



Ochieno (Suing as Legal Representative to the Estate of Ochieno Aswana Namukobe and on his Behalf) v Waithera & 2 others (Environmental and Land Originating Summons E026 of 2022) [2025] KEELC 5376 (KLR) (16 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5376 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E026 OF 2022**

**BN OLAO, J
JULY 16, 2025**

BETWEEN

SOLOMON WANDERA OCHIENO (SUING AS LEGAL REPRESENTATIVE TO THE ESTATE OF OCHIENO ASWANA NAMUKOBE AND ON HIS BEHALF) APPLICANT

AND

**ESTHER WAITHERA 1ST RESPONDENT
LAND REGISTRAR, BUSIA COUNTY 2ND RESPONDENT
THE ATTORNEY GENERAL (SUED ON BEHALF OF THE 2ND RESPONDENT) 3RD RESPONDENT**

JUDGMENT

1. By an Originating Summon dated 9th November 2022 before being amended on 12th March 2023, Solomon Wandera Ochieno (the Applicant herein and suing as the legal Representative to the Estate of Ochieno Aswana Namukobe – the deceased), impleaded Esther Waithera, The Land Registrar Busia And The Attorney General (the 1st, 2nd and 3rd Respondents respectively). He seeks as against the Respondents an order that he has a beneficial interest in the land parcel NO Bukhayo/Bugengi/5158 (the suit land). He seeks a determination of the following issues:
 1. Whether or not the 1st Respondent has been illegally, unprocedurally and fraudulently registered and issued with the title deed to the land parcel NO Bukhayo/Bugengi/5158 by the 2nd Respondent by:
 - a. Presenting false documents to the Lands Registry to the effect that she was the one eligible to be registered as the absolute proprietor of the suit land.



- b. Converting an informal charge as a transfer of interest in land to herself.
 - c. Transferring the suit land into her names without the knowledge or consent of the deceased's family knowing it to be ancestral land.
 - d. Presenting and using an improperly executed land sale agreement to defraud the deceased of his land.
 - e. Processing and obtaining the title deed for the suit land which was meant for the deceased's family.
 - f. Unlawfully asserting rights of ownership of the suit land which did not belong to her.
2. Whether or not the 2nd Respondent had the power to issue a title deed to a stranger.
 3. Whether or not the title deed issued should be cancelled and/or revoked.
 4. Deleted.
 5. Whether the suit land is ancestral property.
 6. Whether or not the Respondents should be condemned to pay the costs of this suit.
2. Arising out of the above issues, the Applicant seeks against the Respondents, jointly and severally, judgment in the following terms:
- a. "An order declaring the 1st Respondent's process or procedure of obtaining the title deed for the land parcel NO Bukhayo/Bugengi/5158 was illegal, unprocedural and fraudulent."
 - b. "An order declaring the action of the 2nd Respondent of registering and issuing title deed for the land parcel NO Bukhayo/Bugengi/5158 to the 2nd Respondent (sic) is unlawful and illegal".
 - c. Deleted.
 - d. "An order directing the 2nd Respondent to rectify the register by cancelling the name of the 1st Respondent and reverting it to the previous proprietor who is Ochieno Aswama Namukobe."
 - e. "A perpetual injunction and/or permanent injunction do issue against the 1st Defendant, her servants, agents, beneficiaries and/or any persons claiming through them from entering, encroaching, constructing, barricading, occupying, trespassing, destroying, alienating or in any manner whatsoever dealing with parcel NO Bukhayo/Bugengi/5158."
 - f. "An order condemning the respondents to pay costs of the suit."
3. In support of his amended Originating Summons, the Applicant also filed a supporting affidavit dated 9th November 2022 and a replying affidavit dated 21st July 2023 both of which he relied upon during the plenary hearing on 7th November 2024.
 4. The thrust of the two affidavits is that the Applicant is the son to the deceased who has always been the registered proprietor of the suit land. That the suit land is the ancestral land of the deceased's family where the Applicant was born and continue to occupy the same and it has traversed generations upto the current generation a fact that is well known to the 1st Respondent.
 5. That the 1st Respondent obtained registration of the suit land on 19th April 2001 fraudulently and meanwhile, the deceased disappeared from home. While in the process of looking for the deceased, the family received information that an unknown person was alleging to have purchased the suit land from



the deceased at Kshs.27,000. It was then that they looked for and found a Mr Mwangi who told him that he (Mr Mwangi) had lent the deceased Kshs.27,000 on the security of the title deed to the suit land which the said Mr Mwangi was to hold until the loan was repaid. The matter was reported to the Assistant Chief who informed Mr Mwangi that the suit land is trust property which could only be disposed of with the consent of the family and by following the legal procedures. The Assistant Chief prohibited Mr Mwangi from undertaking any activities on the suit land and asked him to return the title deed. When he was summoned by the District Officer, it was discovered that Mr Mwangi had transferred the title deed to his daughter the Applicant herein. Then recently, the 1st Respondent showed up threatening to evict the Applicant from the suit land yet it is land held in trust and could not have been transferred without the consent of the family.

