



REPUBLIC OF KENYA



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Mwakulagizwa & 32 others v Mwinzangu (Sued as the Administrator of the Estate of Abdulrahman Nassib Ali) (Environment and Land Case 35 of 2018) [2025] KEELC 5476 (KLR) (23 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5476 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND CASE 35 OF 2018

SM KIBUNJA, J

JULY 23, 2025

BETWEEN

KHAMIS MOHAMED MWAKULAGIZWA & 32 OTHERS & 32 OTHERS & 32 OTHERS PLAINTIFF

AND

ALI MOHAMED MWINZANGU (SUED AS THE ADMINISTRATOR OF THE ESTATE OF ABDULRAHMAN NASSIB ALI) DEFENDANT

JUDGMENT

1. The plaintiffs commenced their suit through the amended plaint dated 7th August 2022, averring inter alia that in 2008, the defendant came to the suit property and put beacons claiming it was his land. The defendant sued David Karisa Tsui and two others in Mombasa High Court Civil Case No. 168 of 2008 over the suit property, and obtained judgment in his favour on 30th October 2009. The plaintiffs avers that after the High Court order were issued the defendant came to the suit property and threatened to evict them and demolish their properties. That the defendant then started to extort money from them demanding each of them to pay him directly or through his company, Control Risk Security, Kshs.10,000 in exchange for their house not being demolished. That the plaintiffs paid the said amounts for four years, and sometimes in 2012 offered to sell to them the portions of the land they were residing on to them. Consequently, vide a sale agreement dated 5th May 2015, the defendant agreed to sell the portion of the suit property occupied by the plaintiffs at Kshs.2million, with Kshs.380,000 being paid as deposit, and balance after defendant discharges the wakf. That the defendant asked the plaintiff to pay him more as deposit promising to fast track the subdivision and transfer and they paid him an additional sum totalling Kshs.500,000. That the defendant later rescinded the sale agreement, despite having received a total of Kshs.1,000,000 from the plaintiffs. The plaintiffs accused the defendant of breach of contract and particularized the breach under paragraph 25 (a) to (g) of the plaint, and sought for the following prayers:



1. “An order for mandatory injunction compelling the defendant to complete his part of bargain/ specific performance in the impugned sale agreement dated 5th May 2015.
 4. An order for mandatory injunction compelling the first defendant to accept the balance of purchase price of Kshs. 1,000,000 and consequently transfer the portion of the suit property to the plaintiffs.
 6. An order of permanent injunction restraining the defendant, his agents, assigns, proxies and/ or any other person acting through him from interfering in any way whatsoever with any of the plaintiffs’ quiet possession of Plot No. 428/I/MN.
 8. In the alternative and without prejudice to prayers 1, 4 & 6 above (now 1,2 and 3), the court do order the defendant to pay the plaintiffs the general and exemplary damages, prevailing market value of all the plaintiffs’ property situate at the suit premises, interest on sum held and received by the plaintiff from the date of payment.
 9. The costs of the suit.”
2. The defendant opposed the plaintiffs’ claim through the amended statement of defence and counterclaim dated 27th September 2022, among others averring that he is the legal owner of the suit property as he is the legal administrator of the estate of Abdulrahman Nassib Ali (deceased). That through Mombasa High Court Civil Case No. 168 of 2008, he obtained judgment in his favour as an administrator of the above estate, and the court issued orders against the defendants to vacate the suit property as they were trespassers. He further added that the orders made in the above case were declaratory in nature and that the plaintiff was declared as rightful owner of the suit property in his capacity as the registered trustee of the WAKF of Kilifi Mosque. He further averred that he had no capacity to enter into any agreement as the suit property was not part of the deceased estate, but WAKF property of Kilifi Mosque. In his counterclaim, the defendant averred that the plaintiffs are trespassers as the suit property as it was a WAKF property, and therefore, it was not available for sale. The defendant sought for the following prayers:
- a. “A declaration that the plaintiffs’ occupation and/or presence on the property known as Plot No. 428/I/MN is illegal.
 - b. An order of permanent injunction do issue to restrain the defendants in the counterclaim their agents, servants and/or employees from interfering with the plaintiffs’ possession in plot 428/I/MN.
 - c. An order of eviction against the defendants, their agents, servants, employees, representatives or any other person acting on behalf of the defendants from plot No. 428/I/MN.
 - d. An order do issue declaring the impugned agreement dated 5th May 2015 as void and invalid.
 - e. Damages for illegal trespass.
 - f. Costs and interest.
 - g. Any other relief that this Honourable court may deem fit to grant.”



