of County Council of Taita Taveta (allegedly reserved for Gandia spring), the one at the eastern corner of the said southern boundary was allotted No. Chawia/Wusi-Kaya/2194 and is

now registered in the name of Mwambeta Mwaragasi (the 3rd Defendant), and the one at the other end of the said southern boundary was allotted No. Chawia/Wusi-Kaya/1198 and was given to the 2nd Defendant, Katindi Mwafuwe Mwakshungi.

12. The Plaintiff also averred that he took over the ownership and possession of the suit property on legitimate belief that he owned the entire suit property and all the wells his grandfather dug in it. This belief was reaffirmed by the fact that he fenced it off, as hereinbefore averred and no one raised any objection or stopped him. It was not until sometimes in the month of February 2025 when he received a call from a person who introduced himself as the County Environmental Committee Chairman, Taita Taveta County who informed him that they were in his farm, i.e. the suit property with a contractor who has been hired to drill water and they needed his consent in writing to get a wider access path to the drilling spot.

13. It was also averred that the parties where the wells had been dug were hived out, allotted separate land

references and given to other third parties being the 1st to 3rd Defendants.

14. During trial, the Plaintiff **Kiwandu Granton Njai** testified as the sole Plaintiff's witness in support of his case. He adopted and relied on his witness statement dated 11th April 2025 and bundle of documents of even date.

15. On cross-examination, he stated that the title of the land is in his name. He collected it around 2018, having gone through the adjudication process. The land was initially held in the name of his father.

16. When asked about the adjudication process, he stated that there were no issues with the process and he didn't file any complaint.

17. He also stated that his father never filed any objections to the adjudication process.

18. He further stated that the County Government acquired property number 2375 fraudulently. The well is inside his fence. He was not aware that the said property is registered in the names of the County Government.

19. He also stated that he was invited by the County Government to attend a meeting in respect to the

intended project but he was not able to attend. He also stated that there was no public participation conducted and yet he was a key stakeholder.

20. When re-examined, he stated that he did not have any information of any complaint made by his father. He also stated it was his position that the wells were in his land.

The case of the 1st Defendant

21. The 1st Defendant filed a Statement of Defence dated 30th April 2025 denying the averments made in the plaint and seeking for the dismissal of the suit.

22. It was averred that the suit parcel is in an adjudication area which was dealt with in accordance with Land Adjudication Act Cap. 284 Laws of Kenya. The county Government was lawfully allocated the land which process was never challenged and hence the Plaintiff cannot now raise complaints at this stage.

23. During trial, **Elizabeth Mbinga, County Chief Officer** testified on behalf of the 1st Defendant. She adopted and relied on her witness statement filed alongside the 1st Defendant's Statement of Defence in her evidence in chief.

24. It was her testimony that the County Government had been financed through the World Bank Financing Local-Led Climate Action (FLLoCA) program and was to sink a borehole but owing to the dispute herein the project was relocated to a different site since there was an objection to the same.

25. On cross-examination by Counsel for the Plaintiff, she stated that the 1st Defendant only needed access from the Plaintiff. She also stated that she could not confirm how the 1st Defendant acquired the land. The existing well was a community well and the County was only improving it for the betterment of the residents.

26. On further cross-examination, she also stated that the Plaintiff had engaged TAVEVO earlier who were operating on property number 2375 and the 1st Defendant's main issue was to improve the well and not about the land. She also stated that contrary to the Plaintiff's averments public participation was done.

27. When re-examined, she stated that the wells were being operated by TAVEVO which is the 1st Defendant's water company. They were located on 2375. The County wanted to improve the one on 2375. There was no access

road to the well on that plot. The company had visited the site with a Water Surveyor to do a hydrological report since the plan was to sink a borehole which would ensure more water supply to the residents.

The Plaintiff's submissions

28. The Plaintiff filed written submissions dated 2nd December 2025.
29. It was submitted that the dispute arose in the manner in which the adjudication process was conducted. The Plaintiff is the owner of Chawia/Wusi-Kaya/1116 in Mwatate having gotten the said land from his father Harry Njai Mwanjari.
30. It was further submitted that the County Government had sought to commercialize the well without his consent sometimes in February 2025.
31. It was also submitted that there was no way the Plaintiff nor his father would have known that parcels No. Chawia/Wusi-Kaya/2375, 2194 and 1198 are right within the bigger parcel of Chawia/Wusi-Kaya/1116 upon which he would have objected to the same.