6. Further, the 1st Respondent is aware that members of the Applicant's family have been interred on the suit land including the Applicant's daughter Mercy Akinyi in 2003 and his father Aswama Namukobe in 2005 without any objection by the 1st Respondent.
7. The Applicant also filed an affidavit by his witness Meltus Juma (PW2) dated 9th November 2022. He is a step-brother to the deceased and has deposed, inter alia, that in 2001, he heard that the deceased had sold land and someone was insisting by taking possession of the same. So he went to the Applicant's home and advised him to build houses on the suit land since it was family land. That the deceased's sons namely Peter Ochieno And Samuel also died and were buried on the suit land. That to the best of his knowledge, the suit land is ancestral land and could only have been transferred fraudulently.
8. The Applicant also filed the following documents in support of his case:
 1. Green Card for the land parcel NO Bukhayo/Bugengi/36.
 2. Green Card for the land parcel NO Bukhayo/Bugengi/5158.
 3. Green Card for the land parcel NO Bukhayo/Bugengi/1155.
 4. Letter dated 23rd May 2001 addressed to the 1st Respondent from the Assistant Chief Esikulu sub-location inviting the 1st Respondent to a meeting with the District Officer over the suit land.
 5. Letter dated 2nd May 2001 addressed to the District Land Registrar Busia advising him to place a caution on the suit land.
 6. Copy of Title Deed to the suit land issued in the name of the 1st Respondent on 19th April 2001.
9. In response to the Originating Summons dated 9th November 2022, the 1st Respondent filed a replying affidavit dated 17th January 2023. Therein she deposed, inter alia, that she is the registered proprietor of the suit land having purchased it from the Applicant's deceased father. She denied that her or her late father had lent the Applicant's deceased father Kshs.27,000 as alleged but added that she fully paid the purchase price of Kshs.27,000 and the transaction took place at the Busia Law Court in the presence of the 2nd wife of the Applicant's deceased father and other witnesses including the 1st Respondent's late father JOseph Mwangi Njuguna. The 2nd wife to the Applicant's deceased father being a Ugandan. She could not sign the sale agreement but she fully consented to it. The 1st Respondent denied the allegation of fraud levelled against her adding that all the relevant legal documents were executed at the 2nd Respondent's office before she was issued with the title deed to the suit land after the Applicant's deceased father informed her that he was relocating to Uganda with his family having acquired land there. That problems only arose after the Applicant and his mother who is the 1st wife of the deceased refused to accompany him to Uganda but decided to stay on the suit land. That from the time she



purchased the suit land, she and her family have never been in peace and have been to Offices of Assistant County Commissioner Nambale, the Area Chief and Assistant Chief countless times for purposes of resolving this dispute but without success. At one time, the Applicant's late brother Peter Ochiengo offered to refund to her the purchase price of Kshs.27,000 plus Kshs.3,000 being expenses so that she could transfer the suit land back to the Applicant's family but nothing came out of that proposal. In 2009 after the post-election violence, she and her father had a meeting with the Applicant's family in the Chief's office and it was suggested that she surrender a portion of land out of the suit land to the 1st wife of the deceased since she was not involved in the sale agreement. However, the Applicant declined and demanded back the whole of the suit land saying the documents in her possession were fake. In 2011, the Applicant attacked the 1st Respondent's father with a panga when he tried to cultivate the suit land. Another meeting was called and the Applicant never denied that his deceased father had sold the suit land to the Applicant. It was again proposed that the 1st Respondent hives off a portion of the land to be given to the Applicant's family. The Applicant sought for time to engage his family so that any amicable solution could be arrived at. However, the Applicant continued to threaten the 1st Respondent if she ever stepped onto the suit land and so on 28th October 2022, she instructed her counsel to serve the Applicant and one CAROLINE AORI with a notice to vacate the suit land within 30 days.