3. The plaintiffs filed a reply to the defendant's defence and defence to the counterclaim dated 3rd November 2022, denying all the allegations in defence and counterclaim, specifically that the suit property is Wakf property or was registered as Wakf property before the death of the deceased. They also denied being trespassers on the suit property, and prayed for the counterclaim to be dismissed with costs, and judgement be entered in their favour as sought in the amended plaint.
4. During the hearing of the plaintiffs' Khamis Mohamed Mwakulagiza, the 1st plaintiff and chairman of Mafisini Community, testified as PW1. He told the court that the Mafisini Community consisted of 35 members, and adopted the contents of his statement dated 1st August 2022, list of documents and supplementary list of documents dated 13th February 2022 and 23rd August 2023 respectively, as his evidence in chief. He added that they had bought land from the defendant through the sale agreement made before an advocate, and sought for the prayers on the amended plaint to be granted. In cross-examination, PW1 stated that though he had written authority from the other plaintiffs to represent them, it had not filed in court.
5. The next witness was Millicent Omondi, 2nd plaintiff and working with the Mombasa County Government, who testified as PW2. She adopted the contents of her statement dated 1st August 2022 as her evidence in chief, and told the court that she was the Secretary of the Mafisini Group. That they agreed to buy the land from the defendant in 2015 at Kshs.2,000,000 and paid one million, and have substantially developed it. She prayed for specific performance orders against the defendant. On cross-examination, PW2 she stated that they bought the suit property from David Karisa but had not availed to the court a copy of the sale agreement. She admitted that although they were told to pay Kshs.10,000 for four years, they did not pay that amount. She admitted that the sale agreement dated 5th May 2015 had named the 1st plaintiff, Morris and herself as the purchasers, and defendant and another as sellers/vendors, who were trustees of the wakf and administrators. She added that the three named purchasers were acting for all plaintiffs even though there was no documentary evidence to prove it. She stated that they did not join that other seller/vendor as a defendant because he had been brought by the defendant. She also admitted that although the agreement indicated the deposit payable was Kshs.380,000, the receipt and acknowledgment dated 13th February 2018 and 28th April 2018 respectively, shows payment of only Kshs.100,000. She insisted that they had paid the whole Kshs.380,000 upon execution of the sale agreement, but she agreed that the acknowledgment note dated 14th May 2015 for Kshs. 380,000 was of the date different from the date of execution of the agreement. PW2 stated that even though clause 3 of the said agreement provided that upon payment of the deposit, the Wakf would be revoked through the Kadhi's court, they did not commence proceeding against the vendors in that court. She further told the court that though the agreement provided that the balance of Kshs.1,200,000 was to be paid after revocation of the wakf, the plaintiffs continued paying the purchase price despite it not having been revoked. She also admitted that she did not have any evidence to show who were the owners/directors of Control Risk Security, to which some of the payments were made. PW2 stated she had no evidence of the plaintiffs who paid the Kshs.500,000 in various instalments. She however produced a receipt dated 8th March 2012 for Kshs.50,000 as lease fees paid to Control Risk Security, in the name of one Asina Mohamed Jaffrey, who she admitted was not one of the plaintiffs herein. She also referred to several other receipts issued to Asina Mohamed Jaffrey for the lease of suit property, but stated she had no evidence to show that Control Risk Security forwarded the monies received to the defendant. She told the court that they had conducted only one search over the suit property, which was on 20th August 2008, and it indicated the land was registered in the name of Abdulrahman Bin Nassib. She agreed that the photographs in the list of documents did not specify the parcels of land each plaintiff occupied. In re-examination, PW2 stated that the search they conducted over the suit property did not mention that the land was wakf property, and added that even the court in HCCC No. 168 of 2008 did not find the property to be wakf.