32. It was also submitted that the Land Adjudication Act does not envisage the acquisition of land by the then Local Government. The 1st Defendant's witness appeared to have not been aware that the County owned parcel No. 2375 and she was unable to explain how the 1st Defendant acquired the said land.

33. It was further submitted that the wells were dug by the Plaintiff's grandfather and allocating the portion of the said land which has the wells to the 1st to 3rd Defendants amounted to unjust enrichment which would be unjust in the circumstances.

34. The court was urged to grant the prayers sought.

The 1st Defendant's submissions

35. The 1st Defendant filed written submissions dated 28th January 2026. Counsel submitted on the following issues:

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- (i) Was the land held within an adjudication area?**
- (ii) Was any dispute raised by the Plaintiff during adjudication?**
- (iii) Does the court have jurisdiction to cancel the 1st Defendant's title?**
- (iv) Who bears the cost of the suit?**

36.It was also submitted that the Plaintiff is laying claim to Government Land. The area was marked out and left out during adjudication. There was no evidence adduced that anybody challenged the adjudication process.

37.It was argued that **Section 26 and 30 of the Adjudication Act (Cap 284)** provides a clear process of challenging the ownership of land in an adjudication area. There was no evidence that the Plaintiff challenged the same. The title has been in existence for 43 years. Reliance was placed in the Court of Appeal case of **Amarnath (suing on behalf of the Estate of the Late Amarnath Gupta =Versus= Kazungu & 2 Others (Civil Appeal E033 of 2021 (2023) KECA.**

38.It was further submitted that the land is public land, it is hosting boreholes under the 1st Defendant's water company known as TAVEVO which was never sued in this matter and hence the Plaintiff's claim has not been proved to the required standard and the same ought to be dismissed with costs.

Analysis and Determination

39.Having considered the pleadings filed, oral and documentary evidence tendered together with written

submissions filed by the parties, the main issues for determination are as follows:-

- (i) Whether the Plaintiff has proved his case to the required standard.**
- (ii) Whether the Plaintiff is entitled to the reliefs sought.**

40. The Court shall now proceed to address the said issues sequentially.

41. It is trite law that he who alleges must prove. This is set out under **Section 107(1)(2)** of the **Evidence Act**, which provides as follows:

“(1) 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.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

Sections 109 and 112 of the same Act states;

“109. 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.

“112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

42. In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in **Mumbi M'Nabea vs David M. Wachira [2016] eKLR** stated as follows:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.

...The position was re-affirmed by the Court of Appeal in Maria Ciabaitaru M'mairanyi & Others

v Blue Shield Insurance Company Limited -Civil
Appeal No. 101 of 2000 [2005] 1 EA 280 where
it was held that:

“Whereas under section 107 of the Evidence Act, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

43.The Court will be guided by the aforementioned provisions and cases.

44.In the instant case, it was the Plaintiff’s case that he took over the ownership and possession of the suit property on legitimate belief that he owned the entire suit property and all the wells his grandfather dug in it. This belief was reaffirmed by the fact that he fenced it off, as hereinbefore averred and no one raised any objection or stopped him. It was not until sometimes in the month of February 2025 when he received a call from a person who

introduced himself as the County Environmental Committee Chairman, Taita Taveta County who informed him that they were in his farm, i.e. the suit property with a contractor who has been hired to drill water and they needed his consent in writing to get a wider access path to the drilling spot. The County Government acquired property number 2375 fraudulently. The well is inside his fence. He was not aware that the said property is registered in the names of the County Government. Neither his father nor himself raised any objection during the adjudication process.

45. From the evidence that was tendered, it was evident that the suit parcel was acquired through adjudication process which happened in 1982. From that time there was no challenge to the same until 2025 when the Plaintiff filed the instant suit as against the Defendant.

46. During trial and in considering the evidence that was tendered, it also emerged that the wells in the said parcels were dug sometimes back and had been in use for over a period of time and that the 1st Defendant through FLLOCA program had sought to upgrade the same to a borehole

but since they could not obtain any consent from the Plaintiff then they had to seek an alternative site.