10. It is the 1st Respondent's case that she purchased the suit land from the Applicant's deceased father who executed all the relevant documents. That the Applicant has no locus standi to file this suit since there is no evidence to show that he has taken out letters of Administration in respect of his late father's Estate. That she has offered the Applicants family an opportunity of redeeming the suit land by either refunding the purchase price or being given a portion thereof but they have ignored the offer. She therefore prays that the Originating Summons be dismissed and the 2nd Respondent be ordered to remove the restriction placed on the suit land on 2nd May 2001.
11. The 1st Respondent also filed the statement of her witness Ignatius Wambwire Muyaga (DW2) dated 15th May 2023. In the said statement, he states that he knew Mr Mwangi the 1st Respondent's late father as he used to plough land for him. That in 2001, the late Mr Mwangi informed him that the 1st Respondent had purchased the suit land which he wanted the witness to plough for her. He showed the witness the land which had three semi-permanent mud grass thatched houses but was deserted with over-grown weeds and no-one was living there. He was informed by Mr Mwangi that the owner had migrated to live in Uganda where he had bought a bigger portion of land. Before the witness could commence ploughing the suit land, Mr Mwangi informed him that the seller had not told him that he had two wives and the sons of one of the wives had surfaced and objected to the sale of the suit land. Mr Mwangi informed him that the issue was being resolved and he would inform the witness when to plough the land. Mr Mwangi further informed him that other than the suit land, the 1st Respondent had also purchased other parcels of land from the Applicant's late father but she was not living in Busia. Mr Mwangi instructed the witness to show the 1st respondent the suit land if she visited. After the demise of Mr Mwangi, the 1st Respondent and her mother visited Busia and the witness showed them the suit land which was still in the same condition it was when he first visited it except that the grass thatched houses were now bending and almost collapsing an indication that no one was living there.
12. On 10th January 2022, the 1st Respondent called him to join her in a meeting where the issue of the suit land was being discussed. He agreed and at the said meeting, the 1st respondent narrated how she had purchased the suit land from the Applicant's late father and produced all the relevant documents. It was then that the 1st Respondent and the Applicant agreed to dialogue over the matter and see if they could arrive at an amicable settlement. Later however, the 1st Respondent informed him that



the Applicant refused to dialogue claiming that his late father had never sold the suit land to the 1st Respondent.

13. The 1st Respondent filed the following documents:
 1. Copy of title deed to the land parcel NO Bukhayo/Bugengi/5158 issued in her name on 19th April 2001.
 2. Copy of land sale agreement dated 19th April 200 between Ochieno Aswama Namukobe And Esther Waithera Mwangi in respect of the suit land.
 3. Copy of Application for consent of the Land Control Board for the sub-division of the suit land.
 4. Minutes of meeting held on 25th October 2022 at Chief's Office Bukhayo West Location in respect of land parcels NO Bukhayo/Bugengi/1158, 5158 and 5159.
 5. Copy of Official Search for the land parcel NO Bukhayo/Bugengi/5158.
 6. Mutation Form for the land parcel NO Bukhayo/Bugengi/1155.

The 2nd and 3rd Respondents did not file any responses to the Originating Summons nor participate in any way in the proceedings.
14. I may add that although the Applicant and 1st Respondent also filed statements of other witnesses, only the two witnesses listed above were called to testify during the trial.
15. The trial commenced on 7th November 2024 and ended on the same day. The Applicant and his witness Meltus Juma (PW2) testified and adopted as their testimony the contents of the affidavit and statement already summarized above. The 1st respondent and the witness Ignatius Wabwire Muyaga (DW2) also adopted their respective affidavit and statement as their evidence. The parties also produced their documentary evidence as listed above.
16. Submissions were thereafter filed both by Mr Odhiambo instructed by the firm of Odhiambo B.f.o & Company Advocates for the 1st Respondent and by Mr Otieno instructed by the firm of Masiga Wainaina & Associates Advocates for the Applicant.
17. I have considered the evidence by the parties as well as the submissions by counsel.
18. The gist of the Applicant's case is that the 1st Respondent illegally, unprocedurally and fraudulently registered herself as the proprietor of the suit land and was issued with the title thereto by the 2nd Respondent. The particulars of the fraud and illegality have been pleaded in paragraph 1(a) to (f) of the amended Originating Summons which I have already set out at the commencement of this judgment. The main remedy sought by the Applicant therefore is that an order be issued cancelling the name of the 1st Respondent from the said title, reverting it to the name of Ochieno Aswama Namukobe and permanently injunctioning the 1st Respondent, her servants, agents, beneficiaries and any persons claiming through her from entering, encroaching, constructing, barricading, occupying, trespassing, destroying, alienating or in any manner whatsoever dealing with the suit land.
19. It is common knowledge and not in dispute that the 1st Respondent obtained the title deed to the suit land as far back as 19th April 2001. The Applicant concedes that he discovered about the sale of the suit land to the 1st Respondent by his late father in 2001 and not later. This is what he has stated in paragraph 4, 5 and 6 of his statement dated 9th November 2022 and which he adopted as his evidence during the trial:



- 4: “That in 2001, my sister came home running and stating that she had received information that our father was dead.”
- 5: “This arose as a result of sudden disappearance by our father from home.”
- 6: “That while in the process of looking for our father, we got information that an unknown person was alleging that he had bought land from our father.”