6. The defendant called Dominic Kioko Tito, a donee of a general power of attorney dated 27th January 2022 and registered on 8th February 2022, who testified as DW1. He adopted his statement dated 4th April 2023 and the list of documents of even date as his evidence in chief. He testified that the suit property is a wakf property and that the defendant is a trustee of the wakf and administrator of the estate of the deceased. He alleged that the signature of the defendant in the said sale agreement is a forgery, and had reported that to the police on 3rd April 2023, and was told that the matter was under investigation. He added that no monies were paid to the defendant over the sale agreement. Upon cross-examination, DW1 stated that he got the power of attorney in 2022, while the sale agreement was made in 2015. He stated that he had attended a wakf meeting as an employee of the defendant where it was agreed that it was not possible to reopen the wakf. In the said meeting, he alleged that there were four Commissioners and some plaintiffs who attended but did not have minutes for the said meeting. He clarified that they discovered about the forgery on the sale agreement when their advocate was served with the document in 2023, but he later changed and stated they discovered the forgery when this suit was filed in 2018. He agreed that the Kadhi's court does not have jurisdiction to determine the owner of the wakf, and that he has never seen the deed of trustee that was registered in favour of the EL-Kilifi Mosque. He also admitted that the confirmation of grant dated 21st August 2009 does not indicate that the defendant was a trustee of a wakf. He added that the defendant has not made any returns on the wakf because of the trespassers on the land.
7. The learned counsel for the plaintiffs and the defendant filed their submissions dated 20th March 2025 and 16th April 2025 respectively, which the court has considered.
8. The issues for the court's determinations on both the main suit and counterclaim are as follows:
 - a. Who was the registered owner of the suit property as at the time the sale agreement dated 5th May 2015 was made.
 - b. Whether the sale agreement was valid and enforceable between the parties.
 - a. Whether the suit property is wakf property or not.
 - b. Who bears the costs of the suit?
9. The court has considered the pleadings by the parties, oral and documentary evidence presented, the submissions by the learned counsel, superior courts decisions cited and come to the following findings:
 - i. The relevant statute guiding transactions over the suit property at the time of entering into sale agreement of 5th May 2015 is the *Land Registration Act* Chapter 300 of Laws of Kenya that came into being in 2012. Under section 26 of the said Act a certificate of title is stated to be prima facie evidence of ownership unless it is challenged on grounds of fraud, irregularity or illegality. The only document of title to the suit property produced in this proceeding indicates that the defendant became a trustee vide a deed of trustee dated 26th April 2004 that was registered on 6th May 2004. The plaintiffs have not tendered any title document of ownership of the suit property, but are relying on sale agreement dated 5th May 2015 as the basis of the claim. That sale agreement has been denied by the defendant, who has produced an O.B dated 25/3/4/2023, in which he reported a complaint of forgery to the police. That from the available evidence, it is clear to the court that the defendant was registered as a trustee of a wakf over the suit property in 2004. It is in that capacity the 1st, 2nd plaintiffs and another entered into sale agreement of 5th May 2015 with the defendant and another. The defendant has denounced that sale agreement claiming the signature attributed to him is a forgery and the matter is under investigations following his report under O.B dated 25/3/4/2023. Under section 109 of the



Evidence Act chapter 80 of Laws of Kenya, the person who raises any claim or allegation has the responsibility to tender proof in support. Apart from claiming that the sale agreement was a forgery and that he had lodged a complaint with the police, the defendant has not tendered proof to support his claim. The court will thus ignore the forgery allegations.

- ii. The defendant has stated that the plaintiffs are trespassers because he could not have entered into agreement for sale over a wakf property. Though DW1 was not present at the time the sale agreement was made on 5th May 2015, as he only got the power of attorney in 2022, he does not therefore, qualify to testify on it under the provisions of sections 33, 35, 37 to 41 of the Evidence Act. However, his testimony of attending the Wakf Commissioners' meeting representing the defendant was not rebutted, and therefore his evidence that the suit property was a wakf was evidently within his knowledge, and goes to prove the defendant's contention through his defence and counterclaim that the suit property is a wakf property. The three named purchasers, who included PW1 and PW2, were well aware that the suit property was a wakf property, and cannot therefore purport to claim that it was not. Further, the sale agreement appear to have been properly executed, and is therefore valid. It left no doubts that the suit property was a wakf, as at clause 4 it provided on the removal of the WAKF before the Kadhi's court. The court therefore finds that the suit property was wakf property, and though the sale agreement was valid, it is unenforceable as the defendant and that other were without capacity to dispose of the suit property belonging to a wakf.
- iii. The statute at the time the said sale agreement that provided for wakfs was the Wakf Commissioners Act Chapter 109 of Laws of Kenya. Under the said Act the general rule is that Wakfs are forever and this can be deduced from the decision in the case of *In re Wakf of Mohamed Bakari* (Civil Case 17 of 2016) [2016] KEKC 41 (KLR) (17 March 2016) (Ruling) where the Kadhi's court held:

“9. Wakf is intended to be perpetual and last forever, however Islamic law envisages conditions under which wakf may be terminated.”

The parties herein had agreed, and properly so, under their sale agreement of 5th May 2025, that revocation of Wakf was to be through the Kadhi's court. It is not lost from the court that a wakf cannot be transferred except as per the provisions of a Deed of Trustee. In this case, the Deed of Trustee was not among the documents filed or produced as exhibits, and the court cannot tell what it provided for. The burden was on the plaintiffs to show that the defendant was authorised to dispose of the suit property that was a wakf and apply for the wakf revocation under the applicable Deed of Trustee, but they failed to discharge that obligation. This being a civil dispute, and proof being on a preponderance of evidence or on a balance of probabilities, the court finds from the evidence presented, the plaintiffs have failed in their claim. He who alleges bears the responsibility of proving. See the case of *Springboard Capital Limited versus Njenga & another* (Civil Appeal 14 of 2024) [2024] KEHC 7013 (KLR) (14 June 2024) (Judgment).