47. The copies of the title deeds which were produced in evidence demonstrated the following; Property No. 1116 was registered in the names of the Plaintiff on 4th April 2005 and title deed issue on 6th April 2016, Property No. 2375 was registered in the name of the County Council of Taita Taveta on 7th July 1982, Property No. 1198 was registered in the names of the 2nd Defendant on 3rd April 1991 and Property No. 2194 was registered in the names of the 3rd Defendant.

48. As earlier stated, that the parcels of land herein including the suit parcel were acquired through an adjudication process. The Land Adjudication Act governs the process of ascertaining land interests in an adjudication area complete with an inbuilt mechanism.

49. Considering the evidence tendered herein, there is no evidence that the Plaintiff nor his father nor even his grandfather sought to challenge the adjudication process and the allocation of the said property to the Defendants. It is not merely enough to allege that one was not aware when the said titles were issued since adjudication is an

elaborate process visibly done in the presence of all and sundry.

50. In the instant case herein, there was no evidence that the Plaintiff made any effort in complying with the provisions of the Land Adjudication Act which was promulgated to cure such mischief since the Plaintiff seeks to reopen a process that was undertaken and completed over 40 years ago.

51. While the Plaintiff pleaded particulars of fraud and malice against the 1st to 4th Defendants, he was unable to prove the same to the required standard during trial. There was no cogent evidence adduced demonstrating that the the 1st to 3rd Defendants acquired the said properties fraudulently and or they were not entitled to the same and or to warrant this court to nullify and or revoke the defendants' titles.

52. Under the provisions of **section 26(1) of the Land Registration Act**, a certificate of title issued by the Registrar upon registration or to a purchaser of land upon transfer 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 of the subject land.

53. The Plaintiff claimed that the registration was fraudulent.

He pleaded in paragraph 17 of the plaint that the 1st to 3rd defendants had fraudulently acquired the same. The plaintiff itemized the particulars of fraud under section 17 of the plaint. The 1st defendant denied the averments made in the plaint.

54. Indeed, under **section 26 of the Land Registration**

Act fraud is one of the grounds under which title to land can be impeached. It provides that the title of a proprietor shall not be subject to challenge except on ground of fraud or misrepresentation to which the person is proved to be a party.

55. It was therefore paramount to prove fraud and secondly to prove that the Defendants were party to the fraud. The degree of proof in cases based on fraud is higher than proof on a balance of probabilities.

56. Under the provisions of **section 107 of the Evidence Act**, the plaintiff has the burden to prove the alleged particulars of fraud pleaded

57. Such evidence was however not adduced. It is on record that the 1st to 3rd defendants have been using the title deed since they were issued. The Plaintiff never

challenged the same and only moved this court when the 1st Defendant wanted to sink a borehole in the year 2025. The Plaintiff failed to prove that the acquisition of the property by the 1st to 3rd Defendants was fraudulent.

58. In the case of **Pande & another (Suing as the Legal Representatives of the Estate of Aboma Otieno (Deceased)) v Karia & 4 others (Civil Appeal 110 of 2020) [2025] KECA 741 (KLR) (Court of Appeal, 25 April 2025)**, the Court of Appeal held that the appellants failed to prove any act of fraud by the respondents. No fraud, misrepresentation, illegality, or collusion was established, so Section 26 protection applied, and the appeal failed.

59. Similarly, in the cases of **Otieno v Omwom (Environment and Land Case E006 of 2024) [2025] KEELC 18267 (KLR) (ELC, 11 December 2025)** and **Nyambune v Ngaye (Environment & Land Case 5 of 2022) [2024] KEELC 1409 (KLR) (ELC, 14 March 2024)** the court held that the burden of proof regarding fraud was not discharged, and the court declined to impeach the title on that basis.

60. In the circumstances, it is the finding of this court that the Plaintiff's claim has not been proved to the required standard as per the provisions of the applicable law and evidence tendered.

61. Having found that the Plaintiff's case has not been proved to the required standard, it therefore follows that this court is unable to grant the reliefs sought.

62. Consequently, the Plaintiff's suit is hereby dismissed in its entirety. Each party to bear own costs of the suit.

Dated, Signed and Delivered Virtually at Voi this 12th day of February 2026.

E. K. WABWOTO

JUDGE

In the presence of:-

Mr. Odongo for the Plaintiff.

Mr. Frank Nyongesa h/b for Mr. Oddiaga for the 1st Defendant.

N/A for the 2nd to 4th Defendants.

Court Assistant: Mary Ngoira.