The Applicant then goes on to narrate in paragraphs *para_77*, *para_88*, *para_99* and *para_1010* on how his family managed to trace the 1st Respondent’s father Mr Mwangi who informed them that the Applicant’s late father had borrowed from him Kshs.27,000 using the title deed to the suit land as security. The matter was then referred to the area Assistant Chief. In paragraph *para_1111*, the Applicant has stated as follows:

- 11: “The Assistant Chief later wrote a letter asking the land registrar to register a restriction on the parcel on behalf of the family (attached are copies of the letter and the green card dated 2.5.2001 marked SWO-1(a) and SWO-1(b)).”

When he was cross-examined by MR ODHIAMBO on 7th November 2024, he said:

“The 1st Defendant obtained that title deed to the land in dispute fraudulently. She has the title to the land. The land was transferred to the 1st Defendant on 19th April 2001 as per the green card.”

It is clear from the Applicant’s own testimony that he knew about the fraudulent transfer of the suit land to the 1st Respondent in 2001. Indeed it was as a result of his complaint that the Assistant Chief wrote a letter dated 2nd May 2001 to the District Land Registrar Busia advising him to place a restriction on the suit land. This suit was filed on 9th November 2022 some twenty one (21) years later long after the three (3) years period set out in Section 4(2) of the *Limitation of Actions Act* within which an action founded on a tort must be filed. That provision reads:

- 4(2) “An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued.”

Fraud is a tortious action as envisaged by Section 4(2) of the *Limitation of Actions Act*. The cause of action herein arose in April 2001 when the 1st Respondent acquired the registration of the suit land in her names. So the latest that this suit ought to have been filed was in April 2004 and not later. It is barred by law.

20. Could the Applicant’s claim to the suit land be saved by Section 26 of the *Limitation of Actions Act*? That provision reads:

- 26: “Where, in the case of an action for which a period of limitation is prescribed, either-
- (a) the action is based upon the fraud of the Defendant or his agent, or of any person through whom he claims or his agent; or
 - (b) the right of action is concealed by the fraud of any such person as aforesaid; or
 - (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the Plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.”



Again, as I have already stated above, there is no doubt that the Applicant discovered the fraud in 2001. I have not heard him claim that he discovered it later. And it was soon after the discovery that he prompted the Assistant Chief to write to the Land Registrar on 2nd May 2001 to place a caution and restriction on the suit land. Clearly, therefore, the provisions of Section 26 of the Limitation of Actions Act cannot aid the Applicant.

21. Finally, this was basically a claim to land. Section 7 of the same Act provides that:

7: “An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

The above provision is a complete bar to a claim to land after twelve (12) years from the date when the cause of action accrued. The purpose of the Law of Limitation was stated in the case of *Mehta - v- Shah* 1965 E.A. 321 as follows:

“The object of any limitation enactment is to prevent a Plaintiff from prosecuting stale claims on the one hand, and on the other hand, protect a Defendant after he has lost evidence for his defence from being disturbed after a long lapse of time. The effect of limitation enactment is to remove remedies irrespective of the merits of the particular case.”

In the case of *Gathoni -v- Kenya Co-operative Creameries Ltd* 1982 KLR 104, the Court of Appeal held that:

“The Law of Limitation of Actions is intended to protect Defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending Plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”

The Applicant’s cause of action accrued in 2001 when he discovered that the suit land was registered in the name of the 1st Respondent. Yet it has taken him twenty one (21) years to file this suit on 9th November 2022 before being amended on 12th March 2023. This suit has been filed well outside the statutory period within which a claim to recover land should be filed. It can only be for dismissal.

22. The up-shot of the above is that having considered the evidence herein, this Court makes the following disposal orders:

1. The Applicant’s suit is dismissed.
2. The 2nd Respondent shall forthwith remove the restriction placed on the land parcel NO Bukhayo/Bugengi/5158 and in any event not later than 30 days from the date of this judgment.
3. The Applicant shall meet the 1st Respondent’s costs of this suit.

JUDGMENT DATED, SIGNED AND DELIVERED ON THIS 16TH DAY OF JULY 2025 BY WAY OF ELECTRONIC MAIL AND WITH NOTICE TO THE PARTIES.

Right of Appeal.

BOAZ N. OLAO

JUDGE

16TH JULY 2025