- iv. In the case of *Nyaga versus Attorney General* (On Behalf of the Ministry of Environment, Water and Natural Resources) (Civil Appeal E019 of 2023) [2023] KEHC 26484 (KLR) (13



December 2023) (Judgment) the court cited with approval the case of Palace Investment Ltd versus Geoffrey Kariuki Mwenda & Another (2015) eKLR and held as follows:

“The standard of proof in civil cases is a matter of fact and the scale is to be tilted using the competing arguments and evidence in order for the court to establish this standard. That is to say, the balance of probabilities is usually attained when both parties tell their stories and the court considers the weight of the evidence on other side. In the case of Palace Investment Ltd v. Geoffrey Kariuki Mwenda & Another (2015) eKLR, it was held that:

“Denning J. in *Miller v Minister of Pensions* (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

As the plaintiffs have evidently failed in their pursuit for orders to enforce the sale agreement of 5th May 2015, they should consider to take legal advice on how to pursue for refund of the monies they may have paid under the said sale agreement or any other arrangement, from the person(s) or entity(ies) that received the same, including Control Risk Security, in accordance with the provisions of the law. The plaintiffs also ought to vacate from the suit property and give vacant possession as sought in the counterclaim.

- v. The prayer for damages for trespass fails and the court refers to *Ochako Obinchu versus Zachary Oyoti Nyamongo* [2018] KEELC 3418 (KLR) where the court held:

“On general damages, In *Nakuru Industries Limited -vs- S S Mehta & Sons* [2016]eKLR court observed:-

“In tort, damages are awarded as a way to compensate a plaintiff for loss he had incurred due to a wrongful action on the part of the defendant. The damages so awarded are intended to return the plaintiff back to the position he was before the wrongful act was committed. In cases where trespass to land results in damage then the computation of damages is on the basis of restitution of land. The value of the soil (or trees or fruits) which have been removed from that land are all factored as well as the cost of restoration of the land to the position it was in before the wrongful act was committed.”



Halsbury 4th edition, Vol 45 at paragraph 26, 1503 provides as follows on computation of damages in an action of trespass:-

- (a) If the plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss.
- (b) If the trespass has caused the plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.
- (c) Where the defendant has made use of the plaintiff's land, the plaintiff is entitled to receive by way of damages such sum as would reasonably be paid for that use.
- (d) Where there is an oppressive, arbitrary or unconstitutional trespass by a government official or where the defendant cynically disregards the rights of the plaintiff in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded.
- (e) If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased.

In the case of *Nakuru Industries Limited (supra)* the court cited the case of *Duncan Ndegwa versus Kenya Pipeline HCC No. 2577 of 1990 (Nairobi)* where the court held:-

“The general principles as regards the measure of damages to be awarded in cases of trespass to land where damage has been occasioned to the land is the amount of diminution in value or the cost of reinstatement of the land. The overriding principle is to put the claimant in the position he was prior to the infliction of the harm.”

Due to the role played by the defendant in the transactions relating to the suit property, including executing the sale agreement that he now denounces, and noting that he did not produce a valuation report or any documentary evidence to show the nominal amount of damage or wastage to the suit property, no damages will be awarded.

- vi. Under section 27 of the *Civil Procedure Act*, chapter 21 of Laws of Kenya, costs follow the event unless where there is a good reason to order otherwise. That due to the complicity of the defendant directly and indirectly in the transactions over the suit property that is a wakf, the court finds this is an appropriate case where justice will be better served with an order that the parties bear their own costs in both the main suit and counterclaim.
10. From the foregoing conclusions, the court finds and orders as follows on both the main suit and counterclaim:
- a. That the plaintiffs have failed to establish their claim against the defendant to the standard required of balance of probabilities, and their case is dismissed.
 - b. The defendant has substantially proved his case in the counterclaim against the plaintiffs to the standard required by the law. The court therefore enters judgement for the defendant against the plaintiffs in the following terms:



- i. A declaration is hereby issued, that the plaintiffs' occupation and/or presence on Plot No. 428/I/MN, suit property, is illegal.
- ii. That the plaintiffs are directed to vacate from plot No. 428/1/MN, demolish their structures thereon and give vacant possession thereof to the defendant as trustee of the wakf in ninety (90) days, and in default eviction order to issue against the plaintiffs, their agents, servants, employees, representatives or any other person acting on their behalf from the said plot.
- iii. An order of permanent injunction is hereby issued restraining the plaintiffs, their agents, servants and/or employees from interfering with the defendant's possession in plot 428/I/MN.
- iv. The parties to bear their own costs in the main suit and counterclaim.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 23RD DAY OF JULY 2025.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

Plaintiffs : Mr. Ondeng

Defendant : No Appearance

Shitemi-Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